2014-NSHRC No. _____

NOVA SCOTIA HUMAN RIGHTS BOARD OF INQUIRY

BETWEEN:

Sandra Wakeham

(the "Complainant")

Nova Scotia Department of Environment

(the "Respondent")

-and-

Nova Scotia Human Rights Commission

(the "Commission")

DECISION

Nova Scotia Human Rights Board of Inquiry:	Kathryn A. Raymond, Chair
Place of Hearing:	Dartmouth, Nova Scotia
Date of Hearing:	December 5 & 6, 2013 with post-hearing submissions concluding May 13, 2014
Appearances:	Bruce Evans, on behalf of the Complainant Andrew Taillon, on behalf of the Respondent Ann E. Smith, Q.C. on behalf of the Commission
Date of Decision:	June 13, 2014

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Overview of the Issues

1. Sandra Wakeham, the Complainant, submits that her complaint of discrimination, as referred to this Board of Inquiry, is ambiguous. The Complainant requests that she be permitted to amend her complaint and/or file particulars to clarify issues that were raised but not stated clearly enough in the complaint. For the reasons that follow, she is being allowed to do so.

2. The Complainant describes her complaint as an allegation that she was discriminated against by the Respondent in respect of employment on account of disability originating with a 1999 motor vehicle accident. She submits that the amended complaint involves the same subject matter or substance of the original complaint, but simply provides more particulars of the original complaint.

3. In part, she wishes to amend her complaint to specifically include mental disability, as the complaint form uses the words "physical disability". The Commission and the Respondent both assert that the complaint is limited to physical disability. The Commission and Respondent oppose the request on the basis that the amendment would create a new complaint by adding a new ground of discrimination to the complaint, one that was not referred to the Board of Inquiry. They submit that this Board of Inquiry lacks the jurisdiction to consider a complaint based on mental disability.

4. The parties also are in dispute concerning whether the original complaint alleges discrimination that occurred for a few weeks of time in February-March 2012 or over many years, dating back to 1999. The Commission submits that the complaint relates to discrimination which began on February 21, 2012. The complaint form states that the discrimination began on February 21, 2012. The complaint form also refers to the Complainant suffering from disabilities related to injuries sustained in motor vehicle accidents, the first of which occurred in 1999. Attached to the complaint is a letter from the Respondent dated February 21, 2012 that alleges that the Complainant has had an attendance problem at work dating back to 2008.

5. The issues relevant to determining whether the amendments should be granted may be summarized as follows:

    a) Is the original complaint ambiguous?

b) What is the substance of the complaint?

i) Is the complaint limited to the protected characteristic of physical disability or may it include mental disability? This includes an interpretation of the protected characteristic of "physical disability or mental disability" in section 5(1)(o) of the *Act*. Is the protected characteristic to be defined as "disability" or as two separate characteristics or grounds of discrimination, either "physical disability" or "mental disability"?

ii) Over what period of time does the complaint factually extend?

c) Would the amendments, if granted, cause prejudice to the Respondent?

d) Do the requested amendments run afoul of the one year limitation period for making a complaint in section 29(2) of the *Act*?

6. A further issue was raised by the Respondent. The Respondent submits that the complaint is not sufficiently particularized to enable it to respond and that the Respondent is accordingly prejudiced in its preparation for the hearing on the merits. It has requested further particulars of the complaint.

7. The Complainant has submitted two versions of an amended complaint for consideration by the Board in its determination of the preliminary matter. For simplicity, the first amended complaint is referenced in the body of these reasons. The second amended complaint is addressed in the section entitled "Objection to Second Amendment and Ruling".

8. During the hearing of the preliminary issue concerning the proposed amendment, an evidentiary issue arose respecting the admission of an Affidavit sworn by the Complainant. The Commission and the Respondent object to the admissibility of the Affidavit on the ground that the Board of Inquiry lacks the jurisdiction to consider this evidence. They also object on the ground that the evidence is irrelevant. As well, the Commission submits that a resolution report prepared by Commission staff, which is an exhibit to the Affidavit, is privileged and ought not to be reviewed or considered by this Board. For the reasons which follow, the Complainant's request to have her Affidavit admitted into evidence is denied.

9. The submissions from the parties respecting both the merits and the evidentiary issue are extensive. While I have considered all submissions, I have not referred to all of the legal

arguments or case authorities contained within the parties' submissions but rather only those that are most germane to the real issues in dispute and to the rulings within these reasons.

Background

10. Several case management conferences were held following appointment of the Board of Inquiry. The first occurred on June 20, 2013. At that time, the Complainant self-identified as requiring accommodation respecting the conduct of the proceedings as a result of suffering from certain disabilities that include cognitive difficulties. She was advised to consider retaining legal counsel.

11. At the outset of case management, the complaint form was noted to potentially be ambiguous by the Board of Inquiry with respect to the scope of the complaint. In general, the Board of Inquiry was of the view that the original complaint required particulars so that the Respondent would better understand the case that it had to meet.

12. In particular, this Board asked the parties to address the relevance of the employer's efforts to accommodate the Complainant following injuries she allegedly sustained in several motor vehicle accidents. These motor vehicle accidents, the first of which occurred in 1999, were referenced by the Complainant in her complaint, as was an allegation that the Respondent had failed to properly accommodate the Complainant. However, while the complaint referenced the motor vehicle accidents, it also stated that the discrimination began on February 21, 2012.

13. After this Board requested clarification of the scope of the accommodation issue, the Complainant, who was unrepresented, indicated that she wished to amend her complaint to allege that the discrimination began after the first motor vehicle accident in 1999 referenced in her complaint. She also advised that she wished to amend other paragraphs of the complaint to more fully identify the nature of her complaint. The Complainant was directed by this Board of Inquiry to provide further particulars and to delineate her requested amendments by August 6, 2013. The Commission and the Respondent did not object to the direction that the Complainant provide further particulars of her complaint.

14. Subsequently, the Complainant indicated that she was facing challenges in preparing and communicating the information related to the particulars. The Complainant advised that

she intended to allege that her health issues impacted her ability to appropriately articulate the scope of her complaint, although this point was not subsequently pursued in any direct manner during the preliminary proceeding. The Complainant was given additional time to prepare written particulars to include a list of the significant examples of what she believed was discrimination by her employer. This was to be provided by September 18, 2013.

15. The Complainant then retained legal counsel. A request was made on her behalf for new dates to be set for the hearing of the preliminary matter and respecting the merits to enable her counsel to have an opportunity to prepare. This was granted subject to certain terms. A revised complaint was presented by the Complainant to the other parties on November 6, 2013.

16. At the hearing of the motion, the parties were asked if they intended to present evidence. The parties took the position that the issues to be determined were legal issues and that evidence was not required. Given the position of the parties, the Board of Inquiry proceeded to hear oral submissions. However, the Board of Inquiry advised the parties of the potential need for evidence, should it become apparent that there were factual matters in dispute relevant to the determinations the Board needed to make respecting the requested amendment. The parties were advised that, in that event, all parties would be given an opportunity to present evidence and any required adjournments would be granted, if needed, to permit a fair process. This approach reflects the Board of Inquiry's responsibility under section 34 of the *Act* to inquire into the complaint and its powers and authority to compel production of evidence "deemed requisite to the full investigation of the matters into which the Board of Inquiry is appointed to inquire", pursuant to section 4 of the *Public Inquires Act*, RSNS 1989, c 372.

17. Following this procedural discussion, the parties acknowledged that certain documents should be reviewed by the Board of Inquiry. Several documents were admitted into evidence as exhibits either on agreement of the parties or without objection.

18. Exhibit 1 is a letter dated February 21, 2012 from the Public Service Commission, Resources Corporate Services Unit to the Complainant. In part, the Complainant alleges in her complaint that she was provided this letter on February 21, 2012, by the Respondent, after she returned to work from a disability leave the day before, on February 20, 2012. She says that the Respondent discriminated against her on the basis of her

poor attendance at work in that letter in that the Respondent applied its attendance management policy to her in a discriminatory manner.

19. The second exhibit was a "Nomination for Appointment to a Human Rights Board of Inquiry" pursuant to the *Act*, dated March 28, 2013, signed by the Chief Judge of the Provincial Court of Nova Scotia. The nomination document states:

> *I hereby nominate* ***Kathryn Raymond****, of Dartmouth, in the Province of Nova Scotia, for appointment by the Nova Scotia Human Rights Commission to a Human Rights Board of Inquiry to inquire into the complaint of* ***Sandra Wakeham****, dated May 10, 2012, against* ***Nova Scotia Department of Environment****, being the complaint to which the request relates.*

20. The third document entered as an exhibit is a letter dated March 5, 2013 from the Chair of the Nova Scotia Human Rights Commission to the Chief Judge of the Provincial Court. It advises that the Commission had adopted a motion "that the complaint be referred to a Board of Inquiry pursuant to section 32(A)(1) of the *Human Rights Act* to determine whether discrimination had occurred". A copy of the original complaint was enclosed with this letter. This letter is referred to in these reasons as the "Commission's referral letter".

21. As the complaint form is such an important document in the context of this motion for amendment, the parties and the Board had a discussion on the record of their common understanding of the complaint process prior to referral to a Board of Inquiry in general terms, without reference to the history of this particular complaint. That process may be summarized as follows.

22. There is a distinction between the information an individual brings to the Commission when he or she believes that they have a complaint and what is included on the complaint form sanctioned by the Commission. The Commission confirmed that an Intake Officer obtains information from the individual. The Intake Officer decides whether the matter properly falls within the jurisdiction of the *Act* and whether the matter will be accepted as a complaint for purposes of warranting investigation by Commission staff. If accepted, the information is reduced to a formal complaint.

23. In practice, section 29(1)(a) of the *Act* permits the pre-screening of complaints by Commission staff, as a complaint may only be submitted on a form provided by the Director for making a complaint. The fact that the filing of a complaint is completely controlled by the Commission was recently noted by the Nova Scotia Court of Appeal in *Izaak Walton Killiam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18 ("*IWK*").

24. The standard complaint form is two pages long, although counsel for the Commission indicates that some complaint forms are longer. The Intake Officer has the Complainant sign the formal complaint.

25. Once filed, a complaint used to undergo a process of investigation, described as the "older process"; more recently, the filing of a complaint usually leads to a resolution conference. Counsel for the Commission advises that the resolution conference is a substitute for officers interviewing witnesses and writing up statements. Commission counsel advises that the parties are told to bring relevant documents and witnesses to the resolution conference. Depending on whether the older or newer process was followed, the Officer prepares a report of either the investigation or the resolution conference. That report is provided to the Commissioners of the Nova Scotia Human Rights Commission for their consideration. Written information or submissions from the parties may be provided to the Commissioners, as well.

26. The Commissioners determine on behalf of the Commission whether there is sufficient basis to conclude that discrimination may have occurred so as to warrant an inquiry by a Human Rights Board of Inquiry. Pursuant to section 29(4), they may dismiss a complaint in certain circumstances, for example, where the complaint is without merit, raises no significant issue of discrimination, or where there is no reasonable likelihood that an investigation will reveal evidence of a contravention of the *Act*.

27. If the Commission does not dismiss the complaint or approve the settlement of a complaint pursuant to section 32 of the *Act*, the Commission appoints a Board of Inquiry to inquire into the complaint pursuant to section 32A(1). Section 32A(1) of the *Act* states as follows:

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

28. Notably, while the *Act* requires the Commission to inquire into a complaint, it does not specifically require an investigation or other particularized process to have occurred prior to appointment of a Board of Inquiry. The Commission may refer a complaint for inquiry at any point after filing.

29. In this case, a resolution conference took place. The complaint form that began the resolution process was referred to the Board of Inquiry along with the Commission's referral letter.

30. Counsel for the Commission was not able to speak to whether there is a policy or practice of amending the complaint form filed with the Commission at the intake stage as a result of information forthcoming from the investigation or resolution process or as a result of any determination made by the Commission in deciding to refer the complaint to a Board of Inquiry. For purposes of these reasons, it is inferred that if such a policy or practice existed, that would have been brought to the Board's attention, on the basis of the Board's inquiry of Commission counsel on this point and on the basis of its relevance to the issues raised in this preliminary motion.

The Ambiguity Issue and the Evidentiary Objection

A. Factual Background

31. During the course of submissions at the hearing of the preliminary issue, this Board raised the issue that all parties were straying into assertions of fact or mixed fact and law in their submissions. These apparent facts included such matters as:

    a) the Complainant's intentions respecting the content of her complaint and her account of events as expressed through the complaint form; and,
    b) the Commission's conclusions about this particular complaint, including the Intake Officer's assessment and what was investigated (or not) by the Commission.

32. The submissions highlighted that the parties did not share a common understanding of the facts alleged in the complaint let alone the legal significance of those facts. A few examples follow. With reference to the question on the complaint form, "When did the alleged discrimination begin?", the answer is, "The discrimination began on February 21, 2012". The Commission and Complainant disagreed as to whether this date referred to when the alleged discrimination actually began or related to the date the Respondent's

discriminatory application of its attendance management policy began to have a known effect upon the Complainant (February 21, 2012 being the date the Respondent informed the Complainant by letter that she could face discipline).

33. As a further example, the complaint form states the Complainant's belief that she has suffered from chronic pain since 2005. Counsel for the Commission submitted that Commission staff were well aware that Ms. Wakeham suggested that she suffers from chronic pain and despite that only referred a complaint based on physical disability forward to the Board of Inquiry.

34. This submission requires the Board to infer that Commission staff were aware that chronic pain includes both a physical and a mental component and that the mental component of chronic pain did not form part of the complaint, although the complaint is one founded on disability. Counsel submits that the same position was taken by the Commissioners on behalf of the Commission. Commission counsel was asked to clarify whether there was a decision by the Commission to not proceed on the basis of mental disability. Commission counsel indicated that the Commission does not mean to factually assert that mental disability was or was not considered. It submits that all that is before the Board of Inquiry is physical disability. In response, counsel for the Complainant suggests that it is appropriate for the Board to infer that the Commission did not reject a complaint of mental disability.

35. There was no evidence of what information was provided by the Complainant to the Intake Officer, or by the Intake Officer to the Complainant, or the role each played in preparing the content of the complaint form. Counsel for the Commission asserted that no events prior to February 21, 2012 were considered or investigated by the Commission when it referred the complaint to the Board of Inquiry. There was no evidence of what was considered or investigated by the Commission, apart from what could reasonably be inferred from the initial complaint form.

36. In response to the Board raising the issue of whether a further evidentiary basis was required to support the submissions advanced by all parties, the Commission and the Respondent took the position that they did not wish to offer evidence. However, the Respondent reserved its right to do so in the event that the Complainant was permitted to submit further evidence.

37. The Complainant wished to submit two additional documents into evidence. These were described as letters between the Complainant and the Commission in which the Complainant allegedly provided further information to the Commission about her complaint.

38. The Commission and Respondent submitted that the Board of Inquiry did not have jurisdiction to look at evidence of what occurred prior to the referral of the complaint to the Board of Inquiry. They relied upon the decision of the Nova Scotia Court of Appeal in *IMP Group Ltd. v. Dillman (1995)*, 143 N.S.R. (2d) (N.S.C.A.) *("IMP")*, where the Court reviewed the amendment of a complaint granted by a Board of Inquiry. The Court of Appeal held that complaints must pass through the investigation and referral stage and be referred for inquiry by the Commission. The Commission and the Respondent submitted that this Board has no jurisdiction to look at pre-referral evidence concerning the complaint and must consider the complaint, as filed, to determine whether it can be amended. However, in my view, *IMP* did not address the issue of the jurisdiction of this Board to consider evidence or the admissibility or relevance of evidence arising during the complaint process in the context of the requested amendment of a potentially ambiguous complaint. As this evidentiary issue arose during the course of the hearing, the parties were provided with an opportunity to offer additional authorities on this point.

39. In any event, there was insufficient time to conclude submissions respecting the evidentiary issue and the merits during oral submissions. The matter was adjourned for purposes of case management. The parties subsequently agreed that any additional documents proffered by the Complainant ought to be entered into evidence via an affidavit and that they would proceed by way of written submissions respecting the merits and the evidentiary issue.

40. The Affidavit produced subsequently by the Complainant included a number of additional documents attached as exhibits, including the resolution report prepared by Commission staff prior to referral of the complaint to this Board. Both the Commission and the Respondent objected to the Affidavit being entered into evidence. A copy of the Affidavit was not provided to the Board of Inquiry pending receipt by the Board of submissions from the parties on the evidentiary issue, which concluded on February 7, 2014.

41. The Complainant submitted that the Affidavit was relevant to show that all of the issues clarified by the requested amendments were raised by the original complaint, were investigated and sent to the Commission and were referred to the Board of Inquiry by the Commission for determination. Counsel for the Complainant also indicates that a document from the Commission confirming that the resolution report was prepared "on the record" is attached to the Affidavit as an exhibit. He submits that, since the report from the resolution conference was shared by the Commission with the parties, the document cannot be privileged and that the Complainant is able to produce it.

42. In addition to the jurisdictional argument outlined above, the Commission further submits that evidence concerning the complaint's factual development during the intake, investigation and referral stage is not relevant. It submits that the only matter of relevance is the referral letter from the Commission, which it says defines the complaint. The Commission submits that if the Complainant wishes to dispute the Commission's decision, she is required to do so through judicial review.

43. The Commission also objects to the consideration of any pre-referral documentation prepared by Commission staff, such as the resolution report, on the basis of section 35 of the *Act*. Section 35 provides:

> *35 No member of the Commission, nor the Director or any officer or employee provided for in Section 27, shall be required by any board of inquiry or any court to give evidence, or to provide access to Commission records, relating to the information obtained in investigation of a complaint under this Act.*

44. The Commission submits that pre-referral records of the Commission are privileged and cannot be considered by this Board.

B. Further Objections of the Respondent

45. The Respondent submits that counsel for the Complainant has made assertions of fact that should have been supported by evidence led at the motion hearing on behalf of the Complainant. The Respondent submits that it was only after Complainant's counsel realized that he had erred in not leading evidence that the Complainant's counsel made an

attempt to characterize the Respondent and Commission's legal arguments as factual arguments.

46. I do not accept that characterization. It was the Board of Inquiry, not counsel for the Complainant, which identified that counsel were making submissions that appeared to require the assumption of certain facts. Counsel for the Respondent also made submissions that included assertions of fact.

47. The Respondent submitted that it would be procedurally unfair to permit the Complainant to submit evidence during rebuttal submissions, suggesting that Complainant's counsel was splitting his case. Given that the evidentiary issue is being determined on other grounds, it is not necessary to address this point with full reasons. However, this objection would not have been upheld in these particular circumstances. In part, the hearing proceeded on the initial premise that the matter could be determined on a legal basis. The parties were put on notice at the outset that the Board could decide at a later point that evidence was required to permit the Board to make any factual determinations required; in that event, all parties would be given an equal opportunity to provide evidence. No party objected. The Board subsequently raised the issue of whether evidence from all parties was required to support their submissions. The perception that the matter could be argued solely on a legal basis came into question. All parties were given an opportunity to present evidence. The Complainant would have been required to submit evidence first, with the Respondent and Commission having an opportunity to submit evidence in response.

48. This Board is under a statutory responsibility to conduct an inquiry into the complaint to determine whether discrimination occurred. This includes determining the substance of the complaint. This proceeding is not civil litigation where it is left to the parties to determine the issues that they wish to have determined and the evidence they wish to lead; rather, a hearing under the *Act* is a quasi-judicial inquiry into whether discrimination occurred. Boards of Inquiry have been granted the authority to compel production of evidence on their own initiative pursuant to the *Public Inquiries Act, supra*. In my view, while the Board must ensure that no party suffers procedural disadvantage or prejudice as a result, a Board of Inquiry acts within its jurisdiction and authority to request or receive relevant evidence from any party that is necessary to the determinations the Board is statutorily tasked to make. As all parties were in the same situation and given the same

opportunity, I was not persuaded that the Respondent's submission of procedural unfairness should be upheld.

49. The Respondent raised a further objection in relation to the Complainant being granted an opportunity to make a rebuttal of points raised by the Respondent's submissions of March 25, 2014. These submissions, prepared in response to the Complainant's submissions of March 12, 2014, referenced the decision of *Gover v. Canada (Border Services Agency)* [2013] C.H.R.D. No. 14 (*"Gover"*) and the decision of *Canadian Human Rights v. Lemire* et al, 2012 FC 1162 (*"Lemire"*) (*Lemire* varied on other grounds, relating to the declarative remedy, in *Warman v. Lemire* [2014] FCA 18.). These cases were offered in support of the Respondent's position that the Board of Inquiry should not consider evidence of what occurred pre-referral. They are decisions of some significance in these reasons.

50. The Commission and Respondent were asked to provide authority on this point at an early stage of submissions. The *Gover* and *Lemire* decisions were provided by the Respondent in its submissions of March 25, 2014. The Complainant had not had an opportunity to respond to those decisions. Fairness requires that the Complainant have an opportunity to provide submissions in response to those cases.

51. Furthermore, the Respondent requested an opportunity to file further submissions respecting the decision in *IWK*, issued on February 19, 2014, on the basis that the decision had relevant implications for the preliminary issue. As this request from the Respondent was granted, I am not prepared to uphold the Respondent's objection to the consideration of submissions from the Complainant respecting the *Gover* and *Lemire* decisions. However, the Complainant also made further submissions concerning the *IWK* case. I uphold the Respondent's objection in that regard and have not considered those submissions, notwithstanding any overlap between those submissions and my own consideration of the *IWK* case.

C. Conclusion Respecting Whether the Complaint is Ambiguous

52. In my view, the submissions of counsel respecting the proper interpretation of the substance of the original complaint and of its particulars compel the conclusion that the complaint is ambiguous and arguably internally inconsistent. This is particularly the case with respect to the time period over which the complaint extends and the nature and extent of the disability in issue. I provide further reasons for these conclusions in subsequent

sections of this decision. It is necessary to clarify the substance of the complaint in certain respects in advance of the hearing on the merits to permit an efficient, effective and fair process. The next issue is whether the Board may consider evidence to assist in interpreting the complaint from the pre-referral stage before the Commission.

D. The Law Respecting the Evidentiary Objection

53. The broad jurisdiction of this Board to accept evidence is prescribed in section 7 of the *Board of Inquiry Regulations* pursuant to the *Act* as follows:

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

54. Accordingly, absent privilege, the Board of Inquiry has the jurisdiction to receive and consider evidence respecting the pre-referral stage of a complaint. The question is whether it should do so in the circumstances of this preliminary issue. This is to be determined on the basis of relevance and privilege.

55. I have carefully considered the *Gover* and *Lemire* decisions. In *Gover*, the investigation report recommended that a portion of the complaint be referred to the Tribunal. However, the Commission referred the complaint in its entirety. The Respondent applied to the Federal Court to have the portion of the complaint that had not been supported by the investigation report struck out on the basis that the investigation had only substantiated part of the complaint.

56. The Commission took the position that the Respondent's argument was, in effect, a request to the Tribunal to review the process whereby the Commission refers a complaint to the Tribunal and "a collateral attack of the Commission's administration of the complaint and its decisions". The Commission relied upon the decision of *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 S.C.C. 10, ("*Halifax*") where the Supreme Court of Canada reconfirmed that the Commission and the Tribunal

have different functions; the former as an administrative body and the latter as an adjudicative body, in support of this position. The Commission also submitted that the Respondent was attempting to rely on irrelevant considerations such as the comments made by the Commission's investigators during the pre-referral stage.

57. The Canadian Human Rights Tribunal in *Gover* held that the adjudication of a motion for amendment is to be based upon the referral letter. It concluded that the request in the referral letter that the Tribunal institute an inquiry "into the complaint, as [the Commission] is satisfied that, having regard to all the circumstances, an inquiry is warranted" was the document that conferred jurisdiction on the Tribunal to proceed with the inquiry. The Court in *Gover* noted that a similar approach had been taken in other decisions: *Premakumar Kanagasabapathy v. Canadian Human Rights Commission and Air Canada*, 2013 CHRT 7; *Côté v. Attorney General of Canada* 2003 CHRT 32; *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22. These cases held that the scope of the inquiry conducted by the Tribunal is limited to the matters arising from the complaint accompanying the request for the inquiry.

58. In *Gover*, the Tribunal declined to consider the investigation reports included in the motion materials, stating at paragraph 47:

> *... with respect to the argument that the reasons in support of the decision by the Human Rights Commission should be considered, I find that it is unnecessary to address the considerations supporting the investigation reports that are in the Complainant's record because, in doing so, the Tribunal would be in the position of reviewing the Commission's reasons, which is not within the Tribunal's jurisdiction, as the Federal Court decided in the Lemire decision (Warman v. Lemire, 2012 F.C.J. 1233, para. 56-58).*

59. In *Lemire*, the Federal Court had held at paragraphs 57 and 62:

> *57 In exercising its authority, the Tribunal cannot collaterally question a Commission decision that is within the statutory authority of that body. This is properly left to judicial review: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at p 853 (QL and WL para 53); Sam Lévy et Associés Inc. c. Mayrand, 2005 FC 702, aff'd by*

2006 FCA 205, leave to appeal to the SCC ref'd, [2006] C.S.C.R. no 317 (QL), at para 169; and Canada v. Prentice, 2005 FCA 395, leave to appeal to SCC ref'd [2006] C.S.C.R. no. 26 (QL); at paras 32-33.

....

62 ...the hearing went beyond the scope of the Tribunal's mandate to determine the factual and legal issues and became an inquiry into the manner in which the complainant and the Commission conducted themselves in relation to the complaint. The Tribunal stepped over the line of its proper role - adjudication of the complaint - and assumed the role the Court would have upon an application for judicial review of the actions or decisions of the Commission.

60. In the instant case, the Complainant submits that *Gover* stands for the principle that unless the document referring a complaint to a Board of Inquiry expressly states that some part of the complaint has been dismissed or that some part of the complaint is not being referred, the complaint in its entirety is referred for adjudication by the Board of Inquiry. The Complainant says that *Gover* is distinguishable, as the complaint in that case was clear and unambiguous. As well, Complainant's counsel makes the distinction that the Complainant is not attempting to use information about the investigation of her complaint obtained by the Human Rights Commission to contradict the referral of her entire complaint to the Board of Inquiry. Counsel submits that her intent is to use information about the investigation of the complaint to clarify what she was complaining about to the Commission and what the Investigating Officer thought she was complaining about.

61. This Board also considered the decision of *Itty v. Canada Border Services Agency*, 2013 CHRT 33 (CanLII), *("Itty")*, where the parties relied upon the investigation report in their motion materials respecting requested amendment. The Tribunal placed little weight upon the investigation report.

E. Conclusions Respecting the Evidentiary Issue

62. I have considered the issue of the relevance of the evidence sought to be introduced by the Affidavit in light of the *Gover* and *Lemire* decisions. Notwithstanding the desirability of resolving the ambiguities in the complaint to determine the substance of the complaint,

which would potentially assist in determining whether the complaint may be amended as proposed, I have concluded that evidence respecting what the Complainant intended her complaint to be about is not relevant for purposes of this motion. Likewise, what the Investigating Officer thought the Complainant's complaint was, as relayed in the resolution report, is also not relevant. I reach this conclusion on the simple basis that only the Commission's decision is relevant at this stage. The Commission could have disagreed with the Investigating Officer. The Commission could have decided to refer the complaint forward in its entirety, even if the Investigating Officer concluded there was no basis to refer the complaint to an inquiry. Likewise, in theory, the Commission could have disagreed with the Complainant respecting the scope of the complaint it wished to refer for an inquiry. Only the decision of the Commission is relevant.

63. That decision consists of the referral letter and attached complaint. The referral letter, the attached complaint and section 34 of the *Act* prescribe the jurisdiction of the Board of Inquiry. The referral letter directs the Board to conduct an inquiry to determine whether discrimination has occurred. Reviewing evidence of what was considered by the Commission has the unavoidable appearance of second-guessing the Commission's decision. This is the case even where the complaint is ambiguous and would benefit from a clarified explanation of its substance.

64. As the Affidavit is not relevant to the interpretation of the substance of the complaint, I am not prepared to accept it into evidence for purposes of this preliminary issue. This includes the resolution report.

65. Because of my finding that the Investigating Officer's report is not relevant evidence in these particular circumstances, there is no need to address the issue of whether the resolution report is privileged. However, on a preliminary review of the matter, it seemed to me that section 35 of the *Act* was primarily focused on the non-compellability of witnesses or documents at a hearing or to a court. I would have found that production of the report cannot be compelled by the Board at the hearing by subpoena or order. However, I would have been prepared to consider evidence that the report was prepared on the record and provided to the parties by the Commission, as alleged by the Complainant. If this evidence was persuasive, I would have found that the report is not privileged and could be admitted into evidence at a hearing by the Complainant, subject to a determination of any other issues related to its admissibility and relevance.

F. Determining the Substance of an Ambiguous Complaint

66. This leaves the Board with the task of interpreting the Commission's decision for purposes of this motion without the assistance of extrinsic evidence. I note that none of the case authorities offered by the parties respecting amendments to complaints involved an ambiguity or potential inconsistency in the complaint that impacted the Board's ability to determine what the substance of the existing complaint was, as referred by the Commission. Accordingly, in my view, a few comments respecting the approach to be taken in determining the "substance" of an ambiguous complaint are in order.

67. Apart from what can be inferred from the attached complaint form, the Commission's decision does not include written reasons from which this Board could draw assistance in determining the substance of the complaint. As noted at the outset of these reasons, I infer that there is no practice or policy of amending complaints based on the Commission's assessment of the investigation. It appears to be the Commission's practice to attach the original complaint form to its referral letter as it was formulated at the intake stage prior to investigation. In any event, this is what occurred on the facts in the instant case. Related considerations are that the complaint was referred for inquiry in its entirety. As well, the hearing by a Board of Inquiry is a hearing *de novo*.

68. In my view, these considerations have implications for how the substance of the complaint is to be interpretted. I conclude that the referral process of the Commission and s. 34 of the *Act* require a Board of Inquiry to take a broad and liberal interpretation of the complaint in determining substance of the complaint. In this regard:

1. The referral letter states that, in relation to the complaint which is attached, the Board of Inquiry's jurisdiction is to "determine if discrimination occurred". Such language is to be read broadly to give effect to the *Act* and its purposes;
2. It is to be presumed that the Board of Inquiry is to take the complaint as a starting point, as the Commission did at the investigation stage, in determining if discrimination occurred, while respecting identifiable parameters of the complaint; and
3. In determining the substance of the complaint, any ambiguity or inconsistency within the wording of the complaint form is to be resolved in favour of an interpretation of the complaint that provides the Complainant with an opportunity to have her case presented fully.

69. In reaching these conclusions, I am mindful of the fact that the Complainant did not have the benefit of legal advice when she signed the complaint form. The Commission submits that the Complainant should be taken to have understood and agreed with the content on the form when she signed it. Many complainants are self-represented, particularly at the stage when they first contact the Commission. This Board is not prepared to assume that complainants are familiar with the legal concepts that commonly arise in the context of human rights, such as individual versus systemic discrimination, the distinction between the application of a policy and its discriminatory effect, or the distinction between liability and damages. It is more probable than not that a self-represented complainant, such as the Complainant in this case, would have some difficulty assessing how his or her complaint should best be phrased or characterized on the complaint form.

70. A further implication arises from the Commission's role as decision-maker at the referral stage. This concerns the submissions made by counsel on behalf of the Commission respecting the interpretation to be given to the complaint. In my view, the Commission's decision is to be considered by the Board of Inquiry on the basis of the decision, as written, in its referral letter. Any substantive submissions to the Board of Inquiry by counsel respecting how the Commission's decision is to be interpreted and applied by the Board of Inquiry could potentially be perceived as the Commission adding reasons to its decision after the fact. Accordingly, I have placed minimal weight on any substantive submissions that may appear to constitute the Commission commenting upon its own decision.

The Merits

Jurisdiction of the Board to Grant Amendment

71. The Respondent took the position that this Board of Inquiry had no jurisdiction to amend the complaint. In this regard, the Respondent relied upon *Tyrell v. Intercall Canada Inc.*, 2009 HRTO 228 and *Richards v. University Health Network*, 2011 HRTO 1146. At the time these decisions were issued, there were transitional rules in place in Ontario respecting procedure governing complaints filed with the Commission prior to June 30, 2008. These transitional rules expressly required the complaint to remain in the form it was in when it was referred from the Commission. In my view, these cases are distinguishable on this basis.

72. The Respondent submitted that this Board lacked the jurisdiction to grant amendments based on its interpretation of the *Act*. I will not address these submissions in detail. The Nova Scotia Court of Appeal in *IMP* did not preclude the jurisdiction of a Board of Inquiry to amend a complaint in appropriate circumstances.

73. In my view, Boards of Inquiry have the jurisdiction to grant amendments to complaints post-referral. Boards may do so where the amendment falls within the "substance" of the complaint and where there will not be significant prejudice to the Respondent: *Welch v. Eggloff (No. 2)* (1998), 34 C.H.R.R. D/438 (B.C.H.R.T.) referenced in *Harnish v. Halifax (Regional Municipality)*, 2007 NSHRC 6 (CanLII) (*"Harnish"*) and *Toneguzzo v. Kimberley-Clark Inc.* 2005 HRTO 45 (CanLII) (*"Toneguzzo"*).

The Law Respecting Determining the Substance of a Complaint

74. The Commission and Respondent advocated a strict reading of the complaint. In the reasons offered with respect to the evidentiary issue, I have concluded that an ambiguous complaint, such as the complaint in this case, is to be given a broad and liberal interpretation. I apply those comments here. I also have concluded that the written complaint cannot serve the same purpose as pleadings in civil proceedings, given the nature of human rights cases. This underlying premise was recognized in *Toneguzzo*.

75. In *Toneguzzo*, the Tribunal rejected the idea that the complaint is at all akin to pleadings in civil cases, at paragraphs 54-59:

> *[54] ...Perhaps most importantly, the Tribunal is not prepared to accept, and there is no support in the case law for the proposition that the "subject matter of the complaint" is restricted to the specific factual allegations set out in the original complaint form, or that the complaint form itself serves a similar purpose to that of pleadings in a civil action.*
>
> *[55] To the contrary, jurisprudence before this Tribunal and the Courts has established that a human rights complaint is not in the nature of a criminal indictment. Rather, it is a notice to a Respondent of the commencement of an administrative proceeding. (See: Cousens v. Canadian Nurses Assn. (1981), 2 C.H.R.R. D/365 (Ont. Bd. Inq.); Smith v. Mardana Ltd. (No. 2)*

(2002), 44 C.H.R.R. D/142 at para. 26 (Ont. Bd. Inq.), (varied on other grounds: (2005), CHRR Doc. 05-434 (Ont. Div. Ct.)).

76. In *Tonequzzo*, the Tribunal held that it had the broad jurisdiction to inquire into all aspects of a matter referred to it. This includes the power to add parties, either at the request of a party or on its own motion, to determine who infringed the right of a complainant under the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, similar to the Nova Scotia *Human Rights Act*.

77. At paragraphs 57-59, the Tribunal held as follows:

> *[57] Thus, both the Code and the Tribunal's Rules make clear that the defining of the case and scope of the inquiry before the Tribunal occurs at the point the complaint is referred to the Tribunal and during the period in which the Tribunal's pre-hearing processes are engaged, not when a complaint is drafted.*
>
> *[58] This approach is also consistant [sic] with the scheme of the Code, including having the Commission investigate complaints and providing the Commission broad investigatory powers. That process and those broad powers would be senseless if the legislature intended that the Tribunal only had the jurisdiction to inquire into the specific factual allegations set out in the original drafted complaint.*
>
> *[59] In the Tribunal's view, this scheme and the process embodied in the Code is established precisely because of the unique character of human rights complaints. Complainants will often have difficulty, either because of their lack of resources or because of the nature of many forms of discrimination, to fully plead all factual allegations at an early stage. As was noted in Basi v. Canadian National Railway Co. (No.1) (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at para. 38481, "Discrimination is not a practice which one would expect to see displayed overtly." See also: Canada (Attorney General) v. Grover (No. 1) (1992), 18 C.H.R.R. D/1 (C.H.R.T.), upheld at (1994), 24 C.H.R.R. D/390 (F.C.T.D.).*

78. The exercise is to determine whether the amendment falls within the substance of the complaint, not whether the amendment is restricted to the allegations contained on the complaint form. The Respondent and Commission rely on the Court of Appeal's decision in *IMP* in suggesting a narrow and strict reading of the complaint. There is nothing in *IMP* that is contradictory to the characterization given to the complaint in *Toneguzzo,* namely that the "subject matter of the complaint" is not restricted to the specific factual allegations set out in the original complaint form and that the complaint does not serve the same purpose as pleadings. The Court of Appeal recognized that amendments could be granted to extend, elaborate or clarify a complaint already before a Board of Inquiry. In the *IMP* case, as explained below, the amendment sought by the complainant clearly did not fall within the substance of the complaint.

79. All parties made submissions respecting the decision of the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd.* 50 O.R. (3d) 18 ("*Entrop*"). The Commission and Respondent cautioned that the broad powers of a Board of Inquiry cannot be used to expand the Board's jurisdiction; in other words, the Board cannot work backwards from its remedial powers to create jurisdiction that the Board does not have. I agree. In *Entrop,* the Board of Inquiry erred in expanding the scope of an inquiry to invoke jurisdiction over the employer's drug testing policy when the complaint alleged discrimination based on alcohol abuse. On the facts, the complainant had never had a drug problem. Drug testing was not relevant to the original complaint and an amendment to include it was not well-founded. However, the Court of Appeal found that the Board was entitled to assert jurisdiction over all aspects of alcohol testing and was able to grant amendments to permit other additions to the complaint.

80. The Complainant referred to *Harnish* as an example of a case where new factual allegations were added to a referred complaint on the basis that the allegations fell within the subject matter of the complaint, even though they were not considered in the Commission's investigation and screening function and may not even have been known by the Commission. The Board of Inquiry's reasons for allowing the amendments are at paragraph 41:

> *41 ...The fact that certain issues were not investigated by the Commission does not necessarily lead to the conclusion that those issues fall outside the scope of the complaint if those issues reasonably fall within its scope:*

Corren v. British Columbia (Ministry of Education) (No. 2) (2005), CHRR Doc. 05-635, 2005 BCHRT 497. The additional allegations simply seek to provide additional examples by reference to separate incidences of the type of discrimination allegedly suffered by Ms. Harnish. Such additional allegations arise out of the same basic set of facts on which the original complaint is rooted: Farias v. Chuang (No. 1) (2005), CHRR Doc. 05-092, 2005 HRTO 8 Can LII), 2005 HRTO 8.

81. It is argued that the instant case involves not only additional incidences of the same type of alleged discrimination but also a new ground of complaint. Commission counsel submitted that there is an important limitation expressed in *Harnish,* at paragraph 41, where the Board of Inquiry noted that: "It is not as if the Commission has investigated a complaint of racial discrimination up to this point, and now has to change course and launch an investigation into sexual harassment." The Commission submits that the case law is clear that complaints cannot be amended to permit the assertion of a new ground of discrimination and that, in the instant case, the Complainant is attempting to add a new ground of discrimination to her complaint, namely, mental disability.

82. As stated above, the Commission and the Respondent rely upon the decision of the Nova Scotia Court of Appeal in *IMP,* referenced above, where the Court of Appeal overturned an amendment that involved a new ground of discrimination and new facts. The primary issue concerned the fairness of granting an amendment in the absence of the Respondent. However, in doing so the Court made the following comments:

36. The letter from the Commission to Mr. Wood dated February 4, 1994 advising him of his appointment enclosed a copy of the complaint dated December 18, 1992. This was the only complaint from Dillman against the Company pursuant to the Act, the only complaint the Commission referred to a hearing and the only complaint referred to Mr. Wood. It related to sexual discrimination between June 14, 1989 and May 3, 1991....

37. The amendment granted by the Board added a new and separate complaint. It now alleged the Company's failure to give Dillman an opportunity to obtain a job as an air frame mechanic because of sexual [sic] [recte gender] discrimination. This took place in the summer of

> *1992.... As counsel for the Company says, it was not merely an extension, elaboration or clarification of the sexual harassment complaint already before the Board. To raise a new complaint at the hearing stage would circumvent the whole legislative process that is designed to provide for attempts at conciliation and settlement. This matter did not go through the preliminary stages of investigation, conciliation and referral by the Commission to an inquiry pursuant to s. 32A of the Act. The Board dealt with a matter which had never been referred to it.*

83. The Commission and Respondent submit that the proposed amendments under consideration in this case are not an "extension, elaboration or clarification" of the complaint, but rather alter the complaint creating a new complaint that was not referred to this Board of Inquiry.

84. The Commission also referred to *Tran v. Canada (Revenue Agency)*, 2010 CHRT 31, ("*Tran*"), where the complainant requested an amendment to her complaint to add new grounds of discrimination. The Tribunal considered the facts in the original complaint and found that it was not possible to identify any logical connection between those facts and the additional grounds of discrimination. The Tribunal held at paragraph 17:

> *17 ... Without such a connection or nexus, there is no statutory authority for the referral to occur...with respect to the proposed amendment, since that is how the Tribunal obtains jurisdiction for the inquiry. ...*
>
> ....
>
> *The Commission must have considered the essential situation that forms the subject-matter of the inquiry, when it referred the Complaint to the Tribunal. This places certain limits on amendments, which must have their pedigree in the circumstances that were put before the Commission.*

85. As cited in *Tran*, further guidance is offered in *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1, where the Canadian Human Rights Tribunal summarized its definition of a "new" complaint, at para. 18:

> *18 A complaint will be considered "new" where it bears no factual, logical or other connection with the original Complaint....*

86. The Commission relies upon *Canada (Procureur général) v. Parent*, 2006 FC 1313 ("*Parent*") as a positive example of a case where it was appropriate to grant an amendment. The Federal Court of Appeal considered disability to be a key fact and held at paragraph 38:

> *38 The facts forming the basis of the initial complaint, including respondent Alain Parent's disability (post-traumatic stress disorder), are the same as those forming the basis of the amendment granted by the Tribunal. In other words, the disability that caused him to be relieved of his chief investigator position according to his initial complaint was also the alleged cause of his discharge. Therefore, the discriminatory acts alleged against the Canadian Forces in both the initial complaint and in the granted amendment are based on this same factor, i.e., the disability suffered by respondent Alain Parent.*

87. In addition to the above-noted cases, this Board also considered the decisions of *Woiden v. Lynn*, 2002 CanLII 45925 (CHRT) ("*Woiden*"), *Itty, supra* and *Cook v. Onion Lake First Nation* 2002 CanLII 61849 (CHRT) ("*Cook*").

88. In *Woiden*, a reference to a section in the relevant human rights legislation was inadvertently excluded from a complaint form. The complaints were advanced on the basis of sexual harassment contrary to section 14 of the *Human Rights Act*. The complainants sought to add complaints on the ground of sex pursuant to section 7 of the *Act*. The Tribunal noted that none of the facts alleged in the original four complaints were being altered and granted the amendment. At paragraph 13 it stated:

> *13 ... The only real change will occur once all of the evidence is in, when the parties will make their final submissions. The additional issue to be debated at that time will be whether the facts adduced during the hearing of the case constitute evidence of a violation of Section 7, in addition to, or in the alternative to, Section 14.*

89. In *Itty*, the complainant alleged he was discriminated against based on race, national or ethnic origin and age contrary to section 7 of the *Canadian Human Rights Act*. After referral to the Tribunal, the complainant filed particulars and sought to amend his complaint to allege systemic discrimination contrary to section 10 of the *Act*. The Tribunal

in *Itty* determined that the complainant was relying on the same factual allegations made under section 7 to support his section 10 allegations, with the exception of one additional incident of alleged differential treatment. Accordingly, the Tribunal held that the requested amendment "cannot correctly be characterized as a new and separate complaint", at paragraph 38.

90. The Tribunal also found that there were substantive connections between the original complaint and the requested amendment. The original complaint alleged discrimination on the basis of the respondent's assessment of the complainant's suitability for a job. The Respondent had relied upon tests and practices in its assessment process; therefore, systemic discrimination in connection with the assessment process was of potential relevance based on the original facts. The Tribunal held at paragraph 40:

> *40 ... The tests and practices used in those assessments would themselves have to be canvassed in evidence in order to both provide a full picture of the matters in issue and also determine "... the real questions in controversy between the parties". (Canderel, supra cited in Parent, supra and Tabour, supra).*

The Tribunal concluded that it was not bypassing the *Act's* referral processes by permitting the amendment.

91. In my view, the addendum within the decision of the Canadian Human Rights Tribunal in *Cook* is most analogous to the instant case. The existing complaint was based on disability, with specific reference to hepatitis C. The complainant wished to add alcoholism to the ground of disability. The complainant alleged that she was not selected to participate in a life skills program by the respondent because of her disability, contrary to section 5 of the *Canadian Human Right Act.* The respondent submitted that an amendment adding alcoholism would create a much broader inquiry, bringing into question the program, which required participants to be alcohol free, and would add the issue of a bona fide justification for denial or differentiation based on section 15(1)(g) of the *Canadian Human Rights Act*. The Tribunal denied the request for an amendment, finding at paragraphs 23-25:

23 ... The [original] complaint relates to her treatment as an individual and states that she has been discriminated against personally. It does not question the design of the program or the admission criteria.

24 The question whether the Life Skills Programme is inherently discriminatory is a separate issue. It was never part of the original complaint....

25 The Respondent feels that it is now facing a new attack on a broader front, which calls the entire Life Skills Programme into question. This raises deep issues for Onion Lake, which requires that all employees refrain from the use of drugs and alcohol. The concern is that any attack on this aspect of the programme undermines one of the fundamental policies on which the reserve operates. This is a systemic issue that does not appear to have been canvassed in the investigation. It follows that the issue was never referred to the Tribunal and cannot be incorporated into the complaint. In my view, the Tribunal has no jurisdiction to deal with it.

92. However, the Tribunal noted that there could be a misunderstanding between the parties respecting the need for the amendment. It made an addendum to its ruling on the subject of personal discrimination against the complainant based on alcoholism, at paragraphs 26-27:

26 ... If Ms. Cook was drug and alcohol free, there may well be an issue of personal discrimination. The precise nature of this discrimination may or may not relate to the fact that she had hepatitis C and might include alcoholism. This could conceivably give rise to an argument that she was not enrolled in the programme because she was an alcoholic, in spite of the fact that she met the programme's requirements. If this is the concern of the Commission, I can only say that it comes well within the parameters of the case law, which establishes that a tribunal has the authority to go outside the narrow bounds of the description in the complaint.

27 It is open to the Commission to raise this much more restricted issue at the outset of the hearing. I see nothing in the present ruling to prevent the member who hears the complaint from dealing with this aspect of the

> *complaint or ordering an amendment to encompass it. The case law seems to suggest that the tribunal would have the authority to consider such a ground, with or without an amendment. The only issue would be whether the Respondent was given adequate notice of the relevant facts and the evidence on which the Commission is relying to prove the allegation. That is a matter that the Member hearing the case should decide.*

93. Accordingly, while obiter, these comments suggest the complainant would have been permitted to add alcoholism to her existing complaint of personal discrimination based on disability arising from hepatitis C. It hardly needs to be stated that both hepatitis C and alcoholism are forms of disability. It appears that hepatitis C and alcoholism were treated as sub-categories of the protected characteristic or discriminatory ground of disability.

94. *Cook* referenced the decision of *Cousens v. Canadian Nurses Association* (1981), 2 C.H.R.R. D/365, at para. 14. In *Cousens*, the Board found that there was:

> *... a public interest in hearing all aspects of a complaint at a single hearing. There was no reason to restrict the precise characterization of the facts before the Board to the specific ground enumerated in the complaint.*

95. Having considered *Cousens*, the Tribunal in *Cook* noted at para. 17:

> *17 The rule of practice is accordingly that issues arising out of the same set of factual circumstances should normally be heard together. This is a general legal rule, which improves the efficiency of the process and avoids the possibility of inconsistent rulings. In the human rights context, it also recognises the inevitable fact that complaints are usually filed before a thorough investigation has taken place, without the benefit of legal scrutiny. As a result, they are often imprecise. It follows, as a practical matter, that commissions and tribunals need some authority to amend complaints so that they are in keeping with the law and evidence.*

96. It is clear from authorities such as *Harnish*, *Toneguzzo*, and *Parent* that the "substance of the complaint" is not limited to the factual content on the complaint form itself. As I read

these authorities, additional examples relating to the same ground of discrimination, such as further examples of alleged incidents of discrimination based on disability, are likely to be considered as falling within the scope of the complaint and evidence related to those examples has been allowed.

97. Where the amendment adds a related ground of discrimination based on the same facts, such as the ground of sex being added to sexual harassment, and new legal arguments can be argued on the same facts, as in *Woiden*, or a complaint of systemic discrimination is added to a complaint of personal discrimination and there are substantive connections factually, such as in *Itty*, the amendment has been allowed. The addendum in *Cook* suggests that a new sub-category within the same ground of discrimination may be added to a complaint, as long as the addition is based on substantially the same general factual circumstances as in the original complaint. All of this is consistent with the requirement that there be substantive connection between the requested amendment and the original complaint.

Is the Complaint Limited to the Protected Characteristic of Physical Disability Only?

98. In the original complaint under the heading, "Section and Nature of Complaint" are the words "5(1)(d)(o); employment; physical disability". The opening statement alleges "that from February 21, 2012 and continuing, the Respondent discriminated against me with respect to employment because of my physical disability". The Commission and the Respondent view this as determinative.

99. A series of questions and answers follow. The first question asks the Complainant to explain her protected characteristic. The Complainant identified that she was involved in a car accident in 1999 that caused herniated discs in her neck. She indicated that she was involved in another car accident in 2005 that caused her to suffer chronic pain.

100. The Complainant submits that the complaint was intended to include and should be understood as including all disability arising from those two car accidents and that she suffered from both a physical and mental disability, namely chronic pain, as a result. The Complainant submits that the disability of chronic pain includes a physical and mental component. The Complainant submits that "chronic pain" incorporated mental disability into the original complaint, even if the label "physical disability" was referenced in connection with section 5(1)(o).

101. Question 4 on the form asks, "Why do you believe the treatment you received is because of your protected characteristic?" The Complainant alleged that she was not able to perform mail duties associated with her job responsibilities and that the Respondent failed to accommodate her. There is no explanation of the nature of the functional limitations that precluded or limited her ability to perform her mail related duties in terms of whether they were physical or mental.

102. The complaint form asked the Complainant how she was affected. The Complainant indicates that she was affected both physically and mentally. However, the Complainant's response was, in my view, confusing. The precise typed response to the question, "How did this affect you?' is the statement, "This has affected me physically and mentally because I am now physically ill. ..."

103. In my view, the original complaint form is ambiguous as it specifies physical disability as the ground of disability, yet references chronic pain in the context of identifying her protected characteristics. The Complainant identifies chronic pain as a mental disability or partly a mental disability. To a lesser extent, there is also ambiguity in the complaint's reference to the Complainant being affected both physically and mentally. It is not clear if the answer was intended to include her functional limitations or relate solely to the factual basis for damages, such as for damages for mental distress.

104. In addressing the complaint's reference to chronic pain, the Respondent submits that the Complainant is required to have medical evidence that chronic pain includes both physical and mental components and has failed to offer such evidence. In response, the Complainant relies upon *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 S.C.R. 504 ("Nova Scotia (Workers Compensation Board"), where the court concluded that chronic pain includes components of both. At para. 1, Gonthier J., in delivering the judgment of the court stated as follows:

> *1 There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in*

distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians….

105. Further, at para. 90, Gonthier J. held:

> *90 … Finally, the medical experts recognize that chronic pain syndrome is partially psychological in nature, resulting as it does from many factors both physical and mental. This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes: Granovsky, supra, at para. 68; R. v. Swain, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, at p. 994; Winko, supra, at paras. 35 et seq. Although the parties have argued the s. 15(1) case on the basis that chronic pain is a "physical disability", the widespread perception that it is primarily, or even entirely, psychosomatic may have played a significant role in reinforcing negative assumptions concerning this condition.*

106. For purposes of determining this preliminary motion, I am prepared to proceed on the basis that the disability of chronic pain has been recognized as having both physical and mental components by the Supreme Court of Canada. It is unnecessarily burdensome to require specific expert evidence regarding a matter which should not be in dispute in this theoretical context. As well, section 7 of the *Board of Inquiry Regulations* permits Boards of Inquiry to accept information whether or not the information would be admissible in a court of law. I am accepting this information. It may be that the evidence at the hearing will not support an allegation of mental disability. However, that is to be determined on the merits. At this point, the issue is whether the Complainant should be able to raise the

issue of mental disability at the hearing in the context of the functional limitations she experienced, or was perceived by the Respondent to experience, arising from her motor vehicle accidents.

107. In any event, given the reference to chronic pain on the complaint form, which could, if supported by evidence, include a mental disability aspect, the conclusion that this was originally a case of purely physical disability is not one with which I can agree. In addition, there will likely be significant factual overlap between physical disability and chronic pain, the latter with its physical and mental components. Many of the facts relevant to this complaint will concern the Respondent's duty to accommodate the Complainant's functional limitations. The legal issues related to the failure to accommodate will be the same regardless of the nature of the functional limitations. It may also be difficult to separate the facts related to the Complainant's functional limitations as between physical disability and chronic pain.

108. Similar considerations hold true with respect to the application of the attendance management policy. The Complainant's absences from work could relate to physical disability, mental disability or both, or be unrelated to disability. The issue will be whether the policy's application to the Complainant was discriminatory.

109. In these circumstances, where the complaint references chronic pain as a protected characteristic, the proposed amendment is not a new complaint. It falls within the substance of the complaint. I am prepared to grant the amendment, subject to limitations stated below, to give effect to the Complainant's ability to advance her complaint in an accurate manner, based on what the evidence will be and the law.

110. This issue has been determined based on an interpretation of the substance of the original complaint. As an aside, the Complainant may have lacked the legal sophistication to recognize the significance of the selection of physical disability at the intake stage. There is no suggestion that the Complainant knew at the time she signed the form that the Commission would take the position at the hearing that she should be limited to the complaint form to such a degree. There is nothing on the complaint form to notify the Complainant of the potential legal significance of the selection of the ground of disability or the selection of one form of disability over the other.

111. I conclude that the original complaint is to be interpreted as including those functional limitations arising from the car accidents of 1999 and 2005, including any physical and mental disability related to chronic pain, subject to the limitations identified at the conclusion of these reasons.

112. If I am wrong in this conclusion, I would find that no amendment of the complaint is necessary to change the ground of the complaint so that it includes mental disability. The Supreme Court of Canada in *Nova Scotia (Workers Compensation Board)* had no difficulty in permitting the parties to argue the case on the basis that chronic pain is a physical disability (see paragraph 90 quoted above), even though it expressly recognized that chronic pain is partly psychological in nature. In my view, this Board ought not to adapt a technical and restrictive approach to the precise nature of the disability when the Supreme Court of Canada has not done so. I note that a similar approach was taken in *Sansome v.Dodd* [1991] B.C.C.H.R.D. No. 17 and *Sime v. Okanagan College (No. 2)*, 2008 BCHRT 257 (CanLII).

Defining "Physical Disability and Mental Disability" in the Nova Scotia *Human Rights Act*

113. The Commission and Respondent made submissions based on the content at the top of the complaint form, specifically, its reference to section 5(1)(o) of the *Act* and its identification of the nature of the complaint as "physical disability". They submit that a proper interpretation of the *Act* requires that physical disability and mental disability be treated as two separate grounds of discrimination. In effect, they submit that the lack of reference to mental disability at the top of the form means that the complaint cannot be amended to include mental disability, as mental disability is a separate ground, and the complaint was only referred on the basis of physical disability. While I have determined that the complaint is most reasonably interpreted, as a whole, as including mental disability for the reasons stated above, it is appropriate to address this submission squarely.

A. The Complainant's Submissions Respecting the Interpretation of the *Act*

114. The Complainant submits that the Respondent and Commission are urging this Board to adopt a literal and narrow interpretation of "physical disability or mental disability" in section 5(1)(o) of the *Human Right Act*. The Complainant submits that the words "physical disability or mental disability" in section 5(1)(o) mimic the phrase "mental or physical disability" in section 15(1) of the *Charter*. The Complainant submits that the protected

characteristic of "physical disability or mental disability" in the *Act* should be read consistently with the values expressed in relation to section 15 of the *Charter,* which treats disability as one ground. The Complainant submits that the *Act* should be interpreted in a liberal and purposive manner consistent with *Charter* values: *Dickson v. University of Alberta* [1992] 2 S.C.R. 1103 at para.16-23 and 94-95.

115. The Complainant submits that the idea that the Complainant's disability must be confined to physical disability poses a government-constructed barrier (based on a stereotype) that her disability has to be characterized as either physical disability or mental disability. Complainant counsel submits that this interpretation is inconsistent with the Respondent's obligation to treat the Complainant with dignity and make an individualized assessment of the Complainant's needs, limitations and capacities which can involve both physical and mental aspects.

116. The Complainant submits that the practical effect of such a position is that a complainant has to choose the classification of disability within which the complaint falls correctly or risk not being able to have a full hearing regarding their actual (alleged) experience with discrimination. The Complainant submits that such a narrow and literal interpretation of the *Act* weakens its effect by unintentionally creating an arbitrary barrier to protecting individuals from discrimination on the basis of disability. The Complainant further submits that requiring such choices inadvertently fosters the discriminatory stereotypes of "mental disability" and "physical disability".

117. The Complainant relies upon the Supreme Court of Canada's decision in *Nova Scotia (Workers Compensation Board)* as offering judicial recognition of the need to avoid imposing classifications in such a way that they create barriers. At paragraph 93, the Supreme Court held:

> *In answering this question, it is vital to keep in mind the rationale underlying the prohibition of discrimination based on disability. As I stated above, this rationale is to allow for the recognition of the special needs and actual capacities of persons affected by a broad variety of different disabilities in many different social contexts. In accordance with this rationale, s. 15(1) requires a considerable degree of reasonable accommodation and adaption of state action to the circumstances of*

> *particular individuals with disabilities. Of course, classification and standardization are in many cases necessary evils, but they should always be implemented in such a way as to preserve the essential human* dignity of individuals.

118. The Complainant further submits that the Supreme Court of Canada in *Nova Scotia (Workers Compensation Board)* recognized the inherent difficulties in labeling chronic pain as physical disability or mental disability, as the cause of chronic pain is not yet established with scientific certainty. The Complainant submits that many disabilities, such as drug or alcohol dependency or mental impairments related to injury or disease, include both a mental and physical aspect. It submits that some disabilities may be difficult to classify as mental or physical due to the fact that science has not yet caught up in its understanding of the exact mechanism or effect of the disability.

119. The Complainant submits that section 15 of the *Charter* has not been interpreted as creating separate grounds and classifications of disability but rather the phrase "mental or physical disability" means any disability and includes "a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, whether real or perceived": *Granovsky v. Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703. The Complainant submits that the phrase "mental or physical disability" illustrates the breadth of the protection, not that the protection is to be limited to arbitrary classifications.

120. The Complainant also submits that "physical disability or mental disability" are listed under the same subsection in the *Act*, section 5(1)(o), because they are two intertwined aspects of one ground, namely disability. The Complainant submits that if the legislature intended that they be separate grounds, each would have been listed in separate paragraphs in section 5, as are a number of other single grounds of discrimination. Likewise, the Complainant notes that physical disability and mental disability are contained in the same definition section within section 3(l) of the *Human Rights Act.*

B. <u>The Respondent's Submissions respecting the Interpretation of the *Act*</u>

121. The Respondent agrees that the *Act* should be interpreted in accordance with *Charter* values. However, counsel submits that this does not mean that the complaint can be expanded to include mental disability when the complaint was referred on the basis of

physical disability. Counsel submits that reading physical disability and mental disability as separate grounds does not offend *Charter* values.

122. The Respondent submits that the cases relied upon by the Complainant do not stand for the proposition that one does away with the interpretative exercise that is required in making a determination as to whether a complaint involves mental or physical disability; rather, the cases suggest that mental and physical disability can include many different human conditions. The Respondent submits that it is still appropriate to determine where the limitation falls within the definition in terms of being either physical or mental disability. The Respondent submits that it is the Commission's role to perform this function when it makes the referral and that the Board of Inquiry is required to work with whatever determination is made by the Commission. In short, the Respondent submits that the *Charter* cannot be used to "fuzz" the distinction between physical and mental disability.

123. Similarly, the Respondent submits that, while the purposes of the *Act* are relevant to the interpretation of section 5(1)(o), those stated purposes do not enlarge the powers of a Board of Inquiry in considering whether to grant an amendment. The Respondent cites the decision of *IWK v. Nova Scotia Human Rights Commission and Patterson*, 2014 NSCA 18, at para. 29, where the Court of Appeal reviewed the purposes of the *Act* as described in section 2 and commented that "...a better outcome [for a complainant] in a particular case cannot be a measure of whether interpretation of the statute better accords with its purposes".

124. The Respondent submits that this Board should draw an inference from the wording of section 5(1)(o) of the *Act*, where physical disability and mental disability are separated by the word "or". The Respondent submits that if the legislature had meant "and" or "and/or" when it used the word "or", the section would have been written with those words. The Respondent further submits that if the legislature did not intend for there to be a difference between physical and mental disability, it would simply have used the word "disability".

125. The Respondent also submits that physical disability and mental disability are two different grounds on the basis of the definition of those words in section 3(l) of the *Act*. The Respondent submits that physical disability is an open-ended list, given the words "including but not limited to", while mental disability is specifically enumerated. The

Respondent submits that this difference provides support for the interpretation that physical and mental disability mean different things.

C. The Commission's Submissions Respecting the Interpretation of the *Act*

126. The Commission also agrees that the *Act* should be interpreted in accordance with section 15 of the *Charter*. The Commission submits that there is nothing inconsistent with the *Charter* in having physical disability and mental disability as two separate characteristics.

127. The Commission submits that it is not fair for the Complainant to suggest that the Commission was applying stereotypical behaviour in "checking off boxes" on the complaint form. It submits that it investigated what was alleged and made a determination. The determination was that there was a complaint of physical disability.

128. The Commission submits that nothing turns on the fact that physical disability and mental disability are both contained within paragraph (o) of section 5(1). Commission counsel compared section 5(1)(o) with other paragraphs in section 5(1) that contain more than one characteristic or separate characteristics. Counsel submits that the paragraphs with more than one separate characteristic are to be interpreted as separate characteristics. Counsel submits, for example, that section 5(1)(q), "ethnic, national or aboriginal origin" must mean three separate grounds, otherwise "aboriginal origin" would have the same meaning as "national origin" and the same meaning as "ethnic origin", which it clearly does not. Commission counsel also referenced paragraph (u) in section 5(1) respecting "political belief, affiliation or activity". Counsel submits that "political belief" is not the same thing as "political activity", nor is "political affiliation" the same thing as "political belief". She submits that these are clearly separate characteristics and that "physical disability or mental disability" are likewise separate characteristics.

129. With respect to the definition of "physical disability or mental disability" in section 3(l), the Commission submits that section 3(l) provides an exhaustive list of what constitutes a physical disability or a mental disability. It submits that the *Act* has an educational component, so that when people read the *Act* they have some idea of what physical disability or mental disability might mean.

D. The Complainant's Reply

130. The Complainant submits that the definition in section 3(l) of the *Act* does not provide an exhaustive list of what constitutes a disability. Counsel submits that *Charter* rights are not finite. It is open to the Supreme Court of Canada to add analogous grounds which flow from the equality rights under section 15 of the *Charter*. The Complainant submits that a similar interpretation is encouraged by section 2(f) of the *Act* which states that:

> *2 The purpose of the Act is to*
>
> *(f) extend the statute law relating to human rights and provide for its effective administration.*

131. The Complainant submits that this Board should read into the definition of physical and mental disability other disabilities that have been recognized by the Supreme Court of Canada or which become identified over time through medical science. It says that this Board should not interpret the *Human Rights Act* in a way that is inconsistent with the *Charter* and inconsistent with the purpose of the *Act* prescribed in section 2(f).

132. In response to the Respondent's submissions respecting the *IWK* case, the Complainant refers to the decision of the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53, at para. 33, where the Supreme Court of Canada described the principles to be applied in interpreting human rights legislation. This includes a consideration of the purposes of the *Act*. In response to the submission respecting the Board's need to guard against interpreting the *Act* on the basis that the requested amendment would be to the Complainant's benefit, the Complainant submits that she has a statutory right as a "person aggrieved" to file the complaint that she wishes to file, subject to any later decision of the Commission to dismiss the complaint. The Complainant submits that this is consistent with the purpose stated in section 2(f) of the *Act,* which includes the expansion of human rights based on the real life experiences of persons aggrieved, without restriction by preconceptions of the Commission about what is and what is not an appropriate complaint.

133. With respect to use of the word "or" in section 5(1)(o), the Complainant submits that the interpretation to be given to the word "or" depends on the context. The Complainant submits that "or" can be conjunctive, disjunctive or both.

134. The Complainant submits that there is a fallacy in the Commission's argument that, because "ethnic, national or aboriginal origin" are separate grounds, by analogy, "physical disability or mental disability" should also be interpreted as separate grounds. Complainant's counsel illustrated his point with reference to the characteristics of race, sex and religion. Counsel submits that to create equivalent wording in section 5(1)(o) under the ground of race, one would have to choose, for example, whether they were of the African race, Caucasian race or Asian race. Counsel submits that subdividing the word "race" into categories is problematic and would defeat the purpose of the *Act*. Counsel asks, what if a complainant was of mixed race? In that event, what box would he or she select? Counsel submits that the purpose of the *Act* is to protect people from discrimination on the basis of the group characteristic of race and that the category of race is irrelevant; similarly, sex and religion do not require a person to identify the type of sexual orientation or religion. The Complainant submits that such an approach is the antithesis of diversity, as the subdivision itself could create barriers to the ability to seek protection from discrimination.

E. Conclusion Respecting Interpretation of the *Act*

135. In my view, there is an ambiguity in the phrase "physical disability or mental disability" in section 5(1)(o) in terms of whether it is intended to mean "disability" or whether it is intended to create two separate classes of disability. In addition there is a real dispute between the parties concerning the meaning of the word "or" in this context.

136. The *IWK* case sets out the relevant principles respecting the interpretation of statutes. The *Act* must be "interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect," and in accordance with the *Act*'s purposes, at para. 22. However, *IWK* may be distinguished on the basis that, in that case, there was no ambiguity in the relevant provision of the *Act*. At para. 15, the *IWK* case serves as a reminder that, notwithstanding these principles, "...if application of principles of statutory interpretation yield only one reasonable interpretation, an administrative decision maker must adopt it".

137. In view of the ambiguities respecting section 5(1)(o), it is necessary to determine the most reasonable interpretation of its wording. The Court of Appeal in *IWK* highlighted the decision of *New Brunswick (Human Rights Commission) v. Potash Corporation of*

Saskatchewan Inc., 2008 SCC 45, at para. 21, where the Supreme Court of Canada said that "...human rights legislation must be interpreted in accordance with its constitutional status" and that "...ambiguous language must be interpreted in a way that best reflects the remedial goals of the statute". Section 2 states, in part, that the purpose of the *Act* is to, "extend the statute law relating to human rights...." In accordance with this principle, in my view, Boards of Inquiry are required to interpret ambiguous provisions in the *Act* in such a manner so as to not import a restricted meaning to human rights. Instead, the *Act* is to be interpreted in a broad and liberal manner so as to give fullest effect to human dignity and respect for equality for which purpose the *Act* was proclaimed.

138. In my view, in keeping with the purposes of the *Act* and its remedial goals, "physical disability or mental disability" in section 5(1)(o) of the *Act* is most reasonably intended to capture the breadth of the protected characteristic of disability, rather than to require two separate and legally distinct classes. Most of the protected characteristics in section 5(1) are broad categories of characteristics. Race, religion, sex, family status and source of income are examples. Only subparagraph (o), "physical disability or mental disability", subparagraph (q), "ethnic, national or aboriginal origin", and subparagraph (u), "political belief, affiliation or activity" further delineate the characteristic. Interpreting those characteristics as being further broken into categories based on the use of the word "or" could lead to a narrowing of application of the *Act*. I conclude that the legislature intended an interpretation whereby these subcategories can be mutually exclusive or exist together as a combined characteristic. For example, a complaint based on the characteristic in paragraph (q) could involve a choice between ethnic or national origin or involve both. Similarly, the characteristic in paragraph (u) could involve political belief and political activity or exclude political activity.

139. In my view, paragraph (o) is intended to refer to disability in all its contexts such that the word "or" must mean "and/or". This interpretation permits the most inclusive approach to the protection of human rights. I am not persuaded that the definition of physical and mental disability in section 3 provides a basis to alter this conclusion. I also note that there is nothing in the *Act* which requires a complainant to make a selection within each protected characteristic.

140. The Supreme Court of Canada has effectively defined physical or mental disability in *Granosky* and other cases as "disability". In my view, the language in section 5(1)(o)

"physical disability or mental disability" is not intended to convey a different intention or to be applied in a different manner. It is to be interpreted in a manner consistent with the values associated with section 15 of the *Charter*, a conceptual proposition which is not in dispute.

141. In my view, the *Act* refers to physical disability or mental disability, in part, so as to educate the public, as suggested by the Commission, and because this phrasing provides a standardized means of referring to disability. However, these standardized references should not become barriers to the preservation of individual dignity and the requirement of individualized assessment in addressing the issue of accommodation. It is the functional limitation that is to be accommodated; the label applied to the underlying disability is not particularly relevant once a condition is recognized as a disability.

142. For these reasons, the phrase "physical disability or mental disability", in the context of defining the protected characteristic in section 5(1)(0), means "physical disability and/or mental disability" or simply "disability". An amendment to include mental disability, therefore, does not add a new ground to the complaint.

What is the Relevant Time Period of the Complaint?

143. The second key factual issue respecting the amendment concerns the time frame over which the discrimination is alleged to occur. The Respondent and the Commission agree that a central component of the original complaint concerns the allegation that the Complainant was required to do mail duties which aggravated her injuries. The Complainant's injuries and mail duties predated February 21, 2012 and extend back to her motor vehicle accident in 1999. However, the Commission alleges that the events referenced on the complaint all occurred after February 20, 2012, when the Complainant returned to work. I am unable to reconcile the Commission's position that the discrimination did not begin until February 21, 2012 with the wording of the complaint.

144. The complaint states that the Complainant had gone off work on September 2011 on short term disability and returned to work on February 20, 2012. The complaint refers to the February 21, 2012 letter that, in turn, enclosed a chart about the Complainant's missed time over the past three years. On this basis alone, the complaint of discrimination potentially relates to events that occurred over the previous three year period.

145. The complaint also contains the following statement in response to question 3 on the complaint form:

> *...They told me that I had to take responsibility for things as well and not be doing things that would aggravate my injuries. I had asked them several times that I not be responsible for mail duties as I it was aggravating my injuries and I was told that it was part of my duties....*

146. There are no dates of when the Complainant had allegedly not taken responsibility for her situation, no dates of the times the Complainant asked the Respondent that she not be responsible for mail duties and no explicit time frame over which the aggravation of the Complainant's injuries is said to have occurred. However, in my view, it is not reasonable to assume that events of this nature all occurred on the first day of the Complainant's return to work on February 20, 2012, after a lengthy medical absence. Allegations such as a "failure to take responsibility" and the "aggravation of injuries" must have occurred over time. It is also very unlikely that events of that nature would occur and the Respondent would prepare a letter to present to the Complainant the very next day respecting such important issues. The complaint itself implicitly suggests that the alleged problems respecting accommodation had been ongoing over a longer period of time. The same conclusion can be reached respecting other statements on the complaint form.

147. Question 4 asks that Complainant, "Why do you believe the treatment you received was because of your protected characteristic?" The answer to question 4 is, "They knew that I was unable to perform the mail duties and still they would not accommodate me." Further, in response to question 7, "How did you try to resolve the problem?", the form states:

> *I asked them several times not to put me on mail duties because I am physically unable to perform those duties. I also applied for several Expression of Interest positions that would have suited my abilities better, but I was unable to secure one of those positions.*

148. The Commission's interpretation would have the Complainant return to work on February 20, 2012 and ask the Respondent "several times" that she not be responsible for mail duties by the time of her meeting with the Respondent on February 21, 2012. It also means that between February 20, 2012 and her last day of work on March 9, 2012 the

Complainant would have applied for several Expression of Interest positions that would have suited her abilities better and been denied by the Respondent.

149. On a plain and ordinary reading of the language in the complaint, it is unlikely that several requests for accommodation and several applications for other positions that were or became available were all denied by the Respondent within that period. No evidence was offered to that effect by the Commission or the Respondent. In my view, the original complaint includes the dates of these occurrences.

150. I conclude that the statement, "The discrimination began on February 21, 2012" in response to question 2 cannot be determinative of every aspect of this complaint based on the most reasonable interpretation of the complaint. In my view, the statement on the complaint form that the discrimination began on February 21, 2012 relates to the Complainant learning on that date that the Respondent was applying its attendance management policy to her in what she perceived to be an allegedly discriminatory manner, giving rise to the discriminatory effect of the Respondent's actions upon the Complainant, based upon its application of the attendance management policy. In my view, this interpretation of question 2 on the complaint form and its response is required so as to permit the original complaint to make sense when the answer to question 2 is read in context with the rest of the complaint.

151. This interpretation recognizes that there are two inter-related, yet separate, components of the complaint, the accommodation issue and the attendance management policy issue. The February 21, 2012 date appears to refer to the attendance management policy and the potential for discipline or job loss, as opposed to indicating when the failure to accommodate began. The accommodation issue most logically began after functional limitations arose from the motor vehicle accidents and not years later. The complaint does not allege that the Respondent began to accommodate the Complainant but ceased to do so. It is more probable that the response to the question, "What is your protected characteristic?" with its references to the motor vehicle accidents suggests that the accommodation issue likely relates back to that time.

152. Accordingly, I conclude that the complaint is not limited in time to events commencing on February 21, 2012. On its facts, it is properly interpreted as including the Respondent's

accommodation of physical disability relating back to the first motor vehicle accident in 1999.

Prejudice to the Respondent

153. The Commission submits that, even if this Board of Inquiry has the jurisdiction to amend the complaint, the Board of Inquiry should decline to exercise its discretion to do so. It offers the case of *M. (R.) v. Toronto Police Services Board*, 2013 HRTO 73 as an example of where such discretion was not exercised. There a complainant sought an amendment to reflect an alleged series of events approximately 5 weeks before the hearing and beyond the disclosure deadline for relevant documents in the Tribunal's Rules. The amendments would have added 13 separate incidents with the police and involved 25 police officers not referenced in the original complaint. Only one of the new allegations involved a named individual respondent. The Tribunal declined the amendment, finding that these were new incidents. The Tribunal noted that the request for amendment was submitted in the context of the complainant responding to an issue of delay raised by the respondents. As well, the Tribunal concluded that some prejudice to the respondents could result from the impact of the passing of time on witnesses' memories, as the events had occurred three to four and a half years earlier.

154. In my view, this case is distinguishable on its facts. The new incidents were not referenced in the original complaint and, most importantly, would have involved 25 more alleged protagonists who had been uninvolved in the proceedings to that point. Further, I have some difficulty with the Tribunal's decision to not require evidence of prejudice but rather to apply a presumption that witnesses' memories could be compromised. In my view, this view of likely prejudice reflects the Tribunal's over-whelming rejection of the request to involve 25 additional individuals.

155. The Respondent submits that prejudice to the Respondent should be assumed to arise if the complaint in the instant case is permitted to extend back in time over 14 years. It submits that it will be extraordinarily difficult, if not impossible, for the Respondent to find witnesses and evidence respecting the complaint, if it is amended.

156. The amendments requested in the instant case essentially provide further particulars. They do not substantively alter the original complaint. The Respondent will not be any more prejudiced by the passage of time by the amendments than it was when the

complaint was filed. The Respondent has had notice of the Complainant's allegation that she suffered from the disability of chronic pain and physical disability arising from the motor vehicle accidents since it received the complaint. Likewise, it has had notice that the alleged discriminatory treatment affected the Complainant both physically and mentally.

157. Further, the Respondent has not offered evidence that it will be prejudiced. Notwithstanding the lengthy period of time involved, I am not prepared to assume that there will be prejudice to the Respondent in these particular circumstances. The Complainant submitted that there are documentary records of what occurred over the years such that the events are well documented. All parties acknowledge that the documentary record is extensive. Without evidence of actual prejudice, such as the unavailability of an important witness, the Board is not prepared to make a ruling that prejudice exists. The limitation period issue is also yet to be decided.

158. In the event the Respondent concludes that it requires more time to prepare for the hearing, I would look favorably upon such a request.

Objection to Second Amended Complaint and Ruling

159. In its initial written submissions, the Respondent cited a lack of particulars of any specific instances of discrimination. The Respondent has argued that even the amended complaint does not enable the Respondent to know the case that it must meet.

160. In this regard, a second proposed amended complaint was provided by the Complainant for the stated reason that the Respondent was still requesting further particulars after the first amended complaint was provided. The Respondent has objected to a second amended complaint being offered before a ruling on the first amended complaint. The Respondent is technically correct. However, the difference between the two is the extent of particulars provided. Nothing turns on the second amended complaint offered by the Complainant. Subject to the directions which follow, I am prepared to permit the Complainant to proceed on the basis of the second amended complaint. The amendments will further particularize the complaint, which is to the benefit of the Respondent.

Prelimary Ruling respecting Limitation Period Issue

161. The Respondent and Commission objected to the amendments on the basis that there is a one year period for bringing a complaint under the *Act*. They assert that most of the Complainant's requested amendments would relate to matters that occurred more than one year before the complaint was filed.

162. In response, the Complainant alleged that the discrimination by the Respondent was on-going since 1999. Complainant's counsel relies upon section 29(2) of the *Act* which permits complaints to be brought where the discrimination is on-going, as long as the complaint is filed within one year of the last occurrence.

163. The parties were previously advised by the Board of Inquiry that, if the amendments sought by the Complainant are granted, the issue of the limitation period will be dealt with at the hearing on the basis of evidence. The limitation period issue is a factual and legal issue. It is not possible to determine, without hearing the evidence relevant to this issue, whether there was or was not continuing discrimination over the potentially relevant time period of the complaint. There will likely be overlap, in any event, between evidence related to the limitation period issue, the potential merits of the complaint and the background to the complaint, such that dealing with this issue at the hearing of the merits will be the most efficient means of addressing this issue. Accordingly, as the Complainant is being allowed to amend and particularize her complaint, the limitation period issue is to be addressed by the parties at the hearing on the merits. Given this earlier ruling, these reasons do not address submissions from the parties received subsequently that relate to the limitation period issue.

Conditions Respecting Scope of Amendment

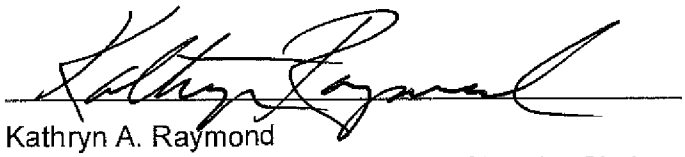
164. The request for amendment by the Complainant is not granted without limitation. The original complaint alleges that physical injuries arose from the accident in 1999 and that the disability of chronic pain began following the motor vehicle accident in 2005. Accordingly, I am not prepared to permit disability arising from chronic pain to be pursued as a basis for a finding of liability for discrimination before 2005. To do so would permit an inquiry into matters that contradict the original complaint. If the Complainant suffered from chronic pain prior to the 2005 motor vehicle accident, that evidence may potentially be offered as relevant background. This ruling also does not pre-judge the relevance of any

evidence with respect to the issue of remedy, assuming liability is established against the Respondent which includes a finding that the Complainant was discriminated against on the basis of physical disability arising from the 1999 motor vehicle accident. The Complainant is directed to revise the second amended complaint to accord with this ruling by June 20, 2014.

Decision

165. For the reasons stated above, subject to the following conditions, the Complainant is granted leave to amend and to thereby particularize her complaint as proposed in the second amended complaint. This amendment is subject any subsequent ruling respecting the application of the limitation period issue issued by this Board. In addition, the amendment cannot include liability for any alleged discrimination related to the disability of chronic pain prior to 2005.

Dated at Halifax Regional Municipality this 13th day of June, 2014.



Kathryn A. Raymond
Nova Scotia Human Rights Board of Inquiry Chair