File Name: In the Matter of: Sue Anne Snow and Cape Breton-Victoria Regional School Board

Date of Decision: October 2, 2006
Area(s): Employment
Characteristic(s): Physical disability
Complaint: Sue Anne Snow is a teaching assistance with Cape Breton-Victoria Regional School Board. Ms. Snow has a visual impairment that prevents her from driving a motor vehicle. Ms. Snow alleged that the School Board did not accommodate her disability, because she was given a school outside her town.

Decision: There was no discrimination. The Board dismissed Ms. Snow's complaint.

Employers Duty to Accommodate
The Board of Inquiry noted that an employer has a duty to accommodate an employee who has a disability. The Board also noted that forcing an employee to work at a specific work location could, in some circumstances, be discriminatory. However, in this case, the Board found that Ms. Snow could take a transit bus to the new school although it meant she would arrive late for work. The Board found that the School Board was willing to allow Ms. Snow to arrive late. The Board found that this was a reasonable accommodation.

Employee Acceptance of a Reasonable Accommodation
The Board noted that an employee cannot turn down a reasonable accommodation just because they would prefer to be accommodated in another way. The employer has a duty to provide reasonable accommodation but not to provide the employer with their ideal accommodation.

Remedy: There was no discrimination and therefore no remedy was ordered.

2006-NSHRC-6

N.S.H.R.C. File No.: 04-02-0024

NOVA SCOTIA HUMAN RIGHTS BOARD OF INQUIRY

IN THE MATTER OF: A complaint under the *Human Rights Act*, R.S.N.S., 1989, c. 214, as amended by 1991 C.12

Sue Anne Snow

Complainant

- and –

Cape Breton – Victoria Regional School Board

Respondent

DECISION OF PETER M. ROGERS, BOARD OF INQUIRY

Heard at Sydney, Nova Scotia, June 6, 7, 8 and 15, 2006.

Parties: **Sue Anne Snow, Complainant, on her own behalf**

Tony W. Mozvik, LL.B., for the Respondent

Michael J. Wood, Q.C., for the Nova Scotia Human Rights Commission

Date of Decision: **October 2, 2006**

SUE ANNE SNOW V.
CAPE BRETON VICTORIA REGIONAL SCHOOL BOARD

Nova Scotia Human Rights File 04-02-0024

BOARD OF INQUIRY
DECISION:

Introduction

1. This case concerns a complaint under the Nova Scotia *Human Rights Act* in which it is alleged that the employer discriminated against, and failed to reasonably accommodate, an employee with a visual impairment preventing her from driving a motor vehicle, by re-assigning her work location to a location outside her home town. In addition to raising a number of factual issues, the respondent School Board asserts that the *Human Rights Act* does not concern itself with work location, because it is the employee's responsibility to find their own way to the employer's work site. It also raises interesting issues regarding the degree to which the duty to accommodate burdens the affected employee as well as the employer. The factual background is important and is set out below.

Facts

2. Sue Anne Snow is a Teaching Assistant ("TA") with the Cape Breton Victoria Regional School Board. She started work as a Casual in 1997 and became a permanent employee in that position in 1999. She has a good work record without any recorded disciplinary sanctions. Teaching Assistants work under the supervision of teachers with special needs students on a one-one basis either in the classroom or in a learning centre.

3. Ms. Snow has lived on Union Street in Sydney throughout her tenure as a Teaching Assistant with the School Board. Her husband does shift work, with variable shifts, in North Sydney. She has two sons who would have been approximately aged 7 and 14 in early 2002.

4. Ms. Snow has a visual impairment which has been diagnosed since at least January of 2002 as keratoconus. It involves a misshapen cornea in which there is a progressive thinning of the central part of the cornea making it cone-shaped (or "football shaped" as described by Ms. Snow), instead of being dome-shaped. Keratoconus generally has its onset in puberty and progresses until age 40, when the deterioration of vision stops. It skews or distorts vision. Ms. Snow described it as like having Vaseline wiped on your eye. In her case, the condition is bilateral, but her left eye is more seriously affected than her right eye. Her distance vision is very poor. Her near vision is somewhat better. Ms. Snow says that she can read documents when they are the right distance away from her eyes (apparently about 12-16 inches), but she does not read easily and I observed her having difficulty finding passages in the Exhibits during her testimony.

5. At some point between age 16 and age 23 Ms. Snow sought a driver's license and failed the vision test component. She went to see a Sydney ophthalmologist, Dr. J. S. Gupta, in November 1993. At that time Dr. Gupta noted astigmatism, i.e. irregularity of the cornea, and prescribed rigid contact lens for her. At that time her uncorrected vision was recorded by Dr. Gupta as 20/50 in her right eye and 20/100 in her left eye. Her corrected vision was 20/30 in her right eye (which Dr. Gupta described as representing 65% of full vision) and 20/40 in her left eye (60%). Dr. Gupta testified that in order to get a drivers license she would have to have at least 20/40 vision in at least one eye. Based on that standard, Ms. Snow was at that time eligible for a driver's license <u>if</u> she could have tolerated glasses or the rigid contact lens required to correct her vision. As it turned out, glasses were not a viable solution for her. Also, Dr. Gupta testified that soft contact lens, which are easier to tolerate, do not properly correct the misshapen cornea, but rigid contact lens are harder for some patients to tolerate. Ms. Snow testified that she could not tolerate the rigid contact lens. Dr. Gupta testified that it was not uncommon for his keratoconus patients to be unable to tolerate rigid contact lens. Of 30 or 40 patients of his with keratoconus, he only has one who is successfully wearing contact lenses.

6. Ms. Snow did not visit Dr. Gupta or any other opthamologist after December 1993 until she returned to see Dr. Gupta in January 2002 as a result of the events to which this complaint relates.

7. When she did return to see Dr. Gupta on January 4, 2002, he tested her eyesight and found that it had deteriorated. He recorded her uncorrected vision as 20/100 in the right eye and 20/200 in the left eye. With correction (which I accept is probably not workable for Ms. Snow) her eyesight would improve somewhat to 20/70 in both eyes. This would still be well below the level of vision required in order to obtain a driving license.

8. Persons with keratoconus can undergo a cornea transplant once the keratoconus has stabilized at about age 40. Dr. Gupta described a cornea transplant as a complicated process and described the outcome as often being unfavourable. It appears that he did not, and does not now, recommend a cornea transplant for Ms. Snow.

9. I am satisfied that Ms. Snow has been unable to have a driver's license due to physical disability since 1993.

10. Ms. Snow is a member of CUPE Local 5050, which is the certified bargaining agent for the non-teaching staff of the School Board, including teaching assistants. The School Board covers Cape Breton and Victoria Counties – essentially all of central and northern Cape Breton Island, including all of industrial Cape Breton. CUPE Local 5050 has approximately 800 regular or "permanent" employees and 300 or 400 "casual" staff.

11. In late 2001 and early 2002 those involved in labour-management issues for the School Board and Local 5050 were weary. The Collective Agreement had expired and a new Collective Agreement had not been negotiated. The School Board had experienced a period of fiscal crisis resulting in cut-backs and freezes. These were quite naturally a source of friction between labour and management. Even though Provincial education policies regarding the mainstreaming of children with special needs has resulted in an exponential growth in TA positions from just a handful in 1996 to about 350 currently, financial constraints resulted in the number of Teaching Assistants for the school year 2001-2002 being frozen at 250 and the TA hours were cut back from 6 hours per day to 5.5 hours. Janice Cantwell, who was at the time the second Vice-President of the Local, testified that at one point she was involved in 67

different ongoing grievances, reflecting the labour-management tension of the time. The distrust between the Union and management was such that the two sides did not discuss much of substance over the phone but convened frequent meetings to deal with multiple issues, at which each side would have at least two representatives to ensure witnesses in the event of disagreement over what was said. When the Director of Human Resources for the School Board, Beth MacIsaac, testified about her decision on April 19, 2002 to allow Ms. Snow to work at the St. Anthony Daniels School in Sydney for the balance of that school year, she described it as a decision made from weariness rather than principle.

12. The understanding between the Union and School Board in relation to the freezing of the number of Teaching Assistants and the reduction of their work hours involved recognition by the Union that management could re-assign some of the 250 TA positions, including re-assigning them between schools, in order to service those students who were most in need of TA support. As a result of the School Board's needs assessment process to accomplish this, some 5.5 TA positions were to be re-assigned between schools in November of 2001. A process was agreed upon between management and the Union Local whereby the TAs with the least seniority in the schools which were losing TA positions would attend a "job picking" event on Wednesday, November 21, 2001 at the School Board offices to be attended by both Union and School Board officials. The displaced TAs were to pick from the new positions in order of seniority.

13. Ms. Snow was apparently one of the least senior TAs at the job pick. When her turn came, only 2 positions remained, one of which had to be filled by a male TA and the other of which was for a position at St. Joseph's School. Ms. Snow accordingly "picked" the St. Joseph's School TA position. St. Joseph's is in Sydney Mines. Sydney Mines is within commuting distance of Sydney, but is on the north side of Sydney Harbour; whereas Sydney is on the south side. The precise distance is not in evidence, but the Transit Cape Breton bus schedule provides for 50 minutes between leaving downtown Sydney and arriving in downtown Sydney Mines, with 4 intervening stops. According to Ms. Snow's uncontested evidence on this point, a taxi would cost $35-40 per day, which would represent roughly half of her gross pay for a (5.5 hour) day's work.

14. It is common ground that neither the Union nor the employer had been advised by Ms. Snow at any time before (or even at) the job picking event that Ms. Snow had a visual impairment which prevented her from being eligible for a driver's license.

15. I will digress from this chronological narrative to relate the evidence of her prior dealings with her employer. Ms. Snow's job application to the School Board in 1997 for a casual position contained a checkbox to identify whether she had a valid driver's license, and she identified by that means that she did not. That application form also contained a box, which she left blank, that invited her to "describe any physical or health limitations you would like to have considered". By that time, Ms. Snow was aware that she had a visual impairment which functionally prevented her from having a driver's license. She was not required to indicate this on her job application form and elected not to do so. Exhibit 2 was contemporaneous with Ms. Snow's application for a casual position. It was put into evidence to show that Ms. Snow asserted willingness to work in Sydney Mines when applying for the initial job with the School Board. I have some difficulty accepting that document as definitive proof that she indicated a willingness to work as a casual in Sydney Mines – but I need not decide that issue as there is a distinct difference between casual and permanent positions. As a provider of casual services Ms. Snow would receive calls to go to various schools which needed a substitute TA and had the option of accepting or declining particular assignments.

16. In 1999, when Ms. Snow applied for a permanent position, she attended an interview. Interview notes were introduced into evidence. Based on the notes, she told the employer's representatives at the meeting that she was willing to work in either Sydney or on the "north side" which includes both Sydney Mines (the location of St. Joseph's Elementary School) and North Sydney (where Ms. Snow's husband does shift work). When confronted with this on cross-examination, Ms. Snow stated that she believed she would have said that she could not presently work at a school on the north side, but that she would consider it. I do not accept that either Ms. Snow or Mr. Sheppard (who was the School Board witness who spoke to the exhibit) has an independent recollection of what was said on that subject at the September 1999 interview, but I certainly accept the document as proof that Ms. Snow did indicate a substantial degree of willingness to work on the north side. The document is inconsistent with the Complainant's assertion of a medical disability preventing her from working there.

17. By the conclusion of the job picking event, neither the Union nor the School Board had any reason to think that Ms. Snow was unable due to vision impairment to accept a re-assignment to St. Joseph's Elementary School in Sydney Mines. On the contrary, the employer had every reason to think that the re-assignment would be acceptable to Ms. Snow,

notwithstanding that she might naturally prefer to work in a location which was closer to her home.

18. Ms. Snow was decidedly displeased with the re-assignment. On Monday, November 26, 2001 Ms. Snow wrote a letter to Charles Sheppard of the School Board. At the material time, as at present, Mr. Sheppard was both a Co-ordinator of Human Resources, reporting to the Director of Human Resources, and the Co-ordinator of Race Relations and Cross Cultural Understanding, reporting to a different senior manager. Within the School Board's HR Department, Mr. Sheppard was the primary individual responsible for administration of the Collective Agreement involving non-teacher staff, namely CUPE Local 5050. Ms. Snow's letter to Mr. Sheppard indicated that the geographic location of the position at St. Joseph's made it "extremely difficult" for her to commute to Sydney Mines "due to transportation and scheduling hardship". The letter referred to her exemplary employment record and stated that "for the above reasons" she requested "to be accommodated and placed in a position which is situated within the Sydney area". The letter did not indicate that she had a visual impairment or any other disability precluding her obtaining a driver's license.

19. Ms. Snow testified that a few days after sending this letter she phoned Mr. Sheppard. Mr. Sheppard was not available, and she spoke with his secretary, Michelle MacLeod. Ms. MacLeod advised her to contact the Union to deal with the matter. Following that discussion, Ms. Snow spoke with Janice Cantwell of Local 5050 and an individual who was herself a TA at St. Joseph's Elementary School. Ms. Cantwell was also the Chair of the Local's Grievance Committee. She testified at the hearing.

20. Beginning on January 1, 2002 Ms. Cantwell recorded the dates and times of her phone calls with Ms. Snow and of her meetings with School Board officials concerning Ms. Snow. Between January 2 and March 7 she recorded having 7 phone calls with Ms. Snow. Between March 1 and June 28 she records having participated in 8 meetings with School Board officials which included some reference to Ms. Snow or her situation. Unfortunately the actual notes which Ms. Cantwell made regarding the content of any phone calls or meetings were destroyed in a sewage flood in her house in January 2005, and the Exhibit presented in evidence was a summary of dates, times and participants and did not contain much substantive content. It contained no record of any phone calls she made to School Board officials. Ms. Cantwell had a

large number of labour management issues to deal with at the time and her memory of the specific telephone calls and meetings involving Ms. Snow is minimal.

21. Mr. Sheppard, with whom Ms. Cantwell had most of her dealings up until March 1, 2002, does not have a practice of keeping notes of phone calls or meetings and he likewise was dealing with a large number of labour management issues (on top of his race relations portfolio), and I have concluded that his memory of events concerning Ms. Snow prior to March 1, 2002 is likewise minimal.

22. Ms. Snow's own evidence of what occurred in that period was also unsupported by contemporaneous notes. The evidence of what transpired between November 26, 2001 and March 1, 2002 is vague.

23. Ms. Snow testified that in her first phone call to Ms. Cantwell in late November or early December, 2001 she told Ms. Cantwell that she had a vision problem which made it impossible for her to obtain a driver's license. Ms. Cantwell testified that it was not until somewhat later on, probably just before the Christmas school break, that she learnt of a vision problem affecting Ms. Snow. Ms. Cantwell believes that her normal practice upon learning of this would have been to have requested Ms. Snow to obtain medical documentation. Ms. Cantwell says that if Ms. Snow had indicated to her that she had obtained such documentation, Ms. Cantwell would have provided it to the employer and convened a labour-management meeting to discuss the issue. Ms. Cantwell does not believe that she received a note from Dr. Gupta's office until shortly before the March 1 meeting or she would have provided it to the employer in a timely way. Ms. Snow said she would at least have made reference in her discussions with Ms. Cantwell to the availability of the note from Dr. Gupta's office shortly after receiving it on January 10.

24. Ms. Snow did not attend at St. Joseph's School in Sydney Mines after the job picking event on November 21. I accept that she called in sick to the Vice-Principal or others at the school. Ms. Snow testified that she experiences anxiety problems which can cause migraine headaches and other physical symptoms. She experienced these symptoms in the wake of the job picking event and her re-assignment to the school in Sydney Mines. Mr. Sheppard, on behalf of the School Board, sent her a registered letter on December 11 requesting a medical certificate to document her reason for continued absence from work. In response, Mr. Snow

provided a letter dated December 14 from her family doctor, Dr. Mary Ann Campbell, which indicated she had attended at that physician's office on December 4 and again on December 14 and that she was being treated for "a medical illness", which made her "unable to work at present". According to Dr. Campbell the illness had been "aggravated by losing her job in Sydney". It went on to say that Ms. Snow was "unable to drive and although she has been offered employment elsewhere she is unable to get to the place of employment. This has placed undue stress on her". The note suggested that if the School Board could find her a job within the Sydney area it would be "a great relief to her and return to employment would likely be a possibility". The letter does not indicate that Ms. Snow was medically unable to drive or that she had vision impairment. It is characteristic of a doctor's stress leave letter to an employer. The note suggested that Ms. Snow would be re-assessed in one month.

25. On January 31, 2002, Beth MacIsaac, Director of Human Resources, sent Ms. Snow a registered letter making reference to Dr. Campbell's report of December 14. The letter makes reference to Dr. Campbell's comment about Ms. Snow being unable to drive and says:

> "While this is most unfortunate, if, in fact, the reason you are not attending to your position of employment is because you cannot drive, that is not something that falls within the responsibility of your employer."

26. Her letter made reference to the vagueness of Dr. Campbell's comment about Ms. Snow having a "medical illness" and requested Ms. Snow to provide:

> "…further and better particulars of your current medical illness for the purposes of substantiating that such illness is bona fide".

27. She suggested that the evidence could be obtained from her doctor and submitted in a sealed envelope, marked "Confidential" so that it could be reviewed by the Board's physician without the employer seeing it. A copy of the letter was sent to the Union because:

> "Formal disciplinary proceedings may follow, pending the Board's completion of their investigation into your present absence from work".

28. In this letter, Ms. MacIsaac requested that Ms. Snow contact her office to confirm a time to meet to discuss the matter and invited her to have a Union representative with her on the occasion of that meeting.

29. This documentation is consistent with the School Board being unaware, at least as of January 31, 2002, of any assertion of vision impairment as a reason for Ms. Snow not working at St. Joseph's. In fact, Ms. Snow was on sick leave for stress and the correspondence from Ms. MacIsaac is exactly what one would expect from an HR Director who has seen a note like Dr. Campbell's December 14 letter with no follow-up note from the physician after over one month has expired. A note such as Dr. Campbell's would be an irritant to most employers, both because of its vagueness, and because of the undertone that the employer will be faced with an indefinite stress leave if it does not accede to the employee's demands regarding a convenient work location.

30. This letter was never responded to in writing by Ms. Snow or by CUPE Local 5050 on her behalf. The School Board witnesses say that a labour-management meeting being convened on March 1, 2002 is consistent with the employer doing further follow-up on its unanswered letter of January 31. Mr. Sheppard testified that, not only did the School Board not receive any documentary evidence of a visual impairment prior to the March 1, 2002, meeting, but that he cannot recall the issue of visual impairment having ever been raised to him by either Ms. Snow or Ms. Cantwell until that meeting. Ms. Cantwell thinks she raised it in advance of the meeting, probably in a phone call after the Christmas break, but she was not sure and there is no record of such a phone call in Exhibit 5. In any event, she does not suggest that she raised it as an issue requiring *Human Rights Act* accommodation.

31. As for Ms. Snow's activities before March 1, the evidence is that on January 4, 2002, she attended at Dr. Gupta's office. Dr. Gupta tested her vision with the results described previously. Ms. Snow re-attended to obtain documentary evidence of her visual impairment and obtained the following note, which was written on Dr. Gupta's stationery, giving the appearance to the reader that Dr. Gupta had approved its contents or written it himself:

> "Re: Sue Ann Snow Jan 10/2002
> Unaided vision (R) 20/70 (L) 20/200

Aided vision (R) 20/70 (L) 20/70
Vision may improve with wearing of glasses."

32. The note was not signed and was in fact written by Dr. Gupta's assistant. Dr. Gupta did not review the note before it was issued on his letterhead. According to Dr. Gupta in his testimony, the comments on the note were all appropriate, because everything on it was taken from the chart. Dr. Gupta was insistent that the note was not ambiguous.

33. On January 11th, Ms. Snow attended at the CNIB (Canadian National Institute for the Blind) offices in Sydney and completed the first part of a CNIB Request for Services form. Part of the CNIB Request for Services form is to be completed by "an Opthamologist, Optometrist, Medical Practitioner", and it appears that Ms. Snow took this back to Dr. Gupta's office on January 14th. At that time, Dr. Gupta's assistant completed the form, which included reference to the "best corrected acuity" of 20/70 for both eyes. The known cause of vision loss was described as "suspected keratoconus" and in the space provided for the signature of the practitioner, it was written "Michelle for J.S. Gupta". The CNIB Request for Services, along with the handwritten note, unsigned, on Dr. Gupta's stationery, which I have quoted from above, were presented by Ms. Snow to Mr. Sheppard and Ms. MacIsaac in the presence of Ms. Cantwell and other Union Local Officials on March 1, 2002. The School Board did not receive them before then.

34. I also find that Ms. Snow did not make those documents available to Ms. Cantwell or other Union representatives significantly in advance of that meeting. Ms. Snow acknowledged during her testimony that she had initially been reluctant to make reference to her visual impairment to her employer. She said she was "fearful for her job". This is perfectly natural. She was, after all, working in a school system, assisting students (some of whom needed academic assistance) Her sight within the classroom was significantly impaired and even her reading ability was somewhat compromised, with a possibility of further deterioration over the ensuing years. Eventually, I believe that Ms. Snow realized that it was likely that her employer would accommodate her visual impairment insofar as it affected her in-class activities. So she made the conscious decision in the lead-up to the March 1 meeting, to disclose her visual impairment and request an accommodation in regard to her location of work on account of it. But I believe that that decision was reached only shortly before the March 1 meeting.

35. To find otherwise, I would have to conclude that Ms. Cantwell unaccountably failed to follow up on receipt of medical information from Ms. Snow, which she says she would have acted on. I found Ms. Cantwell to be a fair witness. More than all the other witnesses, she was willing to acknowledge the huge gaps in her memory pertaining to Ms. Snow's situation. She exuded efficiency, occasionally to the point of officiousness, and it is most improbable that she would not have acted on the information evidencing visual impairment to the point of ineligibility for a driver's license, if the information had been pressed upon her by Ms. Snow. In any event, I find that Ms. Snow authorized Ms. Cantwell and Local 5050 to act on her behalf in relation to her re-assignment to St. Joseph's Elementary School, at least up until March 1, 2002, and that until that time, Ms. Cantwell did not treat the matter as one in which an employee was asserting a disability that the employer was required to accommodate under Human Rights legislation. I do not mean to suggest by this that a Human Rights Complainant or Trade Union must make explicit reference to the *Human Rights Act* in order to trigger a duty on the part of the employer to accommodate a disability. However, a mere request to the employer to "accommodate" an employee's job site preference is insufficient to put an employer on notice that it is in peril under the *Human Rights Act*, in the event it does not choose to accommodate the employee's request. That would remain true even if the employer had been told in a vague manner that the employee had some vision problems – a circumstance which I am not satisfied has been proven. There is nothing before me in the evidence to persuade me that Ms. Snow's absence from the workplace, at least up until March 1, 2002, was not being expressly attributed solely to the anxiety condition which Ms. Snow acknowledged formed the basis of her family physician's correspondence of December 11, 2001.

36. On March 1, 2002, at a meeting attended by Beth MacIsaac and Charles Sheppard (for the School Board) and Todd MacPherson, Robert Darby Moore and Janice Cantwell (respectively the Local President, First Vice-President and Second Vice-President of Local 5050), Ms. Snow provided the note from Dr. Gupta's office, and the CNIB Request for Services document. She explained her keratoconus condition and her ineligibility for a driver's license. Ms. Snow requested that her disability be accommodated by allowing her a position within the Sydney area. In response to a question of whether further information was required, the senior School Board representative at the meeting, Beth MacIsaac, said that it was not. I find that Ms. Snow and the Union officials had sufficiently conveyed the medical problem to the employer. This is not to say that the documentary evidence was necessarily ideal. However, I find that the School Board representatives left the impression with Ms. Snow and the Union that they were

satisfied with the evidence concerning Ms. Snow's visual impairment and told them the School Board did not require more. I do not fault Ms. Snow or the Union for not providing further or better evidence on that subject after that.

37. At the March 1 meeting, after receiving the documents concerning Ms. Snow's visual impairment, Mr. Sheppard left the room to photocopy them. Upon his return he indicated that the School Board would look into the matter further. The Union President, Todd MacPherson, assented to this. Ms. Snow took this to mean that the School Board would look into alternative placements for her. Unfortunately, Mr. Sheppard appears to have intended his comment as notice that he might obtain medical information directly from Ms. Snow's physician and from the CNIB. As a result of his investigations into those sources, there has been:

(i) a grievance and arbitration hearing in regard to violation of the Collective Agreement provisions concerning the obtaining by the employer of medical information of employees;

(ii) a *Freedom of Information and Protection of Privacy Act* complaint; and

(iii) a complaint to the Nova Scotia Association of Social Workers. I indicated during the hearing that this Board of Inquiry would not serve as another forum in which to raise issue of breach of privacy. That issue became the dominant issue between the parties and the Union Local after March 27th, when Ms. Snow and the Local learned of it, and it distracted the parties from the *Human Rights Act* issues with which this Board is properly concerned.

38. Mr. Sheppard's inquiries after March 1 focused on two areas:

(1) the nature and extent of the visual impairment and whether it really did prevent Ms. Snow from obtaining a driving license; and

(2) whether there were reasonable alternative means for Ms. Snow to attend at St. Joseph's Elementary School without having to have a driver's license.

39. Another issue, which is largely a legal issue, and was therefore not the explicit focus of factual investigation by Mr. Sheppard, was also a strong focus of the School Board representatives. It was whether the School Board had any legal responsibility to consider issues relating to Ms. Snow's ability to arrive at her workplace. In other words, if an employee's place of work has been determined by an employer through a process acceptable to both the employer and the Union, does the *Human Rights Act* have any application to issues involving an employee's ability to get to the workplace? The employer's position has been that it does not, and the School Board asserts that position again at this hearing. The Complainant and the Commission disagree with that position.

40. The documents from Dr. Gupta's office and the CNIB presented at the March 1 meeting would not be sufficient to satisfy many reasonable employers that Ms. Snow was medically unable to drive. Firstly, neither document was signed by a medical practitioner. Secondly, the notes do not clearly indicate that Ms. Snow could not drive even if she undertook to wear appropriate vision aids. The note of January 10, 2002, is positively ambiguous on that subject. The concluding sentence of the note is unclear as to whether the use of glasses may improve visual acuity beyond the "aided" vision testing result outlined in the previous line. At the hearing, it became clear that this sentence was intended to refer to whether the "aided" vision testing result is actually functionally attainable, and was not intended to suggest she could surpass the "aided" test results. Notwithstanding these problems with the March 1 documentation, if the employer in this instance wished to question the adequacy of the documents as evidence for Ms. Snow's inability to drive a motor vehicle as a result of her impairment, the employer ought not to have indicated that no further information was required, after receiving the documents and hearing the description by Ms. Snow of her keratoconus condition.

41. Mr. Sheppard, as part of his investigation following the meeting with the Union, attended at Dr. Gupta's office on March 11, 2002, and spoke with Dr. Gupta's assistant, Michelle. He did not speak with Dr. Gupta. Exactly what information he obtained from Michelle is unclear. Mr. Sheppard's evidence of his conversation with Michelle was obscure. At one point, Mr. Sheppard indicted that he left Dr. Gupta's office satisfied that Ms. Snow had a vision disability which precluded her from driving, but at another point in his testimony he asserted that he understood from Michelle that Ms. Snow could get a driver's license if she wore glasses. Ms. Snow could not have been eligible for a driver's license, short of cornea transplant surgery

which her ophthalmologist was not recommending. Any thorough inquiry into the matter by the employer would have soon disclosed that.

42. Mr. Sheppard also spoke with Bernadette Johnson, the CNIB's District Manager for Cape Breton Island and the Eastern Mainland.

43. The CNIB is a non-profit society which, amongst other activities, supports medical research and advocacy for persons with visual impairment. Ms. Johnson is herself legally blind. She lives in Sydney Mines and works in Sydney (the opposite direction, but otherwise the same commute that would have been faced by Ms. Snow to work at St. Joseph's). However her husband sometimes works in Sydney and she only uses public transportation about half the time in order to go to work in Sydney. Ms. Johnson explained the services offered by the CNIB and the forms that were completed by or for Ms. Snow as a person requesting service from the organization. The request for services was made in January 2002, i.e. in the period of time leading up to the March 1 meeting. Ms. Johnson was not the CNIB staff person who actually met with Ms. Snow. Her demeanor was unsympathetic to Ms. Snow and a post-it note written by Mr. Sheppard indicated that Ms. Johnson told Mr. Sheppard during his investigation that she thought Ms. Snow was just using the vision impairment as an excuse to avoid an unwanted relocation of her work site.

44. Mr. Sheppard's investigation also included making inquiries of the Transit Cape Berton public bus transportation system. The bus would leave George Street in Sydney at 8:00 a.m. and arrive at Main Street in Sydney Mines at 8:50. The walk from the bus stop to St. Joseph's School was less than five minutes. There would be a return bus leaving Sydney Mines at 3:05 and arriving at George Street at 4:00 p.m. The normal start time for a TA at the St. Joseph's School is 8:30 a.m. and superficially therefore the bus was not a solution. However, both Ms. Cantwell and Mr. Sheppard testified that the Principal at St. Joseph's was reasonable about accommodating variations in the TA work schedules. Ms. Cantwell gave some specific examples of that, including the fact that another TA began her workday at 9:00 a.m. to accommodate that person's circumstances.

45. On March 8 the Union requested the School Board to respond to the request for accommodation by Ms. Snow by the end of March Break. The School Board in fact responded at a meeting on March 27, 2002. At this meeting Mr. Sheppard was the primary representative

of the School Board (Ms. MacIsaac was not present) and Ms. Snow was not herself in attendance. She was represented by three Union officials including Ms. Cantwell. At this meeting, Mr. Sheppard advised that the School Board maintained its position that St. Joseph's was Ms. Snow's work location and that it was not the School Board's responsibility to concern itself with her ability to get to work. Mr. Sheppard advised of his contact with Dr. Gupta's office and the CNIB and I am satisfied that he told the Union (incorrectly) that the information he obtained was that her condition did not prevent her from driving. However, he also indicated that Ms. Snow could obtain other means of transportation to her position in Sydney Mines and made reference to the bus schedule. At the hearing, he testified that during this meeting he spoke to the Union about the fact that Ms. Snow's work schedule could be arranged with the Principal (i.e. her work day could start after the bus arrived) and his testimony on the point was not contradicted by any other witness. He also offered to provide a list of employees of the School Board (teachers and TAs) who work in the Sydney Mines area and lived in Sydney so that she could arrange for a ride. According to Mr. Sheppard (and again his evidence in this regard was uncontradicted by other witnesses), the Union representatives were not interested in accommodations involving changes to the hours of work or car pooling. Unfortunately, it appears that the Union focus at this meeting was largely reactive to the news that Mr. Sheppard had contacted Ms. Snow's ophthalmologist without Ms. Snow's express consent.

46. On April 12, 2002 there was another meeting between the Union and the employer. This time Beth MacIsaac was at the meeting on behalf of the School Board and Mr. Sheppard was not available and did not attend. Ms. Snow attended. At this meeting the Union again requested accommodation for Ms. Snow and the Union had signed grievances ready to present, regarding Mr. Sheppard having contacted Dr. Gupta without the consent of Ms. Snow. Ms. MacIsaac testified that the Union indicated at this meeting that it had checked into the bus schedule and babysitting options open to Ms. Snow and advised that Ms. Snow could not work at St. Joseph's. Ms. MacIsaac indicated she wanted to discuss the matter with Mr. Sheppard (particularly relating to Mr. Sheppard having spoken with Dr. Gupta's office, as I understood the evidence) and would get back to the Union at the next meeting after Ms. Sheppard's return.

47. On April 19, 2002 at a meeting attended by Beth MacIsaac, Charles Sheppard, Janice Cantwell and other Union representatives, Ms. MacIsaac advised that Ms. Snow would be placed at a school location in Sydney by the following Monday. I have indicated previously that she said this was done out of weariness and not out of a sense of legal obligation. She

probably hoped that making this concession might end the escalation of hostilities that had resulted from the contact with Dr. Gupta's office.

48. Ms. Snow was in fact re-located to the St. Anthony Daniels' School in Sydney effective April 23, 2002. She has continuously been able to work in Sydney as a TA since that time. Her claim is for the period of time after the "job pick" and before being reassigned to St. Anthoney Daniels'. She used up 18 days of her sick leave bank and then went on EI sick pay.

Issues

49. The issues are:

1. Given that it is normally an employee's responsibility to get themselves to the workplace, is a change in the employee's work location a matter which is beyond the purview of a *Human Rights Act* employment discrimination complaint?

2. Having regard to the facts of this case, did the School Board unlawfully discriminate against Ms. Snow, and fail to accommodate her to the point of undue hardship, by not granting Ms. Snow's request for a work location within the immediate Sydney area until April 23, 2002?

3. If so, what remedy is appropriate?

Analysis

50. The relevant provisions in the *Human Rights Act* are as follows:

> 2. The purpose of this Act is to
> . . .
> (e) recognize that … all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and

productive life and that failure to provide equality of opportunity threatens the status of all persons;

. . .

3. In this act

(l) "physical disability or mental disability" means an actual or perceived

(i) loss or abnormality of psychological, physiological or anatomical structure or function,

(ii) restriction or lack of ability to perform an activity,

(iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,

. . .

4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

. . .

5 (1) No person shall in respect of

. . .

(d) employment;

. . .

discriminate against an individual or class of individuals on account of

. . .

(o) physical disability or mental disability;

. . .

51. The School Board asserts that employers do not become vulnerable to *Human Rights Act* complaints for failing to concern themselves with issues about an employee getting herself to her job. Since that is in essence what is involved in a re-assignment from one workplace location to another, the entire subject matter of this complaint is, in the submission of the School Board, beyond the purview of the *Act*.

52. Both counsel referred me to the Court of Appeal decision in *Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (Puddicombe) 2005 N.S.J. No. 137. Mr. Puddicombe was a snow-plow operator for the Department of Transportation and Public Works who was injured on his way to work when he was called out to operate snow clearing equipment during a late April storm. The issue was whether the injuries to Mr. Puddicombe were injuries "arising out of and in the course of employment" in order to trigger the statutory Workers Compensation scheme. In paragraph 36, the Court refers to the general principle that injuries suffered going to and from work do not arise out of or in the course of employment. It explains this principle by reference to the fact that the workday normally begins once the employee reaches the workplace; that the risks of getting to work are the same risks that everyone faces and therefore have no special link to the employment context - they are properly viewed as general risks of life, not risks of one's employment. However, the Court of Appeal, applying an appellate standard of review of reasonableness to the decision of the Workers' Compensation Appeal Tribunal ("WCAT"), upheld the WCAT decision (i.e. that the injury arose out of or in the course of employment) which was based on the special connection between Mr. Puddicombe's duties and the risk of injury in responding to a call to clear the highways of snow.

53. Mr. Mozvik, for the School Board, cited several U.S. cases, including the U.S. District Court decision in *Bull v. Coyner*, 2000 U.S. Dist. Lexis 1905. This was a case in which the plaintiff asserted a violation of the *Americans With Disabilities Act* ("ADA"). That legislation requires employers to make reasonable accommodations to qualified individuals with disabilities. The plaintiff had a visual impairment and he asserted that his employer had an

obligation not to schedule him to work at nights and/or had an obligation to have other employees drive him to and from work. The Court held that:

> Accommodations are directed at enabling an employee to perform the essential functions of a job … Activities that fall outside the scope of the job, like commuting to and from the workplace, are not within the province of an employer's obligations under the ADA. After all, the ADA addresses discrimination with respect to any "terms, condition or privilege of employment"
> …
>
> Coyner, with full knowledge of Bull's vision problems, may have been insensitive or even malicious in requiring him to work at nights. But she had no legally-imposed obligation to be thoughtful and certainly no duty to require her employees to drive Bull on company time.

54. Another case cited by School Board counsel was to the same effect: *Salmon v. Dade County School Board*, 4 F. Supp. (2d) 1157 (U.S. Dist. Ct.). The plaintiff in that ADA case was a school guidance counselor who suffered from a back condition that was aggravated by driving in heavy morning traffic. She requested permission to arrive at work 5 to 25 minutes late on a regular basis in order to stretch and rest her back. Alternatively, she asked to be transferred to a school closer to her home. The court held that:

> ... plaintiff's commute to and from work is an activity that is unrelated to and outside of her job. While an employer is required to provide reasonable accommodations that eliminate barriers in the work environment, an employer is not required to eliminate those barriers which exist outside the work environment. *Schneider v. Continental Casco*, 1996 U.S. Dist. Lexis 19631
> …

55. Mr. Mozvik also referred to *LaResca v. A.T.&T*. (2001), 161 F. Supp. (2d) 323 (U.S. Dist. Ct.). The Court found that the employer in this case did not have a duty to accommodate an epilepsy disability by providing the plaintiff with dayshift work so that he could use public transportation. The plaintiff's condition rendered him unable to drive. The court made reference

to *Bull v. Coyner*, *Salmon v. Dade County School Board*, and *Schneider v. Continental Casualty Co*. and held that:

> the change to the dayshift sought by plaintiff was in essence a commuting problem, which A.T.&T. was not legally obligated to accommodate.

56. However, the Supreme Court of Canada has affirmed for over 20 years that human rights legislation in this country has a high priority and has *quasi* constitutional status. In interpreting it, courts and tribunals are directed to advance its broad purposes and to constrain activities which have a discriminatory effect as well as the more obvious cases in which the intention is discriminatory: *O'Malley v. Simpsons-Sears Limited et. al.* (1985), 7 C.H.R.R.D./3102 (F.C.C.) at para. 24766.

57. The definition of discrimination in section 4 of the Nova Scotia *Act* and the purpose expressed in s. 2(d) signal the concern of the legislature with an employer's role in creating or magnifying limitations or burdens upon access to opportunities faced by persons with disabilities. I do not find the American cases persuasive as authority for the broad proposition they assert. They do not reflect the balance that Canadian legislatures, courts or tribunals have struck between the responsibilities of the employer and those of the employee. I note that in *Central Okanogan School Dist. No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.), the Supreme Court affirmed its previous rejection of U.S. case law concerning an employer's duty to accommodate as "particularly inappropriate in the Canadian context". Would it really be the case that an employer could deliberately impose commuting burdens on racial or religious minorities without running afoul of the *Human Rights Act*? Or, could an employer in Canada transfer a disabled, non-driving employee with no means of transportation to a remote area without having to consider alternatives that involved little or no hardship to the employer? I think not.

58. I found the decision of the British Columbia Court of Appeal in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society* (2004), 50 C.H.R.R./D 140 to be interesting and useful. That case involved a claim of employment discrimination on the prohibited ground of family status in circumstances when the mother of a child with substantial special needs was directed to change her work hours to hours which would have precluded her from providing her child with after school care. The Arbitrator had

ruled that the domestic impacts of work requirements, which resulted in employees attempting to balance work and childcare arrangements, are not the kind of circumstance intended to be dealt with under the umbrella of "family status discrimination". On his view, the employer had the right to change Ms. Howard's shift and had no duty to accommodate her. The Court of Appeal echoed the Arbitrator's concern about the potential for disruption and uncertainty in a workplace if family status discrimination could be asserted every time an employer's selection of hours of work interfered with the family duties of a parent. However, it found in favour of the employee in the particular circumstances. It was essential to the ultimate decision of the Court of Appeal that the complainant's son had a major psychiatric disorder and that the complainant's attendance to his needs after school was "an extraordinarily important medical adjunct" to the son's care. The Court of Appeal found that a *prima facie* case of family status discrimination is made out when a change in a term or condition of employment results in a serious interference with a substantial parental duty of an employee.

59. Just as hours of work is a term of employment that can have discriminatory impacts because of circumstances occurring entirely outside the workplace, so too can the requirement to attend at a particular work location in some circumstances be legally recognized as discriminatory, notwithstanding the general principle recognized in the *Puddicombe* case and other authorities to the effect that it is usually the employee's responsibility to get themselves to work. When an employer changes the venue of an employee's work, there are certainly circumstances when that can amount to discrimination "in respect of employment", to use the phrase in the statute. The fact that all employees are expected to overcome the conventional commuting and childcare hardships of life in order to arrive at work is simply a contextual factor to be taken into account in determining whether particular work location requirements are discriminatory or whether an employer has accommodated to the point of undue hardship.

60. I now turn to a consideration of the second issue: whether the School Board's actions constitute discrimination, and if so, whether it has failed in its obligation to accommodate to the point of undue hardship.

61. Since the Supreme Court of Canada released its landmark decision in *Meiorin*, British Columbia (*Public Service employee Relations Comm.) v. B.C.G.E.U.,* [1999] 3 S.C.R.3, 35 C.H.R.R. D/257 (S.C.C.), courts and tribunals have been directed to apply a new test in dealing with discrimination and disability, particularly in the context of employment.

62. The *Meiorin* decision integrated the legal analysis for adverse effect and direct discrimination, and created a new three-part test for determining whether discriminatory conduct could be justified. Under the old system, there was a duty to accommodate in cases of adverse effect discrimination, and the test to be applied in cases of direct discrimination was whether the impugned qualification was a *bona fide* occupational requirement or qualification. The new test requires that an employment standard or policy be rationally connected to the performance of the job, and be held in good faith. In order to qualify as a *bona fide* occupational requirement (the third element of the test), the employer has to demonstrate that it was unable to accommodate the employee to the point of undue hardship.

63. Ideally, then, the duty to accommodate is now framed as whether the employer is able to demonstrate that an impugned standard or policy is a *bona fide* occupational requirement, and whether the employer accommodated the disability to the point of undue hardship.

64. However, not all employment discrimination cases involving disability involve formal standards or policies or even settled practices. Some of them - and this case is one - involve *ad hoc* decision-making which is responding to particular events or issues. We are not dealing in this case with a standing policy of “bumping” employees with lesser seniority to more remote geographic locations. There was not much evidence at the hearing concerning how the School Board and the Union arrived at the decision to have the “job picking” event. There was no evidence at all on how the geographic territory within which the TAs could be “bumped” was determined. Was it just coincidence that the furthest distance from Sydney to which Sydney TAs could be bumped was within the territory serviced by the public bus transportation system? We do not know. In any event, the job picking event has not been asserted by either the Complainant or the Commission to be unlawful or contrary to the *Act*. My understanding is that Union and Management, under difficult circumstances, were trying to find a reasonable method of honouring the security of employment of existing TAs while meeting the reasonable objective of ensuring that students most in need of TA services would receive them. At the time that the “job picking” process was agreed upon, those responsible for it had no reason to believe that the alternative locations involved anything more than conventional commuting inconveniences. In the manner typical of unionized workforces, the burden of those inconveniences was felt by those with the least seniority. In this case, that included Ms. Snow.

65. It was only beginning on March 1, 2002, that the employer and the Union were given information which put them on notice that Ms. Snow was an employee with a disability. From that time forward, she was asserting that a change in her work location would have a discriminatory impact on her. How does one properly proceed to analyze that situation?

66. In *Hutchinson v. Canada (Minister of the Environment)* [2003], F.C.J. No. 439 (F.C.A.) a Federal Court of Appeal was dealing with another case in which the alleged discrimination did not involve a threshold standard or policy. The Court said, at para. 74-75:

> 74. There is an obvious distinction between this case and Meiorin which is that the transaction between the appellant and the respondent was not driven by a pre-existing policy. Instead, we find a course of dealings in which the parties operate from an understanding of their respective rights and obligations. That understanding may have been rooted in rights guaranteed or obligations imposed by the collective agreement, the legislative scheme governing employment in the public service, human rights legislation, health and occupational safety legislation or departmental policies. It would be very difficult to extricate from this matrix a discrete coherent policy which one could subject to an orderly analysis as in Meiorin. This is not to say that the Meiorin analysis is not relevant to a course of conduct. But it does suggest that the analysis may have a different starting point.
>
> 75. In Meiorin, the Court's analysis began from a finding that the policy in question distinguished between people adversely on a prohibited ground. Where one is dealing with a course of conduct, the more appropriate question is, does the transaction between the parties, taken as a whole, result in adverse treatment on a prohibited ground? If the transaction taken as a whole does not disclose adverse treatment, then the inquiry is at an end. If adverse treatment on a prohibited ground is shown, one proceeds to the three questions which framed the Supreme Court's analysis.
>
> [emphasis added]

67. This passage is not suggesting that the "discrimination" analysis and the "accommodation" analysis are to be merged into a single step. I believe that the Federal Court of Appeal in *Hutchinson*, like the British Columbia Court of Appeal in the *Health Sciences Association* case, suggests the Board of Inquiry should first determine whether a *prima facie* case of discrimination is made out (the burden of which is on the Complainant), and then should determine whether the employer has discharged its duty to accommodate (the burden of which is on the employer).

68. The question which I am posing in order to determine whether the requirement of the School Board that Ms. Snow work at St. Joseph's (which I will call the "change in the terms of her employment") was *prima facie* discriminatory is the following one:

> Is the change in the terms of her employment one which very significantly interferes with the Complainant's ability to attend at the workplace, because of her disability, relative to the burden which others would face in the circumstance?

69. If Ms. Snow could have taken the public transportation system to and from work and arrived at the regular start time for TAs at that school, I would have found that the change in work location was <u>not</u> *prima facie* discriminatory. I say this recognizing that many non-disabled people would have the option of driving their vehicle to the workplace, and that taking public transportation for 50 minutes in either direction to or from work is an unattractive option for many people, particularly for a job which only provides a 5.5 hour workday at relatively low rates of pay. However, commuting to and from work is a life experience in which there is a wide variety of burdens, hardships and choices amongst the population at large. Some people are willing to make financial sacrifices to move closer to their workplace in order to avoid the inconvenience associated with lengthy commuting. Others are willing to commute for significantly longer periods of time in order to maintain the existing location of their residence. I am not prepared to accept that a public transportation ride of 50 minutes is normally out of the range of ordinary commuting issues faced by the public at large. I would not hold the School Board to any duty to accommodate except for one important thing: the bus to North Sydney is obviously not like a street car on Queen Street in Toronto, with one going by every couple of minutes. It has a single run to Sydney Mines each morning, such that the bus arrives at 8:55, after the normal start-time for TAs.

70. Consequently, the School Board would have to grant an exemption to its ordinary start time for TAs at St. Joseph's in order for public transportation to be considered a viable option for Ms. Snow. In my opinion, options like employer-sponsored car-pooling arrangements could also be considered, to show that a particular commute was not substantially more burdensome than those experienced by a significant proportion of the public. However, I do not consider that handing a list of names of other commuters to Ms. Snow and asking her to try to arrange a ride would be satisfactory.

71. This take us to the issue of reasonable accommodation. The principles relating to the duty to accommodate may be difficult to apply, but they are not difficult to state. I agree with the comment of the Federal Court of Appeal in *Hutchinson, supra*, para. 72, that the *Meiorin* case has not changed the substance of the core obligation of the employer to the employee.

72. In the *Renaud* case, *supra*, at para. 43-44 the Supreme Court of Canada noted the interactive nature of the duty to accommodate as follows:

> [43] The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley, supra*. At p. 555, McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

> [44] This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to flounder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley, supra*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

73. It follows from this that the Complainant does not have the right to refuse a reasonable accommodation even if there is an alternate reasonable accommodation, which would not cause undue hardship to the employer, which the employee would prefer: See *Hutchinson, supra*, at para. 77 and *Tweten v. R.T.L. Robinson Enterprises Limited (No. 2) (*2005), C.H.R.R. /D05-233 at para. 29.

74. The Complainant has the initial obligation to bring the facts relating to her disability to the attention of the employer so that the employer has the opportunity to offer accommodation. The employer has the responsibility to initiate the process of accommodation. The employee has the duty to work in good faith with the employer to attempt a workable accommodation, and the duty not to reject a proposed accommodation simply because it is not the one preferred by the employee.

75. While it might be convenient for Boards of Inquiries and lawyers if the steps described in the preceding paragraph could all be undertaken in discrete sequential stages by the participants, this is not the way that matters are dealt with in the real world workplace. The Supreme Court of Canada in the *Meiorin* case took a significant step towards emphasizing the

importance of the substance, rather than the form of legal analysis under Human Rights legislation. I believe it is equally true that there is not a pre-determined process by which accommodation must be offered – it is the substance of the offer that is important.

76. In substance, I find that the School Board was prepared to accommodate Ms. Snow by relaxing the normal hours of work for TAs at St. Joseph's in order to make Ms. Snow's hours conform conveniently to the bus schedule. I find this was communicated to Ms. Snow through the representatives that she had authorized to deal with the matter on her behalf, namely the Union officials in attendance at the March 27 meeting and again at the April 12 meeting. Those representatives, and Ms. Snow herself, were not interested in pursuing any solution involving public bus transportation. It was clear from Ms. Snow's own demeanour on the witness stand when asked about this, that she had no willingness to accept the public transportation alternative and to cooperate with the School Board to make it viable. She referred in her evidence to having some family responsibilities making it difficult for her to leave the house to catch an 8:00 o'clock bus, but no evidence was provided that this was more than conventional inconvenience associated with the difficult task of trying to balance family responsibilities with work commitments. She felt she could force the School Board to change her job location back to Sydney from Sydney Mines (and indeed she was ultimately successful in doing so). She was rightly annoyed at the School Board's legal position that the employer had an unfettered right to change her job location. She was rightly annoyed at the School Board's investigation into her disability. But she was legally wrong in not accepting or even seriously entertaining the offer to vary her hours of work to conform with the bus schedule.

77. I do not blame Ms. Snow for wanting to work near her home in all the circumstances, but she did not have a legal right to that outcome in my opinion. It follows that her complaint should be dismissed.

78. If I had not concluded that the employer had discharged its responsibility to offer reasonable accommodation, I would in any event have found that Ms. MacIsaac's attempt at resolving relations with Ms. Snow by reassigning her to a school in Sydney was sufficiently timely in all of the circumstances to warrant dismissal of the complaint. Ms. Snow had herself taken over 3 months to present information to her employer concerning her disability. The information was presented at a time when those involved in Labour-Management relationships were overwhelmed with a variety of problems to resolve. Meetings between the parties often

involved different participants, because of busy schedules, and this caused delay through no one's fault. It is true that the School Board made some very significant mistakes in their handling of the matter. But so too did the Union representatives and Ms. Snow herself. That is what happens in most workplaces when relations are strained. The Union asked the School Board representative at the April 12, 2002 meeting to re-open the decision that Mr. Sheppard had communicated on March 27. The employer did that and found a place for Ms. Snow in Sydney within less than two weeks. I am not prepared to say that it would have been discriminatory in these circumstances to take until April 23, 2002 to get her into a school in Sydney if the employer had been under an obligation to accommodate Ms. Snow by relocating her.

79. I need not consider remedy in light of my findings.

80. The School Board's mistaken position in regards never having to concern itself about the effects of a change in work location on employees with disabilities; its mistaken view that Ms. Snow was eligible for a driver's license if she wore glasses; and its mistake in investigating Ms. Snow's medical status without her clear consent likely caused Ms. Snow to be more assertive and uncooperative than was otherwise warranted. Maybe she would have focused on and accepted the offer of accommodation to her work hours if the offer had been the primary response of the School Board to her situation instead of a third line of defence. However, those mistakes are in the past. The School Board and Mr. Sheppard, personally, have already paid a high price for their mistakes, all of which I think were honest ones. Ms. Snow is fortunate to have been relocated to Sydney in April, 2002. I hope the parties will allow this decision to be the final chapter in their legal battles.

81. The Complaint is dismissed.

Dated at Halifax, Nova Scotia, this 2nd day of October, 2006.

_____
Peter M. Rogers

TO: S.A. Snow
M. J. Wood
T. W. Mozvik

PMR/dp