1999 File No. 99-0091

In the Matter of a Complaint

Under the Nova Scotia Human Rights Act

RSNS1989, c. 214, as amended

BETWEEN:

Cyril D. Kaiser

Complainant

AND

Dural, A Division of Multibond Inc.

Respondent

BEFORE:

Board of Inquiry

Richard L. Evans, Chair

RULING ON PELIMINARY APPLICATION

Cyril Kaiser was hired by Dural in June of 1998 to work as a salesman in the Maritime region. Dural is in the adhesive business. Dural is a division of Multibond Inc. a wholly owned subsidiary of CFS Group Inc. Mr. Kaiser was fired by Dural on May 13, 1999.

Cyril Kaiser filed a complaint under the *Nova Scotia Human Rights Act* (hereinafter the *Act*) on November 26, 1999. That complaint alleges that he was discriminated against by the respondent on the grounds of disability contrary to section 5(1)(d)(o) of the *Act.* The basis of Mr. Kaiser's complaint relates to his firing by Dural on May 13, 1999. Mr. Kaiser was hospitalized on an emergency basis on February 28, 1999 because of a heart condition. His complaint alleges that he was fired because of this health condition and that this firing amounted to discrimination in employment on the ground of disability. Mr. Kaiser received no prior notice from the company that he was going to be fired prior to his dismissal on May 13, 1999.

Pursuant to the *Act* and the relevant *Regulations,* by letter dated April 29, 2002, I was appointed by the Nova Scotia Human Rights Commission, on the nomination of the Chief Judge of the Provincial Court, to act as a Board of Inquiry in this matter.

The Civil Action:

Mr. Kaiser also brought a civil law suit against Dural. This civil action was commenced by Originating Notice and Statement of Claim in July of 1999, approximately four months before the human rights complaint was filed. In essence Mr. Kaiser's civil claim was an action for wrongful dismissal. A Defence was filed by Dural on October 5, 1999.

Documents were exchanged and Discoveries were held in the normal fashion. The wrongful dismissal matter then proceeded to trial in the Supreme Court of Nova Scotia.

The trial was held before the Honourable Justice Richard Coughlan. It was conducted over four days in May of 2001. Justice Coughlan's decision rendered on September 13, 2001, found for the plaintiff Cyril Kaiser. An Order dated October 29, 2001 provided that the defendant (Dural) was to pay the plaintiff (Kaiser) "$49,000 inclusive of prejudgment interest, costs and disbursements." In his written decision Justice Coughlan indicated that Kaiser was hired at a salary of $40,000 a year (paragraphs 8 & 9), that "Dural dismissed Mr. Kaiser without just cause" (paragraph 27) and that "Mr. Kaiser is entitled to a period of notice of nine months" (paragraph 49).

The defendant Dural appealed this decision and judgment to the Nova Scotia Court of Appeal by Notice of Appeal dated November 20, 2001. The Respondent Kaiser filed a Notice of Contention dated December 5, 2001. The Appeal was heard on May 21, 2002 and was dismissed. Oral reasons were given for the Court of Appeal by Justice Cromwell. The appeal decision is reported at 205 N.S.R. (2d) 194; the trial decision at 196 N.S.R. (2d) 377.

As Chair of the Board of Inquiry I held two conference calls with counsel (on July 10 and September 25, 2002). Up to five days were set aside for the hearing of the complaint in March of 2003. Counsel for the Commission, Kevin MacDonald and for Dural, Jean McKenna also agreed that a preliminary hearing should be held to deal with the

implications of the proceedings in the civil suit in the Supreme Court of Nova Scotia on the question of whether (and/or how) the human rights complaint should proceed.

December 5, 2002 was agreed upon for hearing this preliminary aspect of the matter and dates were agreed upon for the exchange of written argument. Written submissions together with agreed upon documents were received and a hearing was held on the morning of December 5, 2002.

The Issue on the Preliminary Application:

Ms. McKenna, on behalf of Dural submits that the matter should not proceed to a full hearing before the Board of Inquiry. She submits that the complaint should be dismissed at this pre-hearing stage. Ms. McKenna bases her argument on the application of one or more of the related concepts of *res judicata*, issue estoppel and abuse of process.

Mr. MacDonald, on behalf of the Commission, maintains that the complaint should proceed to a full hearing. Although he takes no issue with the law as stated by Ms. McKenna on the topics of *res judicata*, issue estoppel and abuse of process, he maintains that this law has no application to the complaint in this case. Mr. MacDonald submits that factually none of these concepts apply here.

It should be noted that since shortly after my appointment as the Board of Inquiry in this matter, Mr. Kaiser has had no independent legal counsel. Mr. Kaiser was represented by Robert L. Barnes Q.C. throughout the civil action. Mr. MacDonald has informed the Board that he has been in contact with Mr. Kaiser at each step to this point of the Inquiry.

There has been no indication that there is any diversion between the position of the Commission and Mr. Kaiser.

Mr. MacDonald also submits that **only** this tribunal has jurisdiction to deal with a claim of discrimination under the statutory provisions of the *Act.* As I understand this aspect of his submission, his assertion is that Justice Coughlan could not, as a matter of law, have made a finding that the actions of the defendant in dismissing Mr. Kaiser amounted to disability discrimination in employment in contravention of the *Act*. In Mr. MacDonald's submission, It follows from this that the judge could not have provided any remedy for a breach of the *Act.*

(a) The Law:

Some differences in detail may exist when dealing with the application of any one of the concepts of *res judicata,* issue estoppel or abuse of process. However, at the heart of all three concepts, there is a basic principle, namely: it is in the public interest to promote finality in legal proceedings. However, any one of these concepts of estoppel should only be applied when to do so advances the interests of justice.

Mr. Justice Binnie in the recent case of *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460 at paragraphs 18 and 19, states:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. …. An issue, once decided should not generally be re-litigated to the benefit of the loosing party and the harrassment of the winner.

> A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal.

The aptness of this statement is not diluted by the fact that in this proceeding it is the **winner** (Mr. Kaiser) who, after success at both the trial and appeal stage in the superior courts of this province, seeks now to also pursue his human rights complaint under the *Act.*

In the context of the concept of issue estoppel, Binnie J. goes on in the *Danyluk* case to articulate how the concept is to be applied. He states (at paragraph 33):

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. …. The first step is to determine whether the moving party … has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra* … If successful the court must still determine as a matter of discretion issue estoppel ought to be applied ….

In *Danyluk,* Binnie J. refers to the majority judgment of Dickson J. in the case of *Angle v. Minister of National Revenue,* [1975] 2 S.C.R.248 at paragraphs 24 and 25 as follows:

> … Dickson J. (later C.J.) speaking for the majority in *Angle, supra,* at p. 255, subscribed to the more stringent conditions of issue estoppel. 'It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or mixed fact and law (the "questions") that were necessarily (even if not explicitly determined) in the earlier proceedings.

The preconditions to the operation of issue estoppel, as they were set out by Dickson J. in *Angle, supra*, at p. 254, are:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to have created the estoppel is final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised …

(b) Application of the Law:

As noted above, counsel do not disagree on the applicable law. This application turns on the application of the law to the facts of this case. Accordingly, the application of these questions in this case begins with an examination of what was at issue and what was decided in the civil case.

I have been provided with copies of the pleadings and with the judgments at trial and on appeal. The Statement of Claim is quite brief. After reciting the parties, the Plaintiff, Mr. Kaiser, pleads in paragraph 3 of the Statement of Claim that:

> … the Defendant wrongfully and maliciously terminated the Plaintiff's employment contract without appropriate notice or appropriate severance in lieu of notice. The Plaintiff accepted employment with the defendant after being induced to leave secure employment with a competitor.

Paragraph 5 states:

> The Plaintiff says that his dismissal by the Defendant was without cause and constitutes a breach of his employment contract for which he is entitled to damages, including general and specific damages arising out of the Defendant's **malicious and unjustified method of termination.** The Plaintiff says that he was dismissed from his employment without warning **because he suffered a heart attack** and that his dismissal was, accordingly, unjust and **discriminatory.**
> (emphasis added)

Paragraph 7 sets out the relief sought. The Plaintiff, in addition to a claim for general damages, seeks:

> ….
>
> b. Punitive, aggravated and exemplary damages for the Defendant's malicious **discriminatory** and wrongful method and motivation in terminating the Plaintiff's employment; (emphasis added)

In its Defence filed in the civil action, Dural maintained that the Plaintiff, Kaiser, was dismissed for cause on the basis that he was not competent in the performance of his duties, and in the alternative that reasonable notice was given.

As I have indicated, the matter came to trial before Mr. Justice Coughlan. The trial lasted for four days. Although I have not read the transcripts from that trial, it is evident that the witnesses that were called, by both parties, testified at some length about the circumstances surrounding the hiring and the firing of Mr. Kaiser, and about his job performance or lack thereof. It is also clear that there were factual differences between the various witnesses called by both parties on each of these aspects and that Justice Coughlan was called upon to deal with these differences in his decision.

In his decision, for the most part, Justice Coughlan recites the facts without making any express findings in relation to the credibility of witnesses. It is only in relation to the circumstances of the meeting at which Mr. Kaiser was publicly fired in a restaurant that

Justice Coughlan finds it necessary to make an express finding of fact. He states (at paragraph 44):

> I accept Mr. Kaiser's version of what happened in the restaurant over that of Mr. Proulx and Mr. Sales.

As noted Dural's primary position in the civil suit was that the defendant had met the onus to establish just cause for firing Mr. Kaiser because he was incompetent. Justice Coughlan has, I believe, ruled directly on this aspect of the civil suit in his reasons. After noting the lack of resources at Dural devoted to human resources issues, and the significant problems associated with having no system (progressive or otherwise) for warning employees about their shortcomings, Justice Coughlan states:

> [22] Mr. Kaiser is not a salesperson. Howard McKay said so. Mr. Commander testified Mr. Kaiser did not have the ability to close a sale – he never asked for the order. Mr. Kaiser did not keep accurate records. In many instances, his mileage records were unbelievable. He was not a good salesperson; although Dural did not give him long to prove himself or offer any sales training.
>
> [23] Incompetence is clearly recognized as aground for dismissal. However, to justify dismissal for cause without appropriate warning, the incompetence must be gross in nature. (*Babcock v. Weickert (C. & R.) Enterprises Ltd.* (1993), 126 N.S.R. (2d) 170 (C.A.)).
>
> [24] I find that Mr. Kaiser was not so incompetent as to justify dismissal without appropriate warning.
>
> [25] When dismissing an employee notice of unsatisfactory performance of duties must be given. ….

After further enunciating what the employers obligations are in setting objectives and standards for employees and providing appropriate notice and warnings when the employer believes the employee is not measuring up, Justice Coughlan then finds as follows:

> [27] I find that Dural dismissed Mr. Kaiser without just cause.

At a later point in the judgment, after expressly referring to the fact that Mr. Kaiser had open heart surgery in April of 1999, Justice Coughlan states in Paragraph 36:

> … The decision to fire Mr. Kaiser was made at the time of the sales meeting in early February (of 1999).

Ms. McKenna argues that the judge's statements quoted above must be interpreted so as to reach the conclusion that Dural's decision to terminate Mr. Kaiser's employment was based on the company's assessment that he was not a competent salesperson. Her position is that the judge found that the company acted wrongfully in dismissing Mr. Kaiser without notice in the manner it did given the level of his (in)competence **and** that the judge also must be taken to have found that the firing was not connected to Mr. Kaiser's health condition or disability.

Though Justice Coughlan could have been more explicit in rejecting the Plaintiff's allegation of discrimination, I agree that at a minimum it must be held that he has made this finding implicitly, if not explicitly. Justice Coughlan has clearly found that Mr. Kaiser was not doing a good job as a salesperson. He has also found however that Mr. Kaiser's shortcomings did not justify letting him go without notice. Paragraph 36 in the judgment must be read to confirm that the decision to fire Mr. Kaiser was entirely related to his poor performance on the job because the decision was made early in February of 1999. This was prior to the onset of any heart condition and therefore before this condition was known by the company.

I also note that Mr. Kaiser was represented throughout the civil case by experienced counsel, Robert Barnes Q.C. The pleadings, as has been noted, clearly do specify that the cause of action and the relief sought are at least in part based on allegations of discrimination. The fact that the pleadings do not make specific mention of the *Nova Scotia Human Rights Act*, or any other legal source for the concept of discrimination, cannot detract from the conclusion that the Plaintiff was asserting that when he was let go by the Defendant Dural, this was discrimination in employment based on disability. In my opinion, this is the same claim that is being asserted in this human rights complaint.

In the end, Mr. Barnes obtained a positive result for his client. Notwithstanding the fact that the trial judge did not find that the defendant's firing of Mr. Kaiser was directly related to the onset of his heart condition, Justice Coughlan did find that he was wrongfully dismissed. Furthermore in assessing damages, the judge did take into account, amongst a number of factors, the fact that the firing was done in a public restaurant at a point when Mr. Kaiser was recovering from heart surgery. So while the disability or health condition was not found to be a factor in the firing, it was still taken into account in Mr. Kaiser's favour in determining that the amount of notice, and hence the amount of damages, he was entitled to. This was nine months (see paragraph 49) or $30,000 (75% of an annual salary of $40,000).

In response to the Notice of Appeal dated November 25, 2001, Mr. Barnes filed a Notice of Contention dated December 5, 2001. In that document the Respondent, Mr. Kaiser sought to have the trial judgment affirmed "on grounds other than but in addition to those given by the court appealed from" based on three contentions including two allegations

of ‘bad faith’ against the Appellant Dural. The Respondent did not seek to have the amount of the damage award increased on appeal. However the Respondent did seek to change the cost award in the original judgment to one based on solicitor client costs.

Ms. McKenna has indicated in her submissions that in his closing argument plaintiff’s counsel, Mr. Barnes, asserted that his client had been let go ‘because he was damaged goods’. Mr. Barnes submissions that Dural had fired Mr. Kaiser as damaged goods because of his heart condition, and the response to the appeal that the defendant had acted in bad faith, are in essence, as I have already indicated, allegations related to the same factual and legal question that is now before me in this human rights complaint. I am of the opinion that the choice made by plaintiff’s counsel in closing argument and on appeal do not take away from the fact that the questions or issues in the Supreme Court action included an allegation of discrimination.

The first criteria from *Angle*, that the same question has been decided in the prior proceeding is therefore met here. The civil suit determined the basis for ending Mr. Kaiser’s employment and found that he was wrongfully dismissed. The issue of whether he was fired because of his disability was before the Court and Judge Coughlan must be taken to have decided this issue. Mr. Kaiser was, according to that decision, not fired because of his disability. Given the principle of fostering finality in judicial decisions, it would not be in the interests of justice to have this Board of Inquiry hear the case again.

Of course, after four or five days of hearing the witnesses and the submissions, I might well come to a different conclusion as to why Mr. Kaiser was let go. Indeed I could find

that he was fired because of his health condition and that this amounted to disability discrimination under the *Act*. But as Justice Binnie so succinctly states, a litigant is entitled to only one bite at the cherry. Whether that litigant lost, or as in this case won, in the first instance, matters not. He has had his kick at the can and the principle at issue here properly denies him a second go round. It is not in the interests of justice that this Board of Inquiry spend several days hearing more or less the same evidence as that heard by Justice Coughlan. One reason behind the principle being applied here is to avoid two adjudicative bodies hearing the same evidence and then coming up with different and inconsistent findings of fact. The principle operates to prevent this from happening because it precludes the second adjudicative body from even embarking on a hearing, provided that the additional criteria are also met.

The second criteria for the application of the *res judicata* or *issue estoppel* principles referred to by Dickson J. in *Angle*, is "the judicial decision which is said to have created the estoppel is final." Both counsel in this matter have agreed that the finality aspect of this criteria are clearly present here. There was a full trial in relation to the wrongful dismissal civil suit. This was followed by an appeal to the Court of Appeal. That body, which clearly had jurisdiction to hear the appeal, dismissed the appeal (on the merits) and awarded costs to the Respondent Kaiser.

The third criteria from *Angle* is as follows:

> that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised …

Mr. MacDonald correctly points out that in this case this condition is not fully met. Two parties to the civil suit, the plaintiff Kaiser and the defendant Dural, are parties to this proceeding as well. However, as with all human rights complaints, the Nova Scotia Human Rights Commission is also a party to these proceedings. Does this factor alone mean that the estoppel principle at stake here can never apply? I do not think so. As Binnie J. says in *Danyluk* (*supra*), "the rules governing issue estoppel should not be mechanically applied."

What is the effect of having the Commission represented as a separate party in a human rights hearing? At the Board of Inquiry stage the role of counsel for the Commission is to place relevant information before the Board, primarily by calling evidence. In reality, in many cases including this proceeding an individual complainant is not represented by counsel and relies on Commission counsel to put forward their case. Despite appearances or perceptions (especially of those who are respondents to human rights proceedings) this does not mean that the Commission or it's counsel represents one side or the other. Rather the Commission must act fairly as between the parties.

It is also the case that in some matters the Commission may wish to pursue certain remedies that differ from, or extend beyond those sought by the individual complainant. The Nova Scotia *Act*, unlike some other Canadian human rights legislation is quite open-ended about the remedial powers available to a tribunal. Section 34(8) of the *Act* states:

> A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

This provision, the past practises of Boards of Inquiry appointed under the *Act* and the experience of human rights tribunals elsewhere in Canada (albeit that their statutes may be differently worded) make clear that this Board does have remedial powers that are available to it that are not available to a Supreme Court judge hearing a civil suit for wrongful dismissal. Companies that have been found to be in violation of the statute can be ordered for example to take remedial action to redress systemic problems or to rehire an employee that has been dismissed.

However in this case Dural is no longer engaged in business in this jurisdiction. Furthermore, Mr. Kaiser, at least in part because of his ongoing health condition, does not seek to be re-employed. In his argument, in response to a question from the Board, Mr. MacDonald indicated that if the matter proceeded to a full hearing the Commission would likely seek as a remedy only additional monetary damages (akin to non-pecuniary general damages) and an apology.

Given what I have already indicated about the nature of and reasons for the damage award arrived at by Mr. Justice Coughlan, I fail to see how it would be fair or appropriate for this Board to essentially rehear the matter in order to possibly augment the damage figure already arrived at by Justice Coughlan. I reiterate that Mr. MacDonald had indicated in his argument before me that it was quite likely that this Board would have to hear, many, if not all the same witnesses that had been called at the civil trial. After the appeal was dismissed, the damage award was apparently paid by Dural to Mr. Kaiser.

Opening the whole matter up and rehearing the evidence (again to paraphrase Justice Binnie) would be granting the complainant with another bite of the cherry.

As for the significance to be associated with the possibility of an apology being forced upon the respondent company (assuming one was warranted) it would not, in my opinion, advance the interests of justice to hold a hearing that could last for up to a week for the primary purpose of determining if the company should be obliged to issue such an apology. And, in any event, as I have noted, I have found that Justice Coughlan did make a finding that companies behaviour, while actionable, did not amount to discriminatory conduct.

I do not mean to discount the potential value of an apology in the range of remedies that may pertain to resolving disputes. Whether by negotiated agreement or by formal order at the end of a hearing where there is jurisdiction to order an apology, the literature on dispute resolution makes clear that an apology can be of great value. Nevertheless in this case, as I have noted, it would not serve the interests of justice to hold a hearing just for the purposes of determining if this remedy should be granted.

I recognize that it is possible that there could be a case where the addition of the Commission as a party to the human rights proceeding could form the basis for allowing that matter to proceed following the completion of a civil wrongful dismissal action. Where a spectrum of remedies not available in a civil court action is sought in the human rights tribunal setting, this might lead a tribunal to exercise its discretion to not apply the estoppel principle. However, this is not such a case.

(c) Does the Board of Inquiry have exclusive jurisdiction with respect to the discrimination claim?

This brings me to the argument put forward by Mr. MacDonald that **only** this tribunal has jurisdiction to deal with a claim of discrimination under the statutory provisions of the *Act.*

Counsel had available to them at the hearing of this application before me a full record of the prior judicial proceedings, including the trial transcripts and the Factums filed on the appeal. Though I have not read these documents, I understand that it was never argued on behalf of Mr. Kaiser on the appeal that the trial judge had erred in any respect in relation to his findings, or lack of findings, in relation to the allegations of discriminatory conduct made in the Statement of Claim. It also seems that at no time during the trial or the appeal did Mr. Kaiser, through counsel, assert that the trial judge had no (or limited) jurisdiction in relation to issues or allegations of discriminatory conduct on the part of the defendant. Both of these conclusions on my part are based on the responses I received from counsel to questions posed to them during the course of the oral hearing before me.

Litigation ought to be recognized as being result orientated. Mr. Kaiser, through his counsel got a positive result at trial. He had a number of options as to how he wanted to plead and argue his case. Indeed, he may also have had an option as to which of the two legal proceedings would go forward to a hearing first. There does not seem to have been

any suggestion or effort by Mr. Barnes to delay the civil trial in order to have the potential human rights hearing take precedence. Nor does Mr. Barnes appear to have asserted at any stage of the civil action that some aspect of his client's claim was to be preserved for the (exclusive) jurisdiction of a Board of Inquiry that might be appointed under the *Act.*

The case of *Ayangama v. Prince Edward Island,* 1998 Carswell PEI 95 is cited by Mr. MacDonald in support of the proposition that this Board has exclusive jurisdiction over the allegation of discrimination. So too is the well known Supreme Court of Canada case of *Bhadauria v. Seneca College of Applied Arts and Technology* [1981] 2 S.C.R. 181. Both of these cases involved suits by individuals who were unhappy with the fact that they had not been **hired** for a position. In addition, both Ms. Bhadauria and Mr. Ayangama had been informed by their respective provincial human rights bodies that their cases would not be processed through to the stage of a referral for a tribunal hearing. Unsatisfied with this result, both individuals then commenced civil actions in their provincial superior court. The respective defendants then moved, successfully, to strike those provisions in the statement of claim that purported to found a cause of action on the tort of discrimination.

In the Ontario Court of Appeal in *Bhadauria v. Seneca College of Applied Arts and Technology*, Justice Wilson (as she then was) had held that a new tort of discrimination should be recognized. However, in the Supreme Court of Canada, Chief Justice Laskin held that, in a situation where no prior common law right of action existed, the (then

relatively new) statutory human rights scheme should be seen as having created exclusive jurisdiction to that statutory scheme.

In the more than twenty years that have passed since Ms. Bhadauria attempted to invoke the jurisdiction of the courts when it was clear that she would have no access to the provincial human rights regime, much has changed in the human rights field. It is quite possible that the approach and analysis of C.J. Laskin could be revisited in light of the lessons from the accumulated experience of federal and provincial human rights regimes in the intervening years.

However, for purposes of this matter, it is not necessary to explore this question in any detail. This is because *Bhadauria (supra)* and for that matter *Ayangama (supra)* do not state that there is always to be exclusive jurisdiction to the statutory human rights regimes for all cases or allegations of discrimination. Exclusive jurisdiction arises only in those cases where it is clear that there is no other statutory or common law action available to the plaintiff/complainant. In this situation, the complainant must resort to the regime provided for in the human rights statute. In both *Bhadauria* and *Ayangama* the plaintiff was asserting that the defendant had discriminated in not hiring them. There is no common law tort that relates to a decision not to hire someone. And as there has been no hiring, there can be no action based on a breach of contract.

However, in this case, Mr. Kaiser had been hired and he had a contract of employment, no matter how imprecise the terms of that contract might have been. When he was terminated, he had available to him a common law action in the courts, an action for

wrongful dismissal. It matters not whether this action is conceptualized as a breach of contract action or as a tort. In either case, there was a pre-existing common law action available to Mr. Kaiser. Accordingly, there was no possibility that the defendant might move, as it had in *Bhadauria* and *Ayangama,* to strike some or all of the plaintiff's statement of claim as disclosing no cause of action.

In this matter the Plaintiff proceeded with his civil action. He was successful therein. In my opinion in a case like this, it comes down to a matter of choice. The plaintiff can commence a civil action and file a complaint of discrimination. However, once he has carried one of these matters through to a full hearing and a decision, and pursued any right of appeal or review, he may not in many instances have the option of starting up the proceeding that has been left latent.

The question is dealt with in *Employment Law of Canada* (Second Edition, 1993, Butterworths) by Christie, England and Cotter. Chapter 8 deals with 'Limitations on Employer's Criteria of Selection'. Subsection D thereof discusses the implications of Human Rights Legislation on the formulation of the employment contract. Chapter 8D4c, at pages 126 to 128, deals specifically with 'The Relationships between the Human Rights Regimes Legislation and Other Enforcement Mechanisms'. The authors state:

> **The human rights legislation potentially can arise** in grievance arbitration proceedings under a collective agreement or **in a suit for wrongful dismissal at common law.** For example, the provisions of a human rights statute can be used in interpreting the terms of a collective agreement, and an arbitrator might be requested to enforce such provisions directly provided that the parties have incorporated them into their collective agreement. **A wrongful dismissal suit might combine a claim that the employee was wrongfully dismissed in violation of a human rights statute as well as being dismissed without cause**. (emphasis added, footnotes omitted)

The authors then go on to state that resort to a complaint under the relevant human rights statute should not be precluded when the employee also resorts to a grievance procedure or a civil action for wrongful dismissal:

> because the scarcity of reliable advice and opinion about the overlapping jurisdictions would make it unfair to apply a **strict** election requirement. As well, if the remedies available in arbitration or civil suit are not as favourable as those available under the statutory machinery - for example, in common law wrongful dismissal suits, reinstatement is not available and damages are not measured on a "make whole" basis - an election requirement would appear to be unfair.
> (emphasis added, footnotes omitted)

It is noteworthy that the reasons proffered as to why two proceedings might be permitted, are not present in this case. Mr. Kaiser did have competent advice from the outset of his civil suit and, as has been noted, he and the Commission seek substantially the same remedy in this proceeding as that achieved in the civil suit.

The third (looseleaf) edition of Employment Law in Canada (1998, as updated, Butterworths Canada Ltd. 1998), primarily authored by England and Wood, deals with this topic in Chapter 5D in Volume 1. The following rather lengthy excerpt from section §5.148 of the text makes the point that the jurisdiction question ought to be approached with considerable flexibility.

> In all jurisdictions, a Human Rights Commission is established to administer the legislation. In addition to their enforcement role, such Commissions perform functions that are educative, advisory, quasi-legislative and adjudicative. In all jurisdictions, complaints of unlawful discrimination must normally be filed exclusively with the Commission. In 1981 the Supreme Court of Canada authoritatively held that there is no general common law tort of discrimination that can be processed in the courts by means of a civil action. The Court was concerned with maintaining the integrity of the statutory procedures, reasoning that judges should defer to the expertise of the specialized adjudicative agencies in this complex and highly sensitive area. Accordingly, courts have declined jurisdiction in civil suits based on breach of human rights statutes, …. and on a

> residual common law tort of discrimination. **Nevertheless, since 1981 many courts have found innovative ways of circumventing this ruling so as to permit claims of discrimination to be litigated in the courts.** The impetus behind these developments is that the statutory machinery for enforcing discrimination claims has become so inefficient in terms of delay and/or the range of remedies available – even when compared to civil litigation – that the courts in question have deemed it justifiable to provide claimants with a more expeditious route to achieving justice. **Thus, the courts have allowed the a civil action for discrimination to proceed if the action is based in part on the proscribed statutory ground and in part on other conduct that is allegedly tortious independently of the statute** such as intentional infliction of nervous shock. **So too, if the action is based in part on an independent breach of the employment contract such as** constructive dismissal or **wrongful dismissal**. Some courts have been even more innovative than this in making inroads into the deference principle. … Unless the efficacy of the statutory enforcement machinery is improved, one can expect further judicial inroads into the *Bhadauria* principle.
> (emphasis added, footnotes omitted)

In this matter the issue of a possible lack of jurisdiction was not raised in the action before Justice Coughlan. It is clear from this passage that there is a reasoned basis for holding that, under the circumstances of this case, there is no basis for holding that only this Board of Inquiry can have jurisdiction over the claim of discrimination.

Furthermore, whatever the merits of the principle enunciated in *Bhadauria (supra),* it cannot be taken to preclude the consideration of human rights values and principles in what is otherwise a valid cause of action recognized by the common law or by other statutory regimes. As has been pointed out by counsel in this case, there is now a large body of case law that establishes the primacy of human rights (and *Charter*) values in the firmament of the Canadian legal system. *Insurance Corp. of British Columbia v. Heerspink* [1982] 2 S.C.R. 145, and many subsequent decisions at all levels of the courts, have made this point over and over again.

In my opinion the objective of fostering and giving primacy to human rights values would not be best achieved by following the submissions put to me by Mr. MacDonald. As noted he has argued that only a Board of Inquiry appointed under the *Act* has jurisdiction to deal with the allegation of discrimination. While it may be true that only a Board may award certain remedies that flow from the open-ended remedial provisions in section 34(8) of the *Act*, it does not in my opinion serve the interests of justice to hold that a superior court that otherwise has jurisdiction over an action for wrongful dismissal cannot concern itself with inquiring as to whether the defendant acted in a discriminatory manner. The Court, having regard to the definition (if any) and grounds of discrimination, set out in provincial human rights legislation can, in my opinion, as a matter of law, inquire into this aspect of the case before it. The Court can also provide significant redress in the event that the defendant is found to have discriminated against the employee who has been discriminated against. Whether and how any litigant in what is otherwise a valid civil action chooses to do this is within the discretion of counsel in the particular case. Similarly, the trial judge may in his or her discretion decide on what emphasis to give this aspect of the civil case before the court.

In many jurisdictions human rights legislation places a ceiling on the amount of monetary damages that can be awarded by a tribunal hearing a human rights case. Though this is not the case in Nova Scotia, it still may be the case that a litigant chooses to proceed with a wrongful dismissal action in the courts because of an expectation of obtaining a larger damage award in that forum. In this case Mr. Kaiser did get a $49,000 damage award as a result of his civil suit. He did not get a finding that his wrongful dismissal involved an element of disability discrimination against him. Had the human rights complaint

proceeded to a hearing first, the results could have been different: on both counts. There might have been a different conclusion in relation to whether he had been discriminated against. There might also have been a different amount awarded as monetary damages. That amount could have been lower, or higher (or the same).

To reiterate, it does not serve the interests of justice to allow this particular case to proceed in both forums. However, it does serve to promote the interests justice to expand the contexts in which violations of basic human rights can be considered. Raising the barriers initially established in *Bhadauria* so that the scope of exclusive jurisdiction of statutory human rights is expanded, rather than contracted, is not the way to go. It is better that the contexts in which consideration can be given to exploring if discrimination has taken place be expanded. Mandating that proceedings must be bifurcated, so that a civil court may hear only some aspects of a wrongful dismissal case while a Board of Inquiry has exclusive jurisdiction to deal with any and all allegations of discrimination, can only add unnecessary complications to legal proceedings. This result would not foster the very values that the Commission and its counsel seek to promote in this and other human rights proceedings.

Under the *Act,* the Commission has a wide mandate to promote human rights by many means beyond inquiring into individual complaints. In the context of its jurisdiction over complaints, the Commission acts as a screening devise to determine if individual cases should be referred to a Board of Inquiry. In the sphere of law reform, there are arguments both for and against the wisdom of retaining this role for Commissions in human rights complaints. That said, it does not in my opinion serve the otherwise paramount position

of human rights values to preclude the possibility of taking into account possible violations of the values of non-discrimination (set out in legislation or found elsewhere) from consideration in what is otherwise a perfectly legitimate civil action.

Many important Supreme Court of Canada decisions in the human and equality rights field make this point, at least inferentially. For example in *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970 Justice Sopinka makes it clear that it would be illegal to enter into a contract or collective agreement that violated the provisions of human rights legislation. Unions and companies cannot in their collective agreements contract out of their obligations not to discriminate. The human rights requirements take precedence. They are to be taken into account, for example, by an arbitrator charged with interpreting a collective agreement.

Similarly, in the seminal case of *British Columbia (Public Service Employment Commission) v British Columbia Government and Service Employees' Union* [1999] 3 S.C.R. 3, which seeks to clarify the requirements of the duty to accommodate as an aspect of interpreting if discrimination has taken place, it seems very clear that these concepts are to be applied no matter what the context in which the issue arises. Analysis of what discrimination is, and of whether it has occurred, are in no sense to be confined to statutory tribunals established under human rights legislation. For very good reason, the tentacles of the legal analysis of discrimination have now extended beyond the specialized confines of human rights forums. The concerns that pre-occupied Chief Justice Laskin in *Bhadauria (supra)* ought to be recognized as being a product of a different era.

Accordingly, I reject the argument of Commission counsel that the question of discrimination was not and could not be, as a matter of law, before Justice Coughlan in the civil suit. This Board of Inquiry does not have exclusive jurisdiction to inquire into whether discrimination, in contravention of the *Act* or otherwise, has taken place.

Conclusion

For these reasons, the application brought by counsel for Dural is granted. By Order of this Board of Inquiry, the Commission and Mr. Kaiser, are estopped from proceeding to a full hearing of the human rights complaint that has been referred to me for adjudication.

Decision delivered at Halifax, Nova Scotia, Canada, this 15th day of January, 2003.

Richard L. Evans,
Chair, Board of Inquiry