

**IN THE MATTER OF: THE NOVA SCOTIA *HUMAN RIGHTS ACT* (the "*Act*")**

**IN THE MATTER OF: Board File No. 51000-30-S11-1908**

**BETWEEN:**

**John Hynes, Douglas Foster, Judy Wadden and Mary Coffin**

**Complainants**

**Cape Breton Regional Municipality and/or Canadian Union of  
Public Employees, Local 759 and 933**

**Respondents**

**The Nova Scotia Human Rights Commission**

**PRELIMINARY DECISION ON ROLE OF COMMISSION**

**Chair: Dennis James**

**Hearing Date: By Written Submission**

**Counsel: Blair Mitchell, counsel for Douglas Foster, Complainant  
Susan Coen, counsel for CUPE, Respondent  
Eric Durnford, counsel for CBRM, Respondent  
Lisa Teryl, counsel for Nova Scotia Human Rights Commission  
Mary Coffin, Complainant  
John Hynes, Complainant  
Judy Wadden, Complainant**

The Board was appointed to hear complaints of Mary Coffin, Douglas Foster, John Hynes and Judy Wadden alleging discrimination by the Cape Breton Regional Municipality (CBRM) and the Canadian Union of Public Employees on the basis of discrimination due to their ages ("the Complaint"). The Complaint is scheduled to be heard on January 28 to 31, 2014 in Sydney, NS.

2. CBRM and CUPE have both indicated they are filing preliminary motions seeking to have the Complaint dismissed as it amounts to an abuse of process. They say the subject matter of the Complaint has already been decided on by a Board of Inquiry in *Talbot v CBRM2009 NSHRC1* (CanLII). The dates December 5 and 6, 2013 have been set to hear the parties on the preliminary motion on abuse of process.

In this current Motion, CBRM is seeking to limit the role of the Human Rights Commission ("Commission") in dealing with the preliminary motion to dismiss the Complaint on the basis of abuse of process. It was agreed that this current Motion would be advanced by written material only and that no hearing was required. CBRM filed its written material on September 4, 2013 with a further reply brief filed on September 27, 2013.

Originally, CUPE had indicated it was not going to take a role in the Motion but it did file a submission in support of CBRM's position on September 18, 2013. The Commission filed its brief in reply on September 18, 2013. The Complainants Coffin, Foster, Hynes and Wadden did not respond to this Motion.

#### CBRM's Position

In its brief of September 4, 2013, CBRM says:

When it comes to making a referral decision to a Board of Inquiry, the Commission is not wearing the hat of investigator or quasi-prosecutor. To argue that the Commission, at a later time, may wear a public interest or, in the appropriate case a quasi-prosecutorial hat at the hearing on the merits is not relevant and confuses the issue. At the referral stage, the Commission, acting in the public interest, must make a decision regarding whether a complaint should be referred to a Board of Inquiry. In fulfilling this role, the Commission must be and be seen to be) impartial and neutral to all parties involved.

Where, as in the present case, a Board of Inquiry is called up to scrutinize the Commission's referral decision, then the Board will

be looking at the decision-making process of the Commission when acting in its impartial, administrative role. The Commission must be (and appear to be) neutral toward both complainant(s) and respondent(s). To that end, the Commission should not take an active role in defending its referral decision.

CBRM relies predominantly on the Supreme Court of Canada decision in *Northwestern Utilities Ltd. and al. v. Edmonton* [1979] 1 SCR 684. In that case the Public Utilities Board was entitled by its incorporating statute to participate on appeals from its decisions. Justice Estey on behalf of the Court wrote that "in absence of a clear expression of intention on the part of the Legislature, this right is a limited one." (See para. 49).

Further at paragraph 50, Justice Estey wrote:

[50] Under s. 63 (2) a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board and the Board itself. The Board has a limited status before the Court and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions .....

After expressing strong concerns about the need to preserve the impartiality of an administrative tribunal, Justice Estey wrote at paragraph 52:

[52] It has been a policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to making of representations relating to jurisdiction.

At paragraph 55:

[55] In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

CBRM also refers to *Dairy Producers Co-operative Ltd. v Saskatchewan (Human Rights Commission)* (1993), 109 DLR (4<sup>th</sup>) 726 and *Brewer v. Fraser Milner Casgrain LLP* 2008

ABCA 160 to support its argument that even though the Commission has a legislated role to appear as a party before a board of inquiry, that is not inconsistent with the principles of *Northwestern Utilities, supra*.

CBRM says that its preliminary motion contending abuse of process is about the Commission's own referral decision and as such the Commission's role should be limited to "an explanatory role with reference to the record" and that it "should not be permitted to assume the role of advocate in defence of its own decision". Further, "the Commission's decision should stand on its own without further elaboration or support".

#### CUPE's Position

12. CUPE also requests that the Commission "be limited in its role before the B01 to explaining the record and making submissions as to jurisdiction".
- 13 In its brief, CUPE broadens the analysis advanced by CBRM and provides submission on the effect of the Supreme Court of Canada's decision in *CAIMA W Local 14 v. Paccar of Canada Ltd*, [1989] 2 SCR 983. The treatment of *Northwestern Utilities, supra* and *Paccar, supra* is addressed in a detailed analysis by Justice Goudge writing for the Court in *Children's Lawyer for Ontario v. David Goodis* 2005 CanLII 11786 (On CA).
- 14 Justice Goudge writes at Paragraph 35:

[35] Nor do I think cases like *Northwestern* and *Paccar, supra*, dictate the use of precise rules of this sort. Particularly in light of the recent evolution of administrative law away from formalism and towards the more flexible practical approach exemplified by *Pushpanatehn v. Canada (Minister of Citizenship and Immigration)* 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982. I think that these cases are best viewed as sources of the fundamental considerations that should inform the court's discretion in the context of a particular case. Resolving the scope of standing on this basis rather than by means of a set of fixed rules is likely to produce the most effective interplay between the array of different administrative decision makers and the courts.

Justice Goudge goes on to focus on *Paccar, supra* and *Northwestern Utilities, supra* as providing the most important considerations in assessing the role of an administrative tribunal before the court or, in this case, before the Board. He said that *Northwestern Utilities, supra* stood for the importance of impartiality while *Paccar, supra*, articulates the importance "of having a fully informed adjudication of the issues".

- 16 CUPE argues that given the broad discretion of the Commission in a referral decision, the need for impartiality is pronounced. As to the breadth of the Commission's discretion, CUPE relies on the *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* 2012 SCC 10.
- 17 CUPE submits that even when one balances the factors in this case, the limited role of the Commission it advocates, as set out above, is appropriate. COPE notes that if there is any concern about whether the Commission's limited role could negatively affect the Board from being fully informed, s. 34 (2) of the *Human Rights Act* empowers the Board to seek independent legal advice.

### **Commission's Position**

18. The Commission argues that the Board has no jurisdiction to consider CBRM's request as it amounts to a review of the Commission's processes. Rather, it says that the Board establishes jurisdiction *de novo*.
- 19 The Commission argues that in dealing with the preliminary motions, the Board is determining its own jurisdiction and that it is not assessing the correctness of the Commission's referral decision. In that role, as opposed to a review inquiry, the Commission is a full party and not confined to the limited role of decision-maker on judicial review.
- 20 In its submission, the Commission says there is no provision relating to the role of counsel in a Board of Inquiry within the *Act*. The Commission said it is assumed that all parties would have authority to advise the Board about procedures and applicable law, conducting pre-hearing conferences, cross-examining witnesses, leading evidence, making submissions on facts and law and mixed fact and law and acting for the agency in court proceedings, among other duties.
- 21 The Commission argues that it is a party to the complaint and as such "can put forward its theory of the case at the Board of Inquiry and participate in preliminary motions."

### **CBRM's Reply**

22. In response to the Commission's argument, CBRM replied as follows on page 2 of its brief:

CBRM is not asking the Board of Inquiry to engage in a form of "judicial review" of the Commission's referral decision or to decide whether the referral decision was reasonable...

At the preliminary hearing, CBRM will be asking you to do what the Commission should have done at the referral stage: dispose of the complaints without proceeding further, [emphasis added]

23. CBRM relies on the decision of the Court of Appeal in *Kaiser v. Durai*, 2003 NSCA 122 in support its submission on the authority of the Board to deal with preliminary matters.

#### Analysis

24. It is important when addressing the Motion advanced by CBRM, supported by CUPE, that there be a clear understanding of the role of the Board. In considering the parties submissions, there appears to be consensus that the Board is not sitting in a judicial review capacity. Rather, the Board is, as the Commission contends, acting in its own jurisdiction.
25. The Board accepts CBRM's statement it is not asking for such a judicial review exercise. The Board understands the legal issue is whether or not the doctrine of *res judicata*, issue estoppel or abuse of process applies to the Complaint so as to dismiss the Complaint at a preliminary stage. This requires an analysis of the Complaint in light of the previous decision in *Talbot, supra*. It does not require an analysis of the Commission's position on *res judicata*, issue estoppel or abuse of process for referral purposes.
26. CBRM is correct that the Board has the authority to consider whether the Complaint is *res judicata* as a result of the decision in *Talbot, supra*, and whether to continue the Complaint in light of *Talbot, supra*, would amount to an abuse of process. As the Court of Appeal in *Kaiser v. Dural, supra*, said at paragraph 31:

[31] ...There is nothing in the Act or in any cases referred to this court suggesting the proposition that the board is required to proceed with a full hearing once it has been appointed to adjudicate a complaint. In my opinion once appointed, the board is independent of the Commission and it is appropriate for it to consider everything relevant to lawfully adjudicating the rights and interests of the parties before it. This is particularly so when the board is required to exercise its discretion in the interests of achieving justice between the parties in the context of an application regarding issues such as issue estoppel, *res judicata* and abuse of process. It may be that only upon the appointment of the independent board will the parties be afforded an opportunity to raise and fully argue such critical, preliminary matters.

27. It is important to look at the role of the Commission in making referrals. This was addressed in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, *supra*. At paragraph 21, Justice Cromwell writes on behalf of the Court:

[21] Where a complaint is not settled or otherwise determined, the Commission may appoint a board of inquiry to inquire into it (s. 32A(1)). The Commission has a broad discretion as to whether or not to take this step. The Commission may do so if it "is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted" (*Boards of Inquiry Regulations*, N.S. Reg. 221/91, s. 1). There is no legislative requirement that the Commission determine that the matter is within its jurisdiction or that it passes some merit threshold before appointing a board of inquiry; the Commission must simply be "satisfied" having regard to all the circumstances of the complaint that an inquiry is warranted.

28 It is clear in Justice Cromwell's analysis that at the referral stage the Commission is not making a decision on the merits of case; rather, it is deciding whether a complaint should advance for deliberation. This is material to the analysis on the Motion brought by CBRM. At paragraph 23, Cromwell J. states:

[23] What is important here is the decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the board of inquiry. In deciding to refer a complaint to the board of inquiry, the Commission's function is one of screening and administration, not of adjudication.

29 In the referral assessment the Commission has not made a decision that it now must defend before the Board. Rather, it has determined there is some basis for this complaint to advance to a board of inquiry. It does so aware that the jurisdiction of this Board includes the right to dismiss the matter upon a preliminary motion such as CBRM and CUPE intend. In this context the concerns of CBRM as to the role of the Commission do not appear to be founded.

30 In *Northwest Utilities, supra*, the Public Utility Board ("PUB") had rendered a decision which was the subject of the appeal. I note the following comments by Justice Estey at Page 710:

Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. (*Vide Central Broadcasting Company Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local Union N 529*).

In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions....

- 31 In reference to the second point, being the concern of allowing a tribunal to defend itself, I again note the representation of CBRM in its reply brief that it is not suggesting a review of the Commission's decision to refer.
32. The circumstances were different in *Dairy Producers Co-operative Ltd., supra*, and in *Brewer, supra*. In *Dairy Producers Co-operative Ltd., supra*, the challenge was in the form of a judicial review on the basis that the Commission breached its common law duty of procedural fairness. That is not the argument on the intended preliminary motion according to CBRM, which is grounded on a previous decision by a Board of Inquiry.
33. In *Brewer, supra*, the Chief Commissioner of the Alberta Human Rights and Citizenship Commission attempted to appeal a decision of a justice of the Queen's Bench quashing the Chief Commissioner's decision dismissing Ms. Brewer's complaint. The Court in that case dealt with the right of a statutory tribunal to appeal a superior court's decision when the decision did not raise the issue of the tribunal's jurisdiction.
- 34 As to the first point advanced by Justice Estey, which is legislative framework, I note the decision of the Nova Scotia Court of Appeal in *Workers' Compensation Board of Nova Scotia v. Workers' Compensation Appeals Tribunal of Nova Scotia et al* 1999 CanLII 1209. The issue before the Court of Appeal was stated as follows:



This is an appeal from a decision of the Nova Scotia Workers' Compensation Appeals Tribunal (hereafter "Tribunal"). The decision under appeal is Tribunal *Preliminary Appeal Decision No. 98-146-PAD*. The Tribunal determined that the Nova Scotia Workers' Compensation Board (hereafter the "Board") could not be a full participant before the Tribunal, and that the Board was not a participant on par with the employer or worker.

- 35 In allowing the appeal of the Appeals Tribunal's decision, the Court was asked to consider the decision in *Northwestern Utilities, supra*, which it did and distinguished the case on the basis of the legislative provisions being very different. Justice Hallett, on behalf of the Court, said:

There is a clear legislative intent expressed in the *Workers' Compensation Act* that the Board is a participant in an appeal to the Workers' Compensation Appeal Tribunal (s. 245(1)) and that as a participant, the Board, like other participants, can adduce additional evidence and make submissions (s. 246(1)(b) and (d)).

- 36 When considering the legislative provisions of the *Human Rights Act* (the "Act"), it is clear that the Commission is a party to the proceeding. Section 33 provides as follows:

Parties to proceeding

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

(a) the Commission;

(b) the person named in the complaint as the complainant;

(c) any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act;

(d) any person named in the complaint and alleged to have contravened this Act; and

(e) any other person specified by the board upon such notice as

the board may determine and after the person has been given an opportunity to be heard against joinder as a party R S 214, s 33.

37. I note as well, Section 34 (3) which provides as follows:

34(3) A board of inquiry shall give full opportunity to all parties to present evidence and make representations.

38. The legislative regime in this case makes it different from the circumstance in *Northwest Utilities, supra*. The *Act* specifically identifies the Commission as a party to a proceeding before a board of inquiry. As noted above, in *Northwestern Utilities, supra*, Justice Estey remarked on the significance of the PUB not being identified as a party to the appeal. At Page 708, Justice Estey remarked:

Section 65 no doubt confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party. That this is so is made evident by s. 63(2) of the *The Public Utilities Board Act* which reads as follows:

The party appealing shall, within ten days after the appeal has been set down, give to the parties affected by the appeal or the respective solicitors by whom the parties were represented before the Board, and to the secretary of the Board, notice in writing that the case has been set down to be heard in appeal, and the appeal shall be heard by the court of appeal as speedily as practicable.

Under s. 63(2) a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.

39 The *Act* directs otherwise with regard to the Commission. The legislature determined that the Commission is a party and that it has full opportunity to present evidence and make representations.

40 In *Workers' Compensation Board, supra*, Justice Hallett described the Board as follows:

The Board has a broad function under the Act. It receives claims, it investigates claims and it allows or disallows claims. It is not a pure disinterested independent adjudicative body. On the other hand, the Tribunal established under the Act to hear appeals, is an independent adjudicator.

41 When one considers the language in Justice Hallett's description of the Board, it is not dissimilar to the description of the Commission by Justice Cromwell in *Halifax (Regional Municipality), supra*:

[20] The Act sets up a complete regime for the resolution of human rights complaints. Within this regime, the Commission performs a number of functions related to the enforcement and promotion of human rights. With regard to complaints, it acts as a kind of gatekeeper and administrator. Under s. 29 as it read at the relevant time, the Commission was required to "instruct the Director [of Human Rights] or some other officer to inquire into and endeavour to effect a settlement" of a complaint, provided that the complaint is in writing in the prescribed form or that the Commission "has reasonable grounds for believing that a complaint exists".

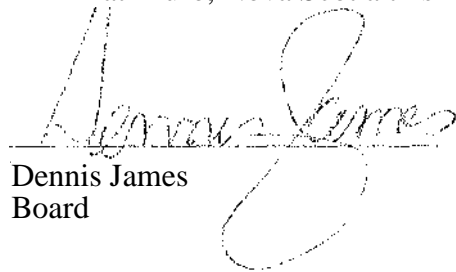
## Conclusion

42. There is no basis to permit the Motion to limit the role of the Commission in the preliminary motion dealing with abuse of process. First, the preliminary motion is not a review of the Commission's handling of the referral to the Board. CBRM confirms this in its reply submission. Second, the role of the Commission in making the referral is not tantamount to an administrative tribunal making a substantive decision; rather its role was "more administrative than judicial in nature". In this regard, the Commission is not participating to defend its referral decision. Third, the analysis of the *Act* shows a clear legislative intent that the Commission be a party to a proceeding before a Board of Inquiry and that it has full rights as a party. Given the intent of the legislation and the role of the Commission in handling complaint referrals, this is not a situation where the concerns expressed in *Northwest Utilities, supra*, are applicable. If the Board were to grant **the** Motion as requested by CBRM "it would be reducing the Commission to a lesser

status than other parties and it would be less than is clearly expressed in the Act" contemplated in *Workers' Compensation Board, supra*.

43. For these reasons, the Motion by CBRM to limit the role of the Commission in the scheduled preliminary motion on abuse of process is dismissed.

DATE at Truro, Nova Scotia this 10 day of October, 2013.



Dennis James  
Board