IN THE MATTER OF:	The Nova Scotia *Human Rights Act* (the "Act")
	- and -
IN THE MATTER OF:	Board File Nos. 42000-30-H13-1637 and 42000-30-H13-1273
BETWEEN:	
	Melissa Clattenburg-Pace and **Valerie Clattenburg** (Complainant)
	- and -
	Boutilier's Glen Campground and/or **Perry Boutilier** and/or **Lynn Collins** (Respondents)
	- and -
	The Nova Scotia Human Rights Commission (NSHRC)
Board of Inquiry:	J. Walter Thompson, Q.C.
Heard:	August 5 - 11, 2015
Facilitator:	Grace Campbell
Counsel:	Kelly Richards for the Respondents
	Kymberly Franklin for the NS Human Rights Commission

Decision of the Board of Inquiry

Introduction

Perry Boutilier and Lynn Collins operate Boutilier's Glen Campground in South Rawdon, Hants County. I will often refer to Mr. Boutilier and Ms. Collins, who are a partnership operating under the name Boutilier's Glen Campground, as "the Campground". The Campground is in fact largely occupied by owners of travel trailers on a seasonal basis. These "trailers" are large and often settle into the Campground with fixtures such as decks and outbuildings added. There is a recreation hall and programs of activities. The occupants of the trailers become friends and form a community.

The Complainant, Valerie Clattenburg ("Ms. Clattenburg"), and her partner, Mr. Gosbee, first rented a space in the Campground in 2003. Their daughter, the Complainant, Melissa Clattenburg-Pace ("Ms. Clattenburg-Pace"), joined them as a guest, but in 2011 rented her own lot. In the middle of the 2012 season, the Campground evicted Ms. Clattenburg, Mr. Gosbee and Ms. Clattenburg-Pace.

Ms. Clattenburg-Pace had been injured in two car accidents. She still carries the effects. She is disabled within the meaning of the *Human Rights Act.* She testified that she suffers pain, has headaches, walks with a cane, has occasional syncope and tires easily. Her disability manifested itself at the hearing in some breaks and an early adjournment. She presented well; she is articulate and intelligent. She seemed to understand her limitations and how to live with her chronic conditions. There is no evidence that her condition had improved in any significant particular since the eviction.

A more detailed medical report was provided in the documentary evidence. This medical report confirms that she cannot drive, she should not lift weights in excess of 15 pounds, uses walking aids, consumes mostly a liquid diet, has occasional seizure like episodes and requires regular rest breaks.

Ms. Clattenburg and Ms. Clattenburg-Pace allege that the eviction was a function of the Campground's discrimination against them because of Ms. Clattenburg-Pace's disability. Mr. Boutilier and Ms. Collins say that they evicted Ms. Clattenburg and Mr. Gosbee because relations broke down, in particular after an argument with Ms. Clattenburg and Mr. Gosbee about an airconditioner in Ms. Clattenburg's trailer. They say that they understood that Ms. Clattenburg-Pace needed the support of her mother and Mr. Gosbee and, for that reason, evicted her

too.

The Process

We, by agreement, used the "restorative justice" model for the actual hearing. We had a facilitator in the person of Grace Campbell. She set us up in a circle with a foot long braid of sweet-grass as a talking piece. The braid passed around the circle. Each of us, parties, witnesses, counsel and facilitator alike held the braid as they spoke. We thoroughly canvassed what had happened in a frank and sometimes emotional way.

Everyone participated sincerely, professionally and, all in all, respectfully. All addressed the facts, and the process produced a better and somewhat more sympathetic understanding of each other's point of view. In the end, the fundamental disagreement remained. I am left to make a determination whether there was discrimination involved in the eviction of Ms. Clattenburg and Ms. Clattenburg-Pace.

Findings

I am satisfied that the parties and the witnesses testified to the facts as they saw them sincerely and, from each of their points of view, truthfully. Having heard them speak, and in the informal and perhaps more self-revelatory restorative process, I am also satisfied that the eviction resulted from a series of miscommunications and misunderstandings which culminated in a blow-up over an airconditioner in the Clattenburg trailer.

I am satisfied that Mr. Boutilier and Ms. Collins misunderstood the nature and the extent of Ms. Clattenburg-Pace's disability. Ms. Clattenburg-Pace, as Mr. Boutilier and Ms. Collins acknowledged during the hearing, is able to look after herself. She will need help from time to time, but so do we all. The major limitation affecting her occupancy at the Campground is that she cannot or should not drive. She would need someone to bring her food and so on and to take her where she needs to go, but this relative to all the frailties our flesh is heir to is not so bad. While no doubt help is important, she is not dependent on anyone.

Ms. Clattenburg-Pace's mother, Ms. Clattenburg, had advised Mr. Boutilier and Ms. Collins of Ms. Clattenburg-Pace's medical condition. This advice came to them in the context of Ms. Clattenburg-Pace's staying with her mother as an adult. The Campground charges guests of occupants a fee if they stay overnight,

but will make exceptions. I accept that Mr. Boutilier and Ms. Collins, as they indeed testified, understood that Ms. Clattenburg-Pace was dependent upon her mother and Mr. Gosbee and so, to accommodate her, made an exception and did not seek the guest fee.

Ms. Clattenburg says that she did not know that Mr. Boutilier and Ms. Collins thought of her daughter as being dependent and had no idea that they believed they were extended an exemption. As with the other issues, there is nothing in writing before me clarifying the issue. A simple note from either one to the other confirming a particular understanding would have avoided grief.

The communication with Mr. Boutilier and Ms. Collins about Ms. Clattenburg-Pace came for the most part, if not entirely, through Ms. Clattenburg. A loving, protective mother may not, in retrospect, have been the best source. It would have been well if, through the initiative of any one of them, Ms. Clattenburg-Pace had engaged directly with Mr. Boutilier and Ms. Collins. Indeed, they were surprised at how well she in fact is when they actually did, during the restorative discussions, see her move around, hear her speak and engage in conversation.

Mr. Boutilier's and Ms. Collins' misunderstanding persisted. After Ms. Clattenburg-Pace rented her own space, she spent considerable time at the Campground when her mother and Mr. Gosbee were not about. Neither Ms. Clattenburg-Pace, her mother or Mr. Gosbee worried about her being alone.

Mr. Boutilier and Ms. Collins, however, became concerned that she did not have the necessary supports. I am not sure it was ever their responsibility to do anything about their concern. Ms. Clattenburg-Pace, Ms. Clattenburg and Mr. Gosbee are all adults and whatever doubts there may have been about Ms. Clattenburg-Pace's physical disability, there should have been no doubt about her capacity and competence to make her own decisions about where and how she lived. Be that as it may, at the end of the first season of Ms. Clattenburg-Pace's occupancy by herself, Mr. Boutilier and Ms. Collins were sufficiently concerned about Ms. Clattenburg-Pace's condition to request confirmation from her physician that she indeed was able to live by herself without nearby support.

For whatever reason, Ms. Clattenburg and Ms. Clattenburg-Pace were dilatory in responding to this request. They resented being asked, but the failure to communicate served to reinforce the Campground's suspicions. The physician's note did not appear until the following spring when the Campground was coming to life for the season and even then was rather perfunctory and did not give in clear terms the assurance that Ms. Clattenburg-Pace could live day to day independently. Physicians are often put upon for all kinds of notes of various

kinds and I can understand why his note was perfunctory, but in the circumstances a full and prompt explanation of some kind from someone would have served to allay concern. In the event, suspicion only grew. Mr. Boutilier and Ms. Collins questioned the provenance of the note. They called the physician themselves and he inturn confirmed the note was his own. Nothing further was done, however, to reassure Mr. Boutilier and Ms. Collins that Ms. Clattenburg-Pace was capable of looking after herself.

Mr. Boutilier and Ms. Collins called another seasonal occupant of the campground, Eileen Ritchie, as a witness to join the circle. She said that she and Ms. Clattenburg-Pace had become friends and that she had assisted Ms. Clattenburg-Pace from time to time. She did not suggest that Ms. Clattenburg-Pace was unable to look after herself, but she expressed a genuine concern about Ms. Clattenburg-Pace and did worry about her. I find that to be reflective of Mr. Boutilier's and Ms Collins' own concern.

In the meantime, other issues were brewing between the Campground and Ms. Clattenburg and Mr. Gosbee. They were trivial, but they lead to the blow up that resulted in the eviction.

Ms. Clattenburg and Mr. Gosbee had a fridge in their trailer. This fridge did not work so they obtained a second one. There are not separate metres for each trailer. The Campground pays the power bill for all. If one wants to run two fridges, then one pays an added fee. The Campground is concerned that some of their seasonal occupants take advantage of them by running two fridges and not paying the fee. The Campground instituted a rule that if there were actually two fridges on site, then the fee had to be paid regardless of whether the two fridges were actually operating. Mr. Gosbee and Ms. Clattenburg temporized about their second fridge worrying about the structural importance of the fridge in the trailer. They neither took the fridge out of the trailer, nor paid the fee. They understood that the Campground was accepting their representations that the fridge in the trailer was not working and was content. The Campground, however, thought that Ms. Clattenburg and Mr. Gosbee were giving them the run around. Again, there is no memo in confirmation of any undertaking not to use the fridge or an exemption from the rule. Each party, in good faith, misunderstood what the other was thinking and intending.

Mr. Boutilier and Ms. Collins had a similar rule about the use of trailer airconditioners. The Campground charged an added fee to compensate for the added cost of an occupant running their air conditioner. The Campground, being unable to determine from time to time whether a particular airconditioner was in use or not, insisted that occupants keep their air conditioners covered if they had

not paid the added fee. The problem with Mr. Gosbee and Ms. Clattenburg arose because they took the cover off their roof in preparation for a roof repair. Mr. Boutilier was not made aware of the roof repair and expected that he should have been. Mr. Gosbee thought of the roof repair as a matter of routine and so did not think he needed to notify Mr. Boutilier. Again we have misunderstandings and, to coin a word, misexpectations. Mr. Boutilier noticed the airconditioner was uncovered and confronted Mr. Gosbee. The two got into an argument, the upshot of which was the eviction of Ms. Clattenburg and Ms. Clattenburg-Pace.

Personalities came into play and, again, I feel I got a greater insight through the restorative process than I would have had through a more formal adversarial process. I formed the impression that Mr. Gosbee, who like most of us can be provoked, is by and large a laid back, easy going and gentle man who assumed too much from his conversations with Mr. Boutilier and did not understand that the Campground had formed the impression that he and Ms. Clattenburg were serially disregarding his rules to control his occupants from, as an employee witness for Mr. Boutilier put it, "stealing power". Mr. Boutilier is a sincere hardworking businessman running what I understand to be a happy campground. Certainly, the Clattenburgs were happy and would have stayed indefinitely. Mr. Boutilier is not without sympathy and understanding, but I also formed the impression that he is also somewhat impetuous.

I am satisfied that Mr. Gosbee and Ms. Clattenburg understood the rules regarding second fridges and the covering of the airconditioner and the reasons for them. They presumed, however, that Mr. Boutilier wouldn't mind if they kept the second fridge as long as it was not operable or, for the purposes of repairing the roof, removed the covering from the airconditioner. The problem was that he did mind.

Ms. Clattenburg and Mr. Gosbee were going about their lives assuming all was well. They did not know a storm was brewing. I am satisfied they knew that the Campground was concerned about occupants using extra power, but they did not understand that were doing anything that would upset Mr. Boutilier. In the context, I am satisfied that the eviction was quite arbitrary and flew out of the argument between Mr. Gosbee and Mr. Boutilier about the uncovered airconditioner. The Campground does have the right to be as arbitrary as it likes as long as it does not discriminate. The Campground is entitled to do business with whomever it likes. As long as the Campground does not discriminate under the law, the Campground can choose to have as occupants anyone it likes and refuse anyone it does not like. Similarly, subject to the terms of the occupancy contract, the Campground may refuse to renew an occupant's place in the campground or even, at the risk of breaching the contract, evict occupants

peremptorily.

I am satisfied that the Campground did not discriminate against Ms. Clattenburg and Mr. Gosbee. I am satisfied that there is no *prima facie* case that they did. The Campground evicted Ms. Clattenburg and Mr. Gosbee because of the argument about the airconditioner and other grievances which the Campground had. The grievances would have included the difficulty about explaining Ms. Clattenburg-Pace's limitations. No doubt the difficulty added to the Campground's frustration with the Clattenburgs, but their annoyance was not a function of any discrimination and I cannot link the decision to evict Ms. Clattenburg and Mr. Gosbee with any discrimination against Ms. Clattenburg-Pace.

The real question here is whether the Campground did discriminate against Ms. Clattenburg-Pace. I will address that question later, but I will comment that I find the eviction of Ms. Clattenburg and Ms. Clattenburg-Pace to have been the culmination of a series of miscommunications and misunderstandings and altogether regrettable. I daresay that the long term occupancy of a site in a campground such as Boutilier's brings with it an identification with a place and a community which would be, as it was in this case for the Clattenburgs, heartbreaking to lose. For the occupant, I am sure, his or her place becomes a place to resort to, a place of rest removed from the stresses of day to day life elsewhere and amongst a community of people who become friends. I don't think Mr. Boutilier understood what he was doing to the Clattenburgs when he peremptorily threw them out of his campground.

The Law

The Nova Scotia *Human Rights Act* R.S.N.S. 1989 c. provides:

> 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. (emphasis added)

Prohibition of discrimination

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;

The *Act* does provide exceptions. The relevant exception for a disability is contained in s. 6 (e):

Exceptions

6 Subsection (1) of Section 5 does not apply...

(e) where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity;

The Supreme Court of Canada said in *Robichaud v. Canada* [1987] 2 S.C.R. 84:

> 9. It is worth repeating that by its very words, the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre J. puts the same thought in these words in *O'Malley* at p. 547:
>
> > The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.
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> 10. Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its

> concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. *O'Malley* makes it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation" (at p. 547). This legislation creates what are "essentially civil remedies" (p. 549). McIntyre J. there explains that to require intention would make the Act unworkable. ...

I have underlined passages out of the above for the purposes of emphasis. Human Rights legislation is quasi-constitutional and must be given a broad interpretation mindful of the purposes for which it was established. The complainant need only prove that there was an element of discrimination in the action complained of, or to put it another way, that discrimination was a factor in the action complained of. The motives or intentions of the respondents to the complaint are not relevant; it is the effect of the discriminatory practice which is significant.

To make a finding under the *Act,* I need to be satisfied that the Campground did make a distinction between able people and Ms. Clattenburg-Pace and that the effect or result of the distinction was to impose a disadvantage upon Ms. Clattenburg-Pace. I need not be satisfied that the Campground actively and wittingly made a distinction between Ms. Clattenburg-Pace and others based on the perceived characteristics of her disability, only that there was an element of that in her eviction. Nor do I need to be satisfied that the Campground was ill-motivated or bore any animus towards her.

If I am satisfied that the Camground made the distinction and the effect or result of the distinction was to impose a disadvantage upon her, then it falls to the Campground to satisfy me that it qualifies for the exception. To find the Campground qualified for the exception, then in my opinion I would have to be satisfied that Ms. Clattenburg-Pace's disability reasonably precluded performance of the particular activity of occupying her own trailer in a park for season long recreational vehicles without active support. I am further of the opinion that in making such a finding I would have to be satisfied too that the Campground could not accommodate her disability without undue hardship.

I refer to the Supreme Court of Canada again and a three-step test stipulated by the Supreme Court of Canada while considering a "bona fide occupational requirement" ("BFOR") exception in *British Columbia (Public Service Employment Relations Commission) v. BCGSEU,* [1999] 3 S.C.R 3 (aka "Meiorin"). The issue

in *Meiorin* was whether a standard of physical strength or fitness for firefighters was discriminatory in its application to women, but in my opinion the principles set out by the Supreme Court reflect issues of discrimination generally and are applicable to the consideration of a physical disability in the occupancy of a campground, or more particularly what the law requires of a campground before it can qualify for an exemption under the *Act*.

I refer to paragraph 54:

> Having considered the various alternatives, I propose the following three-step test for determination whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> 1. that the employer adopted the standard for a purpose rationally connected to performance of the job;
>
> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> 3. that the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

In the present context, the Campground has to show that the eviction for the disability was rationally connected to the seasonal occupancy of the Campground, that the Campground proceeded in good faith in imposing a limitation because of the disability and the limitation is reasonably necessary to the proper administration of the Campground and could not be accommodated without undue hardship to the business of the Campground or the other occupants of the Campground.

In this case, we are speaking of a peremptory eviction. This is the extreme recourse.

In my opinion, given the principles that guide us in our deliberations as set out by the Supreme Court of Canada, I must come to the conclusion that the Campground has violated the *Human Rights Act* in evicting Ms. Clattenburg-Pace.

There is here a *prima facie* case of discrimination. Ms. Clattenburg-Pace had done nothing to provoke the Campground. She was collateral damage arising out of the decision to evict her mother and Mr. Gosbee.

While the Campground was concerned that Ms. Clattenburg and Mr. Gosbee might seek to visit Ms. Clattenburg-Pace, the Campground's main concern was the perception of a characteristic, ie. a disability such that she could not be a seasonal occupant in her own trailer without family support. The Campground, albeit in good faith, unwittingly, without the intention to discriminate, in the end made a rash and somewhat arbitrary judgment about her ability to look after herself. The Campgound genuinely misperceived the extent of Ms. Clattenburg-Pace's disability. They were at the hearing, themselves, surprised at her capacity and competence and graciously said so. Their perception had the result of imposing a disadvantage and an adverse effect upon her by depriving her of her place as a seasonal occupant of the Campground. (*Human Rights Act* s.2)

To qualify for the exemption under the *Act,* the Campground then had the onus to show that it took reasonable measures short of undue hardship to accommodate Ms. Clattenburg-Pace's disability. Undue hardship might include, for example, undue interference with the business of the Campground or the comfort and convenience of other occupants, or an undue expense for the Campground. There is simply no evidence of any effort by the Campground to accommodate any disability Ms. Clattenburg-Pace might have.

The Campground should simply have allowed Ms. Clattenburg-Pace, and have extended the dignity to her, to stay or leave at the end of the season as she chose. I daresay that she would have felt uncomfortable staying given her mother's eviction and the manner of it, but that was, with respect, her decision to make.

As I have said, Mr. Boutilier, I think in something of a reflex, evicted Ms. Clattenburg-Pace when he evicted her mother. While the Clattenburgs could certainly have been more helpful in allaying Mr. Boutilier and Ms. Collins' worries, Mr. Boutilier and Ms. Collins never did actually come to Ms. Clattenburg-Pace and discuss any needs she might have or, most importantly, have such a discussion with her when they evicted her mother and Mr. Gosbee.

Even if one grants that the Campground has the duty to concern itself with the nature and extent of Ms Clattenburg-Pace's disability, they still owed it to Ms. Clattenburg-Pace to canvass the subject with her directly. I acknowledge that they did seek out her doctor's opinion, but in my view the duty went beyond that. In particular, whatever the Campground may have thought about her capacity, it owed her the opportunity to show her own independence after the eviction of her

mother and then work with her in a reasonable way to accommodate her, if any accommodation was necessary at all. In saying this, I am guided by the Supreme Court of Canada's decision in *Central Okanagan School District No. 23 v. Renaud* 1992 CanLII 81 at page 16, which points out that the search for accommodation is a multi-party inquiry in which the complainant must assist. Ms. Clattenburg-Pace was, however, given no opportunity.

Furthermore, in the circumstances of this case, I remain to be persuaded that fundamentally it was properly a concern of theirs what support, if any, Ms. Clattenburg-Pace needed. While we all need support from time to time in our lives, it is not for our landlords to say that we cannot stay because they, the landlords, do not think the supports are adequate. It is for the individuals themselves to determine what they may need or not need and to the point where their disability is somehow actively interfering with the proper operation of a premises or the peace of other occupants, a landlord has little nothing to say about it. It was not, in other words, a proper concern of the Campground what support, if any, Ms. Clattenburg-Pace needed. There was never any question whatsoever about Ms. Clattenburg-Pace's competence to make her own decisions about her life.

Remedy

The *Act* provides in section 34:

> .....(8) 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 and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances

It is now three years since the eviction. All the parties have long since moved on, the Clattenburgs quite literally. There is nothing I can order to ensure the Campground complies with the *Act.* Indeed, I do not believe I need to at all. I accept that the Campground is tolerant and does not discriminate.

Ms. Clattenburg-Pace is, however, entitled to some compensation in a global amount of $3,000.00, which may be broken down to $1,000.00 for the discrimination itself, $1,000.00 for the loss of use of her trailer for the balance of the 2012 season and the use of the lot on which it sat, and $1,000.00 to

compensate her for the cost and trouble of having to take down and move her trailer.

Dated at Halifax, Nova Scotia this 15th day of September, 2015.

J. Walter Thompson, Q.C.
Board Chair