IN THE MATTER OF: The Nova Scotia *Human Rights Act* (the "Act")

- and -

IN THE MATTER OF: Board File No. 51000-30-H11-0358

BETWEEN:

Rodney Small
(Complainant)

- and -

Halifax Regional Municipality
(Respondent)

- and -

The Nova Scotia Human Rights Commission
(NSHRC)

Decision of the Board of Inquiry on Joinder Motion

Halifax Regional Municipality ("Halifax") moves to add a former employee, Mr. W. as a party to the complaint of Mr. S. under the *Human Rights Act.* Extensive briefs were filed on behalf of Halifax and Mr. S. Mr. W. appeared on the hearing of the motion, responded to questions and made a brief, oral submission. Mr. S. also responded to questions.

The Factual Context

Mr. S. and Mr. W. worked together as labourers for Halifax. Mr. W. has acknowledged that he made racist statements to and about Mr. S. The *Human Rights Act* provides:

> 5 (1) No person shall in respect of
>
> (d) employment;
> discriminate against an individual or class of individuals on account of
> (i) race;

(j) colour;

and further that:

5 (3) No person shall harass an individual or group with respect to a prohibited ground of discrimination.

It is agreed that Mr. W. violated this provision of the *Act;* he harassed Mr. S. with respect to Mr. S's race and colour. Mr. S. says, and Mr. W. acknowledges, that they have talked, that Mr. W. has apologized and made amends. Mr. S. says that he now has no grievance with W., has no interest in pursuing Mr. W. and is opposed to Mr. W. being joined to this proceeding. Mr. W. also opposes his joinder.

Mr. W. is no longer an employee of Halifax. I understand his leaving of his employ with Halifax had nothing to do with Mr. S.

I acknowledge with thanks Mr. W.'s own appearance at the hearing of the motion and his co-operation with the process. It would have been easier for him to ignore it. His willingness, however, to appear and to be prepared to "face the music" is admirable.

Mr. S. also complains that he has been discriminated against contrary to the *Act* on the basis of physical disability. Mr. W.'s actions have nothing to do with that part of Mr. S.'s complaint.

Board powers to add a party under the *Human Rights Act* and to make an order against any person

The *Act* provides the following:

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;
(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.

A board also has the following power:

7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision

Halifax Submission

Halifax argues that the word "complaint" s. 33 (d) includes documents other than " a complaint in writing on a form prescribed by the Director" under s. 29 (a) of the *Act.* Specifically, Halifax argues that since Mr. W. is mentioned in the report of Commission staff to the Commission itself for the purpose of the Commission's consideration of whether the matter should be referred to a Board of Inquiry (the Investigation Report), Mr. W. is to be included as a party.

Halifax also argues that fairness to Halifax requires that someone who "perpetrated the discrimination" be held liable too and that, in order to further the objects of the *Act* in its workplace and generally, it is important that those who breach the *Act* be held accountable.

S. Submission

Mr. S. strenuously argues that he has control of the process of adding parties under the *Human Rights Act* saying "Although a Complainant's decision regarding who to make a complaint against is not absolute, a very high threshold must be met in order to add a Respondent where the Complainant objects."

Analysis

In my opinion, the legislature in section33 of the *Act* has given Boards a clear and simple direction about who the parties to the proceeding are and in ss. (e) a clear and simple discretion to add parties to a process.

Section 33 provides that any person "named in the complaint and alleged to have contravened this Act" is a party. Section 29 (1) (a) says that the process under the

Act starts when "the person aggrieved makes a complaint in writing on a form prescribed by the Director". In my opinion, there is no need to try to put some other gloss on the word "complaint". The word complaint in section 33 means the same as the word complaint in section 29 (1) (a). Mr. S. did not in fact name Mr. W. in his complaint as defined in section 29 (1) (a). His complaint is his complaint. He did not name Mr. W. That's an end to it.

There is no need in my view to torture the meaning of complaint to include, for example, the report of an Investigation Officer to the Commission itself. It may be that the use of the word "complaint" in other sections of the Act may provide a context for a different understanding of the word. I do not mean to say that the word complaint is always and only a complaint in the prescribed form. I only say that complaint in the context of the adding of a party should be understood as the complaint in the prescribed form.

Nor does the section provide that the Board, in determining who might be a party, that any particular deference be given to the wishes of the complainant. There is no limitation. The Board may join "any other person". I appreciate that there are opinions from other Boards narrowing the discretion, but in my view one must be careful in these matters not to let the case tail wag the legislation dog. As I say, section 33 is clear and comprehensive. The Board has a discretion to add a party. The exercise of that discretion cannot be arbitrary, but each case will depend on its own circumstances and there is no need, in my view, for some a priori fettering of it.

Furthermore, since Halifax is absolutely liable for W.'s actions (see *Robichaud,* post), then surely there would not be any particular threshold for Mr. W. to overcome if he were the sole party named and then wanted to join Halifax. There should be some balance. Corporate respondents cannot always be liable, but individual employees only liable if the complainant chooses.

I am mindful that ss. 7 of s. 24 has been understood to permit a Board to make a finding of fact against "any person" regardless of whether they are a party or not. Subsection 7 provides, to repeat:

> (7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

I understand ss. 7 to say that if to make a decision, I have to make a finding of fact against someone who is not a party, then I may make that finding of fact.

Section 34, contains a miscellany of directions to and powers for Boards. I understand ss. 7 to be an incidental power enabling a Board to do its job if it found itself in a position where, to give effect to its decision, it could make finding of fact regarding "any person." I do not, however, understand ss. 7 to mean that I may make findings of fact against people who are not parties as if they were. I do not understand ss. 7 to mean that I as a Board can simply make findings of fact against people who are not parties, who have not been given notice, nor any opportunity to respond to allegations made against them. In this case, for example, I do not understand this provision to mean that I may simply make the findings against Mr. W. that I might make against him as if he were a party. That would be an extraordinary power and contrary to the principles of natural justice and, in my view, cannot have been the intention of the legislature.

Mr. W., I should think, would be entitled to the same due process protection if he were in jeopardy of having an adverse finding of fact made against him as if he were a party. One cannot ignore the shame, as I elaborate later, emanating from a finding of racial discrimination. It is the finding itself that is the real penalty. The legal costs will in most cases dwarf the cost of any remedy.

I do not say that a respondent's wishes are irrelevant, nor do I say that they may not be compelling in other circumstances. I just say that in this case, there are other factors to be considered as well. The pre-eminent circumstance of this case is Mr. W.'s frank admission of a violation of the *Act*. Mr. W. is at the centre of the complaint, whether named or not. His liability is, in my view, inescapable, and not to be found in a decision without his being a party.

Fairness to Halifax

I have asked myself whether the Supreme Court of Canada decision of *Robichaud v. Canada (Treasury Board)* [1987] 2 SCR 84, compels a Board to find Halifax to have violated the *Act* if the act complained of was committed by an employee. If the act complained of is, as in this case, admitted by the employee and, as is arguably the case, had nothing to do with anything an employer such as Halifax might reasonably be expected to have done or not done, then is it still to bear the shame, the obloquy of that act, by being blamed for it? Shame and obloquy are the effects of a Board's finding of discrimination. Halifax will be found to have discriminated and anyone who hears or sees a report of finding will conclude that Halifax itself is guilty of the act complained of.

Robichaud complained that she had been the target of sexual harassment by her immediate superior in the Department of Defence. The Federal Court of Appeal, by a majority, found that the liability of the Crown would only be engaged by the

involvement in this case by the Treasury Board itself or the Minister of Defence. This seems to have been an extreme position to have taken nullifying remedies provided under the legislation as MacGuigan in dissent in the Federal Court of Appeal and the Supreme Court itself said. The Supreme Court, however, swung to the opposite pole so that the liability of the employer is, as argued by Ms. Hoyte for Mr. Small and as I now accept, absolute even if the discriminatory act is one committed by equals in the work force and beyond the control of the employer.

> Par. 17 Hence I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment" interpreted in the purposive fashion outlined earlier as being in some way related to or associated with the employment.

Inevitably and always, then, the employer will be held liable for a discriminatory act. The notion that an employer can absolutely prevent misconduct in the workplace, particularly an employer with the number of employees that Halifax has, seems to me to be illusory given the crooked timber of humanity, but the only comfort the Supreme Court gave the employer was the following:

> I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability. Par.19

It seems to me then, that in fairness to Halifax, I should allow Mr. W. to be joined to the proceeding. Halifax will argue, as I understand it, that none of its people senior to Mr. S. had any involvement with Mr. W.'s words to Mr. S. If it is to reduce or at least in part deflect its liability, then it seems to me to be appropriate that Mr. W become a party. Otherwise, Halifax is at risk of being regarded as solely responsible in the larger sense for the discriminatory acts or words and left to bear alone the obloquy and shame which comes with it. Halifax, alone, becomes the racist playing further into the trope of the institution as being inherently, and perhaps irredeemably, racist. That obloquy and shame is again, in my view, for a respondent, a significant part of the real stakes in these proceedings.

Again, I am satisfied that to be fair to Halifax, Halifax should be able to argue the actions of W. were the actions of an individual among the many employees of Halifax, involving no superiors, and not a reflection on what Halifax strives to be or believes itself to be. The result may otherwise be that an order, in isolation, is simply a punishment of Halifax.

Halifax affirms that it is not interested in financial contribution from Mr. W. saying that, in any event, Mr. W. is not likely a person who has the means to respond to a significant award against him. Halifax says, however, that it is important for the removal of discrimination in the community, and in particular for Halifax's ability to eliminate discrimination in the workplace that individuals who transgress the *Act* be held publicly accountable for their actions. I agree.

Halifax argues that it is important for the creation of a tolerant work place that each and every employee refrain from conduct which constitutes illegal discrimination under the *Act.* Halifax argues that refusals to make such people parties compromises Halifax's ability to enforce the *Act* in the workplace. Halifax, in support of its argument, points to the public purposes of the *Human Rights Act*:

> 2 The purpose of this Act is to
>
> (a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;
>
> (b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;
>
> (c) recognize that human rights must be protected by the rule of law;
>
> (d) affirm the principle that every person is free and equal in dignity and rights;

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.
>
> 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 agree that individual employees too, and not just the corporations or entities which employ them, should be held accountable and where appropriate joined as parties in order to fulfill the larger purpose of the *Human Rights Act* as stated in the *Act* itself and the principles stated in the Supreme Court concerning human rights legislation generally. I accept that while an employer may have other remedies, those provided by the *Human Rights Act* may also be important in particular cases, and there is no reason to deny the employer the ability to effect change in its work place through the naming of individual transgressors.

Conclusion

I specify, under section 33(e) of the *Act,* that Mr. W. be a party to this proceeding. Notwithstanding my use of his initial, I would expect that Mr. W.'s full name be used in documents henceforward.

Dated at Halifax, Nova Scotia this 4th day of June, 2014.

J. Walter Thompson, Q.C.
Board Chair