2008-NSHRC-1

CASE NUMBER 42000-30-D03-0007

IN THE MATTER OF: ***Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 12, as amended**

- and -

IN THE MATTER OF: ***A complaint by Linda Lockhart against the Village of New Minas***

DECISION ON PRELIMINARY MOTIONS
BEFORE DENNIS JAMES
BOARD OF INQUIRY
DATED: MARCH 17, 2008

Daniel W. Ingersoll **Cox & Palmer** **Purdy's Wharf Tower I** **1100-1959 Upper Water St.** **Halifax, NS B3J 3N2**	**Randall P.H. Balcome** **Waterbury Newton** **P. O. Box 98** **469 Main Street** **Kentville, NS B4N 3V9**	**Paula Kinley Howatt** **The Newton Law firm** **Suite 200** **10 Webster Street** **Kentville, NS B4N 1H7**
Counsel for the Nova Scotia Human Rights Commission	**Counsel for Linda Lockhart**	**Counsel for Village of New Minas**

Preliminary

[1] Linda Lockhart is a former clerk of the Village of New Minas. Her employment relationship with the Village of New Minas ("Village") ended in 2003 and she subsequently filed a complaint with the Nova Scotia Human Rights Commission ("Commission") on September 23, 2003 claiming that the Village discriminated against her in the matter of her employment because of sex contrary to Section 5 (1) (d) and (m) of the *Human Rights Act* R.S.N.S. 1989, c.12, as amended (*Act).*

[2] There appears to be two distinct aspects to Ms. Lockhart's complaint. First, is the claim of discrimination based on the allegation that the Village paid her unequally for work of equal value. Second, she says was harassed in response to her perceived role in efforts to remedy the pay inequity that she claims to have experienced.

[3] This Board was appointed on October 31, 2007 and met with counsel for all parties by case management conference on November 22, 2007. At that time, dates for the hearing were set down for two weeks starting April 14th and ending April 25, 2008 to take place at the Old Orchard Inn in Wolfville, Nova Scotia; February 29, 2008 was set aside for preliminary motions.

[4] The Village filed application documents on January 29, 2008 in support of two preliminary motions. The first preliminary motion challenges the Board's jurisdiction to deal with the complaint of Linda Lockhart as it relates to the claim that she was discriminated by allegedly receiving unequal pay for work of equal value. The second motion asks that the Board make a pre-hearing finding of fact that Peter Pothier was not an employee of the Village at the material times but was instead an employee of the New Minas Water Commission, an independent incorporated body. At the hearing of the Board on February 29, 2008 the second motion was dismissed with reasons to follow in writing. The Board reserved its decision on the first motion as to jurisdiction.

[5] The Village of New Minas was represented at the pre-hearing motion by Paula Kinlay Howatt and Jon Cummings. The Commission was represented by Dan Ingersoll and Andrew Taillon. Ms. Lockhart was represented by Randall Balcolm, assisted by Adam Church, articled clerk. Mr. Balcolm advised the Board in advance of the hearing that Ms. Lockhart endorsed the position of the Commission as set out in its pre-hearing brief and as a consequence made no further written or oral submission at the hearing. Neither the Village nor the Commission introduced evidence in support of or in opposition to the application, and the motion and response proceeded entirely on the basis of the complaint form filed by Ms. Lockhart. The Board appreciates the submissions by counsel for both the Village and the Commission.

Motion on the Board's jurisdiction

[6] The Village contests the Board's jurisdiction to address the complaint by Ms. Lockhart as it relates to the allegation that she received unequal pay for work of equal value. Specifically the Village says that the Board does not have jurisdiction to hear pay equity complaints which involves valuing dissimilar jobs. The Village says that to engage in the analysis required to hear

Ms. Lockhart's complaint would be tantamount to the Board adopting a legislative function and thereby it would be in excess of its jurisdiction.

[7] The Village relies almost exclusively on the decision of the Saskatchewan Queen's Bench in *University of Saskatchewan* v. *Dumbovic*, [2007] S.J. No. 317 (QL) and encourages the Board to apply that decision and declare that it has no jurisdiction to hear the complaint advanced by Ms. Lockhart.

[8] For reasons set out below, the Board dismisses the Village's application as to jurisdiction and determines that it has the jurisdiction to hear the complaint.

Reasons for Decision on Jurisdiction

[9] Ms. Lockhart's complaint is brought under Section 5(1)(d) and (m) of the *Act* which reads as follows:

> **Prohibition of discrimination**
>
> 5(1) No person shall in respect of
>
> (d) employment;
>
> discriminate against an individual or class of individuals on account of
>
> (m) sex;

[10] The prohibition under the *Act* is not to discriminate in matters of employment on the basis of an individual's sex.

[11] Section 4 of the *Act* defines discrimination:

> **Meaning of discrimination**
>
> 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 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.

[12] The definition of discrimination is set out in Section 4 follows the definition established by the Supreme Court of Canada in *Andrews v. Law Society (British Columbia),* [1989] 1 S.C.R. 143 at 174-75:

> "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

[13] In *Discrimination in the Law*, the authors say at Section 4.1 (b), page 4-8 in reference to the definition set down by *Andrews*,

> "(a)lthough this definition was not adopted in a Human Rights case, it is clearly worthy of full credence in this context."

[14] In the case of Nova Scotia the legislature saw fit to embrace a definition of discrimination mirroring that set out in *Andrews* for the purposes of the *Act*.

[15] In its argument before the Board the Village accepted that pay equity or equal pay for work of equal value is a human right. Its main contention is that the *Act* is deficient in setting out the necessary standards and guidelines that permit the proper analysis of a pay equity complaint and as such it is outside the scope of the *Act* as currently drafted. The Village refers to section 11 of the *Canadian Human Rights Act* as an example of the type of legislative standard that is required before a board would have the necessary jurisdiction. Section 11 of the *Canadian Human Rights Act* is as follows:

> **11.(1) Equal wages** – it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.
>
> **(2) Assessment of value of work** – In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.
>
> **(3) Separate establishments** – Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment.
>
> **(4) Different wages based on prescribed reasonable factors** – Notwithstanding subsection (1), it is not a discriminatory practice

> to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.
>
> **(5) Idem** – For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.
>
> **(6) No reduction of wages** – An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.
>
> **(7) Definition of "wages"** – For the purposes of this section "wages" means any form of remuneration payable for work performed by an individual and includes
>
> (a) salaries, commissions, vacation pay, dismissal wages and bonuses;
> (b) reasonable value for board, rent, housing and lodging;
> (c) payments in kind;
> (d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and
> (e) any other advantage received directly or indirectly from the individual's employer.

[16] The motion brought by the Village in this instance requires that the Board consider whether the allegation of unequal pay for work of equal value can constitute discrimination contrary to Section 5(1) (d) and (m). More precisely the motion raises the question whether a complaint based in pay equity can be considered under the *Act* in the absence of a more detailed provision within the *Act* dealing expressly and specifically with the issue of equal pay for work of equal value. The answer to that question in the Board's respectful view is yes.

[17] If one accepts pay equity as a human right it seems to follow that the violation of the principle of pay equity may constitute sex discrimination either under the general no discrimination provision for an employment relationship, or if present, under an express provision dealing with equal pay for work of equal value.

[18] In *Employment Law in Canada, Fourth Edition*, the authors discuss the role of pay equity legislation in Canada. They observe at paragraph 8.296, page 8-335:

> A major impetus driving this legislative (sic) is a view that equal pay is a fundamental human right. This view relies on a plethora of international covenants and conventions respecting employment and human rights that commit signatory countries eliminating gender discrimination in employment, and particularly gender based wage discrimination.

[19] The Nova Scotia Court of Appeal considered the concept of pay equity in the *City of Dartmouth v. Nova Scotia Pay Equity Commission* (1994), 134 N.S.R. (2d) 308. In its decision the Court approves comments from the Chambers Judge in his decision on a certiorari application. At paragraph 25 of the Court of Appeal decision the Court says:

> "25 Justice Hall referred to the City's duty to bargain in good faith pursuant to s. 18 (1)(c) of the *Act* and stated:
>
> …
>
> 'The Pay Equity Act is human rights legislation. It is my view, and I believe the generally accepted view among jurists, that human rights legislation must be given a liberal interpretation so as to give effect to the intent of the legislation. In other words, it must be interpreted if reasonably possible to remedy the inequality that it was intended to correct or to eliminate discrimination.
>
> …
>
> 26 The commission and Justice Hall were obviously mindful of the purpose of the *Pay Equity Act* and the importance of upholding it."

[20] The Board accepts the Commission's analysis that the issue of pay equity is addressed in Nova Scotia by the intersection and interaction of three pieces of legislation: *Human Rights Act, Labour Standards Code* (*Code*) and the *Pay Equity Act*.

[21] Referring again to *Employment Law in Canada, Fourth Edition*, the authors observe at paragraph 8.294, page 8-344:

> "Legislation in all provinces in the federal jurisdiction has been enacted in response to Canada's problem of unequal compensation for women…three levels of legislation may interact, depending on the jurisdiction: the employment standards, the human rights, and, in some provinces, special 'pay equity' legislation. This body of legislation marks the high water mark for the influence of the 'rights' paradigm in Canadian employment law."

[22] Section 57 of the *Code* offers protection for equal pay for the same or similar work:

> "57 (1) An employer and any person acting on his behalf shall not pay a female employee at a rate of wages less than the rate of wages paid to a male employee, or a male employee at a rate of wages less than the rate of wages paid to a female employee, employed by him for substantially the same work performed in the same establishment, the performance of which requires substantial equal skill, effort and responsibility, and which is performed under similar working conditions.

> (2) Where an employer or person acting on the employer's behalf establishes that a different rate of wages is justified based on payment in accordance with
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> (a) a seniority system;
>
> (b) a merit system;
>
> (c) a system that measures wages by quantity or quality of production; or
>
> (d) another differential based on a factor other than sex,
>
> a difference in the rate of wages between a male and a female employee based on any of the factors referred to in clauses (a) to (d) does not constitute a failure to comply with this Section.

[23] The *Pay Equity Act* is a legislated response to the issue of unequal pay for work of equal value but applies only to provincial government employees or public sector employees within provincial crown corporations, hospitals, school boards, universities, municipalities or municipal enterprises or other public sector corporations or bodies specified by regulation. It applies if the work force has at least ten employees.

[24] Section 4 (2) of the *Pay Equity Act* is a compelling factor to the Board in reaching its conclusion on the Village's motion. Section 4(2) provides as follows:

> "4 (2) Nothing in this Act affects the provisions of the *Human Rights Act* and the *Labour Standards Code* prohibiting discrimination based upon sex."

[25] Section 4 (2) advises that nothing within the *Pay Equity Act* is intended to abrogate provisions within the *Act* prohibiting discrimination based upon sex. Sections 5(1) (d) and (m) of the *Act* prohibit discrimination based upon sex. There is no other express provision in the *Act* that does prohibit discrimination in the employment relationship based upon sex; no other section that may permit a Board to consider a complaint of discrimination based upon unequal pay for work of equal value. If as the Village suggests the *Act* does not provide the jurisdiction to deal with pay equity complaints that begs the question what Section 4(2) of the *Pay Equity Act* was intended to protect against. In the Board's view the only reasonable interpretation is that the legislature expressly recognized the *Act* as part of the legislative network that addresses the issue of unequal pay for work of unequal value in Nova Scotia. In Section 4 (2) the legislature expressly recognizes the intersection and interaction of all three pieces of legislation – the *Human Rights Act*, the *Labour Standards Code* and the *Pay Equity Act*.

[26] From any account it is clear that the *Pay Equity Act* is far from a complete legislative response to pay inequity in the Nova Scotia labour force. If this was the only response there would be a large number of instances when an employee would be without remedy in cases of a

complaint of unequal pay for work of equal value if the *Human Rights Act* is interpreted in such a way as to preclude jurisdiction. While the Board accepts the argument by the Village that an incidental , complaint driven approach may be problematic, the Board cannot go further and accept that there is a legislative gap. In the Board's view the language precluding the role of the *Act* would have to be abundantly clear to arrive at that result. In this instance, the language of 4 (2) of the *Pay Equity Act* is to the opposite effect and clearly indicates the *Act* does have a role in addressing pay equity. There is nothing in the *Act* itself that would suggest such a conclusion.

[27] As mentioned earlier the Village relies entirely or almost entirely on the *Dumbovic, supra* decision. The Board considered carefully the decision of Justice Ball in *Dumbovic, supra* and for reasons set out below has chosen not to follow his decision. The Board prefers as persuasive the view of the Ontario Divisional Court in *Nishimura v. Ontario (Human Rights Commission)*, (1989), 62 D.L.R. (4^{th}) 552.

[28] In *Nishimura, supra* the Divisional Court was addressing the appeal of a decision by the Ontario Human Rights Commission which determined it did not have the jurisdiction to deal with a pay equity complaint on the basis there was no express provision in the Ontario Human Rights Code. Subsequent to its initial decision and before the appeal, the Ontario Commission reversed its view of its jurisdiction and made that known to the Divisional Court. The Court overruled the decision of the Commission and in rendering his decision Justice Gray, on behalf of the Court, addressed the interrelationship of the legislative scheme in existence in Ontario:

> "23. So far as what I have described as the second stage is concerned, it is my view that the existence of the E.S.A. and the P.E.A. does not remove these complaints from the jurisdiction of the Commission. The E.S.A. deals only with pay for the same or similar work and the P.E.A. looks to the future and as I have said was not in existence when the applicant's complaint arose. Under the P.E.A. there are not the broad powers found in Section 40 of the *Code* and the *Code* itself anticipates the problem of overlapping and in Section 46 (2) provides for paramountcy. The fact that the legislature enacted the P.E.A. does not show a lack of legislative intent to have the *Code* apply."

[29] Justice Gray set out a number of reasons in support of the Court's view that the Commission in Ontario had jurisdiction to deal with complaints of discrimination under the general no discrimination provisions of that Province's Human Rights Code.

[30] He said at paragraph 17:

> "17. The court is assisted by considering the issue under both stages. After such a consideration, I have concluded that the Commission erred in holding that the complaints were not within its jurisdiction and I have also concluded that the allegation of unequal pay for work of equal value can constitute sex discrimination contrary to Section 4(1), Section 8 and Section 10 (1) of the *Code*. Note that I use the work 'can' instead of the word

> 'does' because the Commission itself will be required to decide the matter."

[31] And at paragraph 19 he states:

> "19. Four other principles support my conclusion. First, that a broad and liberal construction is required when one is considering human rights legislation, because of its quasi-constitutional status. This principle appears in the judgment of the Supreme Court of Canada in *Action Travail des Femmes v. Canadian National Railways Co., supra.* Secondly, that with respect to the *Code*, it is not necessary to prove an intent to discriminate. Thirdly, that a decision to dismiss as outside the jurisdiction of the Commission should only be reached in the clearest cases and fourthly, that the question of very the very broad language of the *Code* includes structural and pay discrimination is a question to be decided by the Commission itself. The authority for this last proposition is the decision of the Supreme Court of Canada in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756."

[32] In response to a series of arguments advanced by the counsel for Toronto Star, Justice Gray also turned his mind to the alleged absence of technical standards. He wrote at paragraph 28,

> "The second argument, namely, that by reason of the alleged absence of technical standards, the Commission could not deal with the matter on a practical basis does not evidence a lack of legislative intent to have the *Code* apply in situations similar to the present case. The Commission will decide what standards are to apply within its mandate."

[33] In *Discrimination and the Law, supra,* the authors summarize the impact of *Nishimura* at Section 12.5 (d), page 12-79:

> "This decision is of obvious importance in Ontario, because it offers women who are excluded from the scope of the *Pay Equity Act* an avenue to pursue their claims of pay discrimination. It may also impose a significant burden on the Commission, because of the need to develop specialized expertise and workable standards for the investigation of these complaints. The absence of technical standards in the *Human Rights Code* does not foreclose an investigation into questions of equal pay for work of equal value, but it does render the inquiry more difficult. The Ontario Commission, and all other Human Rights Commissions if this decision is adopted in other jurisdictions, may now be required to develop guidelines for the investigation of equal pay for work of equal value complaints, and in doing so it is submitted that the

> existing legislative schemes ought to be relied on for guidance." (emphasis added)

[34] This would not be the first tribunal or court to address legal issues in the absence of detailed standards in legislation, if any standards at all. It is not an insurmountable challenge nor is it an unusual challenge for any tribunal or court. If the Commission is not able to meet the challenge of demonstrating the workable standards in proving the complaint then the complaint will fail. Indeed it is worth observing that there is no provision within the *Act* which contains the type of technical standards that the Village advocated is required in its submission or that seem to pervade the decision of Justice Ball in *Dumbovic, supra.* If one accepted the Village's argument in this instance it would raise serious questions about the efficacy of many other portions of the *Act*.

[35] The Board adopts the reasoning of Justice Gray that the alleged absence of technical standards does not evidence a lack of legislative intent to have the *Act* apply in the situation advanced by Ms. Lockhart.

[36] The Commission in its submission aptly referred to the decision in *Kirk Johnson v. Michael Sanford and Halifax Regional Police Service*, (Board Member Girard), as an example where the Board in that case was required to rely in part on expert evidence to establish standards to assess racial discrimination. Board Member Girard said at page 33 of his decision:

> "I have found that it satisfies this test for the reason stated above. Expert evidence in discrimination cases can be statistically based, with an error of scientific validity, but often it is highly qualitative and uses the 'softer' methodologies of the social sciences. This is clearly appropriate when we are dealing with the illusive but nonetheless power concept of human dignity that underlines human rights law. The often subtle nature of discrimination puts a high burden on complainants, and I would urge future boards not to be too quick to characterize proffered expert evidence as merely 'helpful' and thus exclude it."

[37] The Board takes the point that Board Member Girard makes is that at times a board will have to consider sources of evidence, including expert evidence, to help establish criteria by which an allegation of discrimination can be assessed. In this case the Board will have to consider the evidence presented and determine whether workable standards have been demonstrated so as to assess whether there has been discrimination against Ms. Lockhart as she alleges.

[38] Since the *Dumbovic, supra,* decision was the main authority relied upon by the Village, the Board wanted to make a few observations as to why it did not find the reasoning of *Dumbovic, supra,* compelling in this case. First, the Union strategy to employ its three-prong attack using collective bargaining, the employment standards legislation and the Human Rights complaint process seem to be a matter of significant influence to the court in that case. So too were the procedural deficiencies in a review of the Commission's initial decision which review was carried out by Board Member Prisiack. It was also a significant concern to the Court that complaints were filed by a few of a union membership, the majority of which had reached

resolution with the universities through the collective agreement process. It seems that as a result of the Court's concern with these factors that the decision did not give full expression that at the core of a pay equity complaint is a human right. In the Board's view the Court in *Nishimura, supra,* fully recognizes the principle and recognizes that human rights legislation is "quasi-constitutional" in nature and that as a remedial legislation, it is to be given such interpretation as will best ensure that its objects are attained. See: *Insurance Corp. of B.C. v. Heerspink,* [1982] 2 S.C.R. 145: *Canadian National Railway v. Canada (Human Rights Commission),* [1987] 1 S.C.R. 1114.

[39] The Board is also influenced by the decision in *Canada Safeway Limited v. Saskatchewan Human Rights Commission,* [1999] S.J. No. 228 (Sask. Q.B.) (Q.L.). In that case Justice Wimmer relied on the general prohibition of discrimination provisions of the *Saskatchewan Human Rights Code* to reject an argument that provisions within the *Labour Standards Act* precluded the jurisdiction of the *Code* in investigating a complaint of discrimination for unequal pay for similar work. While the decision does not deal with an equal pay for work of equal value complaint I think the observations of Justice Wimmer are appropriate as to the general approach to human rights legislation. In rendering his decision Justice Wimmer said in reference to *Nishimura, supra,* at paragraphs 12-13:

> "12. …… I do not necessarily agree that it is for the Commission itself to decide, as a matter of law, whether this or that falls within the purview of the *Code*. Nevertheless, I do find the reasons for judgment persuasive insofar as they approve a means for determining if a particular employer's pay practices offend gender discrimination prohibitions.
>
> 13. Counsel for *Canada Safeway* dismisses <u>*Nishimura*</u> as 'wrongly decided' but I am not so sure. In any event, it seems to me implicit on the Court of Appeal disposition of *Canada Safeway*'*s* application that the class complaint, embracing as it does both the employer and the union's representing the employees, as within the scope of Commission's authority to investigate. It is for a board of inquiry, should one be appointed following the investigation to decide whether facts established by the evidence constitute the kind of gender discrimination disallowed by the *Code*. Should the Board commit some reviewable error in the process, then is the time for aggrieved parties to seek a remedy."

<u>Conclusion on Board's Jurisdiction</u>

[40] In summary the Board finds the general prohibition of discrimination on the basis of sex under Section 5 (1) (d) and (m) of the *Human Rights Act* does give it jurisdiction to hear the complaint brought by Linda Lockhart. In the absence of express technical standards the Commission will have the burden of demonstrating those workable standards and producing evidence to demonstrate a breach of those standards by the Village. While this may make an inquiry into a complaint of unequal pay for work of equal value more difficult, it is neither unusual nor insurmountable.

Second Motion – Employment status of Peter Pothier

[41] The Village brought a second preliminary motion asking the Board to determine before the hearing the employment status of Peter Pothier. The purpose was to determine whether comparison to Mr. Pothier's position is valid for the purpose of assessing the value of Ms. Lockhart's previous position as Clerk of the Village. It is alleged in the pre-hearing brief that Mr. Pothier was actually hired by the New Minas Water Commission which was incorporated in 1982 as a separate legal entity, and not the Village of New Minas.

[42] At the hearing on February 29, 2008, the Board indicated to the Village that while the issue may be a valid one for the hearing, in absence of any evidentiary basis the Board was not in a position to make the factual determination required to address the motion. Indeed, the very assertion that Mr. Pothier was an employee of the Water Commission and not the Village of New Minas would require a detailed understanding of the facts should the hearing proceed. The Board determined that it was not in a position to make those findings in the preliminary application with no evidentiary basis.

[43] For these reasons the Board dismissed the second motion brought by the Village subject to its right to raise the issue of comparison to Mr. Pothier's position during the hearing.

DATED at Truro, Nova Scotia, this 17th day of March, 2008.

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Dennis James
Board of Inquiry