IN THE MATTER OF: The Nova Scotia *Human Rights Act*

- and -

IN THE MATTER OF: Board File No. 51000-30-H13-2584

BETWEEN: **Robert Morris**
("Complainant")

- and -

Mariana Cowan Real Estate Limited
("Respondent")

- and –

The Nova Scotia Human Rights Commission
("Commission")

DECISION OF THE BOARD OF INQUIRY

[1] The parties asked the Board of Inquiry (the "Board") to approve a settlement pursuant to s. 34(5) of the *Human Rights Act*, RSNS 1989, c 214 (the "*Act*"). The settlement provided to the Board was a "Withdrawal of Complaint" on the grounds that the matter had been dealt with in accordance with other concurrent legal proceedings. Normally the Board would expect to be provided with detailed minutes of settlement, however, in the circumstances of this case and for the reasons that follow, the Board is prepared to approve the "Withdrawal of Complaint" as a settlement.

Background

[2] The complainant, Robert Morris, was the former Chief Financial Officer of the respondent, Mariana Cowan Real Estate Limited. On or around December 2, 2013, the complaint's employment with the respondent ended.

[3] The complainant alleged that his employment was terminated because he has chronic pain and required accommodation. He brought a complaint to the Nova Scotia Human Rights Commission (the "Commission"), on July 15, 2014, claiming discrimination on the basis of disability. The respondent denied the allegation of discrimination.

[4] Prior to filing a human rights complaint, the complainant also made two Small Claims Court claims and an application to the Labour Board. These matters dealt with alleged breaches of contract associated with the employment relationship as well as allegations of wrongful dismissal and unpaid overtime. The respondent also brought its own action in the Supreme Court of Nova Scotia alleging breach of contract, negligence, and conversion.

[5] It is unnecessary to go into the details of these various legal proceedings. It is important to note, however, that the complainant was represented by counsel throughout whereas he was self-represented before the Board, and also that the related legal proceedings significantly overlapped with the issues raised in the human rights complaint.

[6] On April 16, 2015, the Commission decided to refer the human rights complaint to a Board of Inquiry pursuant to s. 32A(1) of the *Act*. On May 7, 2015, I was appointed by the Chief Judge of the Provincial Court of Nova Scotia to undertake this inquiry. By letter dated June 18, 2015, the Commission made me aware of this appointment.

[7] At the first pre-hearing teleconference in this matter, the Board raised the issue of multiple related proceedings, but the Commission required time to review those proceedings. At the second pre-hearing teleconference in this matter, the Commission took the view that there were some issues in the human rights complaint that would not be covered by the related proceedings. The respondent accepted that the Board had jurisdiction over the human rights complaint but nonetheless stated it wished to make an abuse of process motion. The Board set dates for materials associated with that motion.

[8] Before the abuse of process motion was heard, the respondent and complainant advised the Board that they had settled the human rights complaint as well as all of the related legal proceedings. However, both the respondent and complainant requested that those terms of settlement be kept confidential. The Commission stated that it was prepared to consent to the settlement and took the position that the complaint could simply be withdrawn pursuant to ss. 29(4)(d) and 32(1) of the *Act*.

Issue

[9] Can the parties to a human rights complaint withdraw that complaint by consent after a Board of Inquiry has been appointed? If not, can the Board approve a settlement without reviewing the terms of settlement where the matter has been dealt with in accordance with other legal proceedings?

Analysis

Can the parties to a human rights complaint withdraw that complaint by consent and without the approval of the Board after a Board of Inquiry has been appointed?

[10] Nova Scotia has a "gatekeeper" model for human rights complaints that grants the Commission full authority over which complaints are referred to the Board: *Nova Scotia (Environment) v Wakeham*, 2015 NSCA 114 at para 27 [*Wakeham*]. Accordingly, the *Act* empowers the Commission to dismiss complaints "at any time" in a variety of circumstances: *Act*, s. 29(4). Relevant to this matter is s. 29(4)(d) which authorizes the Commission to dismiss a complaint if "the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding."

[11] The Commission also has the authority to resolve complaints by way of settlement *before* a human rights Board of Inquiry is appointed. Section 32(1) of the *Act* reads:

> When, at any stage after the filing of a complaint and before the commencement of a hearing before a board of inquiry, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection [emphasis added].

[12] In *Halifax v Nova Scotia Human Rights Commission*, 2012 SCC 10 at para 22, the Supreme Court of Canada made clear that once a complaint is referred to a board of inquiry the Board is empowered "to determine any question of fact or law required to make a determination on whether there has been a contravention of the Act…." However, these powers must not be exercised in a way that alters or usurps the powers of the Commission outlined in the *Act*: *Wakeham*, para 27.

[13] The Commission took the position that since the substance of this complaint had been appropriately dealt with in other arenas (s. 29(4)(d) of the *Act*) it was empowered to settle the matter, pursuant to s. 32(1) of the *Act*, by way of a withdrawal of complaint signed by all of the parties. The Commission further argued that the Board could fulfill its reporting obligations under s. 34(5) of the *Act* by issuing a decision that acknowledged the withdrawal of complaint.

[14] The problem with this argument is that a board of inquiry had already been appointed pursuant to s. 32A(1) of the *Act*. Once a Board of Inquiry is appointed, it must "conduct a public hearing": *Act*, s. 34(1). By requiring the Board to conduct a public hearing and vesting it with the powers of a commissioner under the *Public Inquiries Act*, RSNS 1989, c 372 the Legislature has signalled its intention for human rights complaints, which the Commission has decided warrant referral to the Board, to be resolved in a public fashion.

[15] The *Act* makes clear that at this stage, only the Board can resolve a complaint that has been settled: *Act*, s. 34(5). The Commission's power to settle complaints is limited to instances "before the commencement of a hearing before a board of inquiry": *Act*, s 32(1). In my view, the hearing process is commenced when the Board is appointed by the Chief Judge of the Provincial Court of Nova Scotia.

[16] The *Act* states that if a settlement cannot be reached after referral to the Board, the Board must *continue* with its inquiry and make a finding of discrimination or non-discrimination: *Act*, ss. 34(6)-(7). It is noteworthy that the *Act* does not say that the Board must proceed to a hearing, instead it must continue with the inquiry that it is already conducting. This suggests that once a board of inquiry is appointed it has authority over a particular complaint and the Commission shifts to becoming only a party to the proceeding. This conclusion is reinforced by s. 33 of the *Act* which describes the Commission as one of a number of parties to the proceeding before the Board.

[17] While s. 29(4) of the *Act* does grant the Commission the power to dismiss a complaint at "any time" if certain circumstances arise, this power must be read in the context of the provisions that follow in the *Act*. The Commission's power to settle complaints unilaterally is constrained

by the appointment of a board of inquiry: *Act*, s. 32(1). Moreover, both sections must be read in the context of a chronological process and drafting that includes subsequent appointment of a board of inquiry.

[18] Once a board of inquiry is appointed, the *Act* requires it to do certain things which would be made impossible if complaints could be unilaterally dismissed or settled without its input. Therefore, once a board of inquiry is appointed, the parties to a human rights complaint may not simply withdraw that complaint by consent, as a way of effecting a private settlement, without a decision of the Board. To hold otherwise would nullify the Board's powers upon appointment outlined in s. 34 of the *Act*.

[19] A different conclusion might be reached in situations where the complainant legitimately did not believe its human rights complaint was warranted or in situations where the complainant did not want to proceed with an inquiry into the complaint. In these situations, the matter would not be ending because of a settlement or a dismissal by the Commission. Neither of these circumstances apply to this case, which involved a settlement of a variety of legal proceedings that included the human rights complaint.

Can the Board approve a settlement without reviewing the terms of settlement where the matter has been dealt with in accordance with other legal proceedings?

[20] In *Brown v St Vincent De Paul Society*, 2015 CanLII 56697 at paras 30-31 (NS HRC), this Board held that the Board's jurisdiction under the *Act* should be exercised in a way that facilitates "the resolution of complaints by way of settlement." In *Nova Scotia (Human Rights Commission) v Grant*, 2016 NSCA 37 at paras 12-13 [*Grant*], the Court of Appeal implicitly endorsed this interpretation. The Court of Appeal made clear that it is not necessary to find discrimination before the Board can effect a settlement agreement.

[21] In a concurring opinion in *Grant*, Saunders JA held that there is no affirmative obligation on the parties to prove to the Board that a settlement is in the "public interest": *Grant* at paras 25-26. Such a determination, according to Saunders JA, would require a public hearing and stymie the efficiency benefits of settlement: *Grant* at para 29.

[22] Nonetheless, Saunders JA went on to hold that the Board will, of course, "always review the terms of the proffered settlement agreement to assure itself that there is nothing to indicate its affirmation would *not* be in the public interest…": *Grant* at para 30 [emphasis in original]. Examples of a settlement not in the public interest included agreements that are "a sham, clearly unfair, or obtained through duress": *Grant* at para 30.

[23] In this case, all that was provided to the Board was a "Withdrawal of Complaint" form, which stated that the matter had been "dealt with … in accordance with, *The Small Slaims Court Act* and the *Labour Standards Code*." The more exhaustive terms of settlement were not provided to the Board. The Withdrawal of Complaint form also advised the Board of the Commission's position:

> The Commission is in agreement with the complaint being withdrawn, as it is in the public interest to discontinue this proceeding. The Commission is satisfied the matter has been dealt with in accordance with the proper administration of the *Nova Scotia Human Rights Act*.

[24] When the Board inquired whether the Commission had reviewed the settlement terms in reaching its position, the Commission advised that it had not. The Commission also advised that it was presently revising its policy on "confidentiality and publishing information as it relates to settlement agreements" and that this policy was not publicly available but would be in the future.

[25] It is somewhat concerning that the Commission is consenting to settlements for which it has not reviewed the terms of settlement. But as will be discussed below, there are circumstances in this case that mollify those concerns.

[26] The Board could have required the parties to provide it with the terms of settlement. However, this would place the Board in the position of supervising and reviewing settlements in arenas outside its scope. Moreover, as the Court of Appeal has made clear, one of the principal purposes of the *Act* is to encourage settlement and the Board should not be taking approaches that inhibit or delay settlement: *Grant* at paras 13-15.

[27] On the other hand, approving settlement agreements reached outside the *Act*, without reviewing them and sharing them publicly, deprives the public (and future human rights complainants) of important information on how the human rights system is working in Nova Scotia. It also means that there is no opportunity to perform the type of minimal check, as Saunders JA discussed in *Grant* at para 30, to ensure that agreements are at least not clearly against the public interest.

[28] While the normal approach of the Board will involve a review of the terms of settlement before giving its approval under s. 34(5) of the *Act*, there are two factors that strongly support not doing so in this case. First, the complainant was represented by counsel in the related legal proceedings. The complainant advised that he received legal advice in settling the related proceedings that incorporated his human rights complaint. Secondly, the related proceedings were grounded in statutory frameworks that had the potential to significantly consider many of the issues raised in the human rights complaint.

[29] Were either of the above factors not present, this Board would be reluctant to approve the "Withdrawal of Complaint" provided as a settlement by the parties. But this is not a case where the Board needs to be concerned with a self-represented litigant entering into an unfair settlement nor is it a case where the settlement appears to be constructed to defeat scrutiny under the *Act*.

[30] Rather, this case is a situation where there were multiple proceedings dealing with many of the same issues and those proceedings were at a more advanced stage when this Board was ultimately appointed. I am confident that the settlement of those proceedings resolved the issues between the parties and I see no reason to complicate the settlement process further.

[31] Therefore, the Board is prepared to approve the settlement provided without reviewing the more detailed terms of agreement. There is no further reason to continue this inquiry.

Dated at Halifax, Nova Scotia, this 16th day of August, 2016.

"Benjamin Perryman"

Board of Inquiry Chair

Withdrawal of Complaint

This Withdrawal dated November 29, 2015

BETWEEN:

Robert Morris
("Complainant")

-and-

Mariana Cowan Real Estate Limited
("Respondent")

-and-

The Nova Scotia Human Rights Commission

Background Information

1. The Complainant made a complaint under the *Human Rights Act* on July 15, 2014 against the Respondent alleging discrimination.

Terms of Withdrawal

2. The parties have dealt with the matter in accordance with, *The Small Claims Court Act* and the *Labour Standards Code*. Therefore, the complainant is hereby withdrawing the complaint.

3. The Commission is in agreement with the complaint being withdrawn, as it is in the public interest to discontinue this proceeding. The Commission is satisfied the matter has been dealt with in accordance with the proper administration of the *Nova Scotia Human Rights Act*.

Signed by:

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Complainant, Robert Morris Kymberly Franklin, Commission Counsel

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Respondent, Mariana Cowan
Real Estate Limited

Dated at Halifax, Nova Scotia this 29th day of November, 2015.