CASE NUMBER: 5100-30-H10-1896

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY

IN THE MATTER OF:	**The Human Rights Act, R.S.N.S., 1989, c.214 as amended.**
BETWEEN:	**Danny Patterson**
	COMPLAINANT
	- and -
	IWK Health Centre
	RESPONDENT
	- and -
	The Nova Scotia Human Rights Commission

DECISION ON PRELIMINARY MOTION

BOARD OF INQUIRY CHAIR:	Cynthia L. Chewter
COUNSEL FOR THE COMMISSION:	Lisa Teryl
COUNSEL FOR THE RESPONDENT IWK:	Patrick Saulnier
COMPLAINANT DANNY PATTERSON:	Did not appear
HEARD:	December 13, 2012
POST-HEARING SUBMISSIONS:	January 14, 2013 (IWK) January 15, 2013 (Commission)
DECISION:	June 13, 2013

[1] This is a preliminary motion by the respondent IWK Health Centre seeking to dismiss a human rights complaint on the basis that it was filed outside the 12 month limitation period contained in section 29(2) of the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended.

[2] The respondent argues that interpretation of the limitation period is a matter of simple mathematics: the limitation begins to run when the matter arises and expires 12 months later. The Commission argues that it has a practice of suspending the running of the limitation during internal appeals; if this is taken into account, the limitation period had not expired when the complaint was filed. If the respondent is correct, I must dismiss the complaint as filed out of time. If the Commission is correct, the complaint should proceed to a hearing on the merits.

[3] The relevant portions of section 29 read as follows:

> **Procedure on complaint**
>
> 29 (1) The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where
>
> (a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or

> (b) the Commission has reasonable grounds for believing that a complaint exists.
>
> (2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.
>
> (3) Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable.

[4] The limitation period is a relatively new feature of the *Human Rights Act*, having come into force on July 1, 2008, along with the Director's concomitant discretion to extend it. Prior to 2008, there was no time limit for making a complaint under the *Act*.

Facts

[5] At this point, there has been no hearing on the merits of Mr. Patterson's complaint, so I will simply summarize the allegations contained in his complaint dated January 20, 2012: Mr. Patterson has Type 1 diabetes and must take insulin multiple times per day. He does so with an insulin pen. Mr. Patterson was employed as a casual youth care worker at the IWK in the CHOICES program for adolescents seeking treatment for substance abuse,

mental health or gambling. On August 14, 2010 he took insulin in the presence of program participants. The IWK took issue with this as it was felt that this could act as a trigger for youths with a history of injection drug use. Mr. Patterson was placed on leave while the IWK investigated. On November 16, 2010 he received a disciplinary letter and was given a 3 month Development Plan where he would be supervised and take educational classes as the IWK concluded that his use of insulin in the presence of program participants showed a lack of professional judgment and boundaries. Mr. Patterson agreed to take insulin privately in the future, but disagreed with the discipline imposed by the IWK. His offer to have someone from QEII Diabetes Management Team present on his condition was declined. He refused to participate in the Development Plan and has not returned to work for the IWK.

Procedural History

[6] The procedural history is particularly important to this motion, so I will set it out in some detail. The parties are agreed that the limitation period started to run when Mr. Patterson was disciplined on November 16, 2010. They are further agreed that the complaint in this case does not involve ongoing discrimination.

[7] Mr. Patterson contacted the Human Rights Commission shortly after the matter arose (in fact, before he was disciplined.) The Commission forwarded an Intake Form, which he completed and returned on September 17, 2010.

[8] On June 30, 2011 the Commission contacted the IWK to advise that Mr. Patterson had approached the Commission and that the matter was in "the pre-complaint assessment stage." The Commission invited the IWK to respond.

[9] On August 15, 2011 (after requesting and receiving an extension) the IWK responded to the Commission with a four-page letter.

[10] The intake officer at the Commission decided not to proceed further with the complaint. Mr. Patterson objected and filed a Request for Review on September 16, 2011. His file was forwarded to the Commission Director for a decision on whether the file should proceed.

[11] November 16, 2011 marked one year from the date that Mr. Patterson was disciplined. That date came and went while the file was with the Director awaiting the outcome of Mr. Patterson's appeal.

[12] On December 15, 2011 the Director allowed Mr. Patterson's appeal. Only then did the Commission make the prescribed complaint form available to Mr. Patterson. He filed his complaint with the Commission on January 20, 2012.

The Commission's Practice with respect to Complaints

[13] The term "complaint" is not defined in the *Human Rights Act* but section 29(1)(a) of the *Act* requires that all complaints be in writing, and "on a form prescribed by the Director." Commission counsel indicated that the Commission has custody of the prescribed forms and will not release a form to a potential complainant until the Commission sees fit to do so (presumably because the Commission has investigated and determined that it will accept and deal with the complaint.) In other words, a person cannot approach the Commission and simply receive the prescribed complaint form on request. The Commission maintains tight control over the prescribed

form and will not accept a complaint on anything other than the prescribed form.

[14] In this case, Commission counsel indicated that the Commission did not make the prescribed form available to Mr. Patterson until after his appeal was allowed by the Director on December 15, 2011. As such, it was impossible for Mr. Patterson to file a complaint on the prescribed form prior to that time. This is through no fault of Mr. Patterson, who appears to have co-operated with the Commission and acted with dispatch throughout the process.

[15] The Commission created its Policy on Legislative Time Limitation Period prior to the time limit coming into force on July 1, 2008. One objective of this policy is "to establish a process which gives Complainants a fair chance of meeting the limitation period stipulated in Section 29(2)." The first general principle of the policy is that "the policies and procedures of the NSHRC governing the intake and assessment of new Inquiries need to ensure that the Complainant's ability to make a complaint within the 12 month limitation period is not hindered." To this end, the policy requires that "During the initial assessment of a matter, Officers with the Intake Team are

required to pay close attention to the 12 month limitation period," and "Notwithstanding where in the process a matter may be, it will be referred for formal investigation no later than 6 weeks before the expiry of the 12 month limitation period." It is clear from this policy that the Commission took steps to adapt to the introduction of the limitation period.

[16] Nothing in the policy addresses the limitation period in the context of internal appeals to the Director (and in fact, while the Director's discretion is exercised under s.29(4) of the *Act*, the internal appeal process is not referenced in the *Act*. It is entirely a creature of Commission policy.) Commission counsel advises that at least since 2009, the Commission has had an unwritten policy of calculating the limitation period by excluding time elapsed during an internal appeal.

[17] In this case, the internal appeal encompassed the period from September 16, 2011 when Mr. Patterson filed his Request for Review, through December 15, 2011 when the Director allowed his appeal. If this three-month period is excluded from the calculation, as is the Commission's practice, then the limitation period in Mr. Patterson's case did not expire until February 15, 2012. The period from November 16, 2010 (the date the

limitation began to run) through September 16, 2011 (the date of the Request for Review) is 10 months; the period from December 15, 2011 (when the appeal was allowed) through February 15, 2012 (the date the Commission argues the limitation expired) makes up the remaining two months, for a total of 12 months.

Extension of Time under s.29(3) of the *Human Rights Act*

[18] It is common ground that no extension of time to file the complaint was sought or received under s.29(3) of the *Human Rights Act*. Certainly there was no express request for an extension. Nor is the Commission arguing that there was an implied extension by virtue of acceptance of the complaint and appointment of a Board of Inquiry. The Commission takes the view that such an extension was unnecessary in Mr. Patterson's case as the 12 month limit had not expired. The Commission is also of the view that once a Board of Inquiry is appointed, the Commission becomes a party in the case and loses the power to consider an application to extend time under s.29(3). On the Commission's view, s.29(3) is no longer open to Mr. Patterson. The parties agree that if I find that the limitation period has expired, I must dismiss the complaint as filed out of time. I have no

jurisdiction to invoke s.29(3) myself, as it lies in the exclusive discretion of the Director.

Issue

[19] Had the 12 month limitation period in s.29(1) of the *Human Rights Act* expired before Mr. Patterson filed his complaint?

The Burden

[20] The parties are agreed that the respondent IWK bears the burden of showing non-compliance with the limitation period. As such, I will set out the respondent's arguments first.

The Respondent IWK's Arguments

[21] The respondent IWK argues that this is a simple math exercise based on the plain meaning of the section: a time limit exists for filing complaints under the *Human Rights Act*. The time limit begins to run when a matter arises and expires 12 months later. Here the parties are agreed that the time period began to run when Mr. Patterson was disciplined on November 16, 2010. The respondent says it expired 12 months later on November 16, 2011. While Mr. Patterson had contact with the Commission during that 12

month period, he did not file a complaint on the prescribed form within that period, nor did the Commission extend the time for filing a complaint under s.29(3) of the *Act*. As the Board of Inquiry is given no power to extend the limitation period, the respondent argues that if I find that the time limit has expired, I must dismiss the complaint.

[22] In support of their argument, the respondent relies on *ExxonMobil Canada Ltd.* v. *Carpenter* 2011 NSSC 445, in which Justice Moir concluded that the term "complaint" in s.29(1) means a complaint in writing on the prescribed form, and not earlier written communications with the Commission, such as the Intake Form.

[23] The respondent argues that it is irrelevant that the complaint is a near-miss (filed some two months and four days out of time by the respondent's calculation) as I have no jurisdiction to extend that period either under the *Human Rights Act*, or the *Limitation of Actions Act*, R.S.N.S. 1989, c.258, as amended, which does not apply in the human rights context. Human rights cases addressing the issue of undue delay or prejudice are the product of different statutory regimes and while those considerations might be relevant

to an application to extend the limitation under s.29(3) of the *Act*, the respondent argues they have no application before me.

[24] The respondent takes issue with the Commission's unwritten policy of suspending the limitation period during internal appeals and argues that this interpretation renders the 12 month period essentially limitless.

[25] The respondent argues that Commission policy and practice must be consistent with the terms of the statute. In a contest between Commission policy or practice and the statute, the statute must prevail to the extent of any inconsistency.

[26] The respondent further points out that while a decision under s.29(3) to extend the time for filing a complaint is subject to judicial review, the Commission policy on calculating the limitation period is not, which leaves respondents without recourse.

[27] The respondent suggests that if Mr. Patterson was unhappy with the Commission withholding the prescribed complaint form he could have sought judicial review at the outset.

The Commission's Arguments

[28] The Commission makes two arguments. First, its unwritten policy of suspending the running of the limitation period during internal appeals means that Mr. Patterson's complaint was filed in time, as the complaint was filed on January 20, 2012 and by their calculation, the limitation period did not expire until February 15, 2012. Counsel points out that the *Act* does not refer to "calendar months" or "consecutive months."

[29] Second, Commission counsel argues in the alternative that *ExxonMobil* stands for the proposition that the Intake Form is the complaint form for the purposes of the *Act*, citing for this proposition the following portion of the judgement, which reads: "The complaint is prescribed even though information is supplied, such as on the intake questionnaire." If filing the Intake Form stops the limitation period, Mr. Patterson has no difficulty at all, as he filed his Intake Form on September 17, 2010, even before he was disciplined.

[30] The Commission acknowledges that any delay in this case is that of the Commission, not Mr. Patterson. Further, if the respondent's

interpretation is accepted, it puts Mr. Patterson "in an impossible position." Mr. Patterson could not make a complaint on the prescribed form until the Commission provided it to him, and the Commission did not provide him with the prescribed form until more than 12 months had passed.

General Approach to the Construction of Human Rights Legislation

[31] While human rights law in Canada is statute-based, it has long been recognized that human rights statutes have a special status in Canadian law and must be construed accordingly. A human rights statute "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law." *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at 158.

[32] Courts and tribunals have consistently given human rights legislation the wide and liberal construction necessary for the achievement of its important objects. Russel W. Zinn, *The Law of Human Rights in Canada*, loose-leaf (Toronto: Thomson Reuters, 2011) at p. 1-2.

[33] Nova Scotia's *Human Rights Act* lists six purposes in section 2:

Purpose of 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;
(e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and
(f) extend the statute law relating to human rights and provide for its effective administration.

[34] In order to give full effect to these purposes, it is necessary to set the *Human Rights Act* apart from other statutes. Courts and tribunals must not "inspect these statutes with a microscope, but should 'give them a full, large and liberal meaning consistent with their favoured status in the lexicon of Canadian legislation." *Canada (Attorney General) v. Rosin*, [1991] F.C. 391 at 401 per Linden, J.A., quoted with approval by Lamer, C.J. in *University of British Columbia v. Berg*, (1993), 18 C.H.R.R. D/310 at para. 32.

What is a "complaint" under s.29 of the *Human Rights Act*?

[35] Let me deal first with the meaning of "complaint" in section 29 of the *Act.* I agree with the respondent that *ExxonMobil* held that a "complaint" within the meaning of s.29 is a written complaint on the prescribed form and nothing else. The Intake Form cannot be the "complaint" for the purposes of s.29 unless the Director prescribes it so. I note that the Commission's own Policy on Legislative Time Limitation Period defines "complaint" in a manner consistent with the Court's decision in *ExxonMobil.* In my view, Commission counsel has misinterpreted *ExxonMobil.* I find nothing in that decision to support the contention that the Court elevated other forms of communication with the Commission to the status of "complaints."

[36] I am satisfied that the opposite conclusion in *Pinocchio's on Third and Columbia Inc.* v. *British Columbia (Human Rights Commission)*, [1988] B.C.J. No. 3218, 11 C.H.R.R. D/60 is readily distinguishable on the basis that the B.C. legislation contained no definition nor particular requirements for complaints. In any event, *ExxonMobil* is binding on me, and even if it were not, I would have come to the same conclusion.

Is the 12 month limitation period suspended during internal appeals?

[37] After giving the matter a great deal of consideration, I am unable to accept the respondent's argument that the limitation period runs without break until it expires, as to do so would require that I completely disregard not only the Commission's policies and practices – the way it performs its work - but also the manner in which the human rights process differs from civil litigation.

[38] While the plain meaning of the section accords easily with the interpretation the respondent urges, the Commission's interpretation better accords with the purposes and context of the *Human Rights Act* and its administration. As Duff, C.J. wrote in *McBratney* v. *McBratney*, [1919] 59 S.C.R. 550 at 561 nearly a century ago:

> Of course where you have rival constructions of which the language of the statute is capable, you must resort to the object or principle of the statute...; and if one finds there is some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment, runs counter to the principle and spirit of it.

[39] Professor Ruth Sullivan summed up the principle this way: "If the ordinary meaning is clear, but an alternate interpretation is plausible and

more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted." Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (Markham: Lexis Nexis, 2008) at p.281.

[40] The legislature has endowed the Commission with broad powers to screen, investigate, administer and carry complaints under the *Human Rights Act*. The Supreme Court of Canada described this as a "complete regime" and the Commission's role with respect to complaints as including gate keeping and administration. *Halifax (Regional Municipality)* v. *Nova Scotia (Human Rights Commission)* 2012 SCC 10 at para. 20. Nova Scotia's Commission has put into place an extensive pre-complaint process and has chosen to maintain tight control over the prescribed complaint form.

[41] The Nova Scotia Commission's practices and processes have not gone without criticism. In *ExxonMobil* at paragraph 22, Justice Moir commented:

> I see no support in the *Human Rights Act* for the commission's practice of taking over the complaint laying process. The legislation does not permit the commission to refuse a complaint delivered by a complainant rather than one developed with the commission.

[42] Now that a limitation period applies, it may be that it is no longer appropriate for the Commission to maintain such tight control over the

prescribed complaint form. However, it is not for me to question the wisdom of the Commission's processes. I will simply say that it should not take more than a year for the Commission to make the prescribed complaint form available to a potential complainant.

[43] In my view, the Commission may adopt whatever policies and practices it sees fit, as long as those policies and practices are consistent with the *Human Rights Act*. Here, the respondent argues the Commission's policy of suspending the limitation period during internal appeals is inconsistent with the *Act*. I am not satisfied that this is so.

[44] It has long been recognized that the ordinary law of limitations cannot simply be transposed on statutory regimes such as human rights commissions. In *West End Construction Ltd.* v. *Ontario (Ministry of Labour)*, [1989] O.J. No. 1444 at para. 21 the Ontario Court of Appeal held that "the Code is neither fish nor fowl for limitation purposes. It does not create any cause of action which fits within the traditional format of the *Limitations Act*."

[45] The Nova Scotia Court of Appeal took a similar view in *Alcott* v. *Walker* (1997), 160 N.S.R. (2d) 1 in which the Court held that Nova Scotia's *Limitation of Actions Act* does not apply to proceedings under the *Residential Tenancies Act*.

[46] While one effect of this is that complainants under these processes cannot have recourse to extension of any applicable limitation under s.3(2) of Nova Scotia's *Limitation of Actions Act*, another is that Boards of Inquiry must apply the ordinary common law of limitations with caution in what the Ontario Court of Appeal termed "an alien statutory framework."

> The Limitations Act never contemplated socio-economic and pro-active legislation which permits remedies never before available to an aggrieved person and creates its own enforcement process. To repeat McIntyre J. in Simpsons-Sears, supra, the Code is legislation of "a special nature, not quite constitutional but certainly more than the ordinary." It is intended to ensure that the dignity of our citizenry is sustained and it is designed to maintain that purpose through administrative and judicial mechanisms which are quite alien to our traditional common law and statutory remedies. In short, the Code was never within the ambit of the Limitations Act and until the 1981 re-enactment, no limitation period applied to complaints under the Code. *West End Construction Ltd.* v. *Ontario (Ministry of Labour)*, [1989] O.J. No. 1444 at paras. 21, 39.

[47] The Court concluded: "If there is to be a limitation period, it must be fashioned to fit the Code." *West End Construction Ltd.* v. *Ontario (Ministry of Labour)*, [1989] O.J. No. 1444 at para. 33.

[48] One fundamental concept in the law of limitation periods is that it would be unjust for the period to run against an individual who cannot comply with it. Thus, there emerged the "discoverability" exception (see *Central Trust* v. *Rafuse*, [1986] 2 S.C.R. 147, along with statutory exceptions for minors and those under disability (see the *Limitation of Actions Act*, R.S.N.S. 1989, c.258, s.4), among others. There has been no need for the civil law of limitation periods to develop an exception for internal appeal processes because in civil litigation, the plaintiff controls when the writ is filed. The process is entirely different from statutory tribunals, such as human rights commissions, which exercise statutory gate-keeping and administrative functions that courts do not.

[49] One might point out that the Commission's practice of controlling the prescribed form can preclude complainants from filing for many months while the Commission does its administrative and investigative work. If the limitation period does not run during internal appeals, why should it run at

all until the complaint form is available to the complainant? In my view, the difference is small, but important: during the Commission's administrative and investigative work, the file is "in play" as it were – at any point the Commission could make the complaint form available. This is not so while the file is with the Director considering an appeal.

[50] Moreover, suspending the limitation period during internal appeals is as much – perhaps more – for the benefit of the Commission than the complainant. It gives the Commission a fulsome period in which to do the extensive preparatory work that is part of the pre-complaint process, and the Director as much time as necessary to consider and resolve a Request for Review.

[51] It might also be said that the legislature provided the Commission with the means to address limitation issues through the Director's extension power in s.29(3) and as such, there is no need for the Commission's policy on suspension of the limitation period during internal appeals. While the Commission's policy on suspension applies automatically and uniformly to all files undergoing an internal appeal, the discretion available to the Director under s.29(3) is limited to "exceptional circumstances" and must be

exercised only where it is in the public interest and after consideration of any prejudice to both complainant and respondent.

[52] In *ExxonMobil*, the Court took a narrow approach to extensions under s.29(3). In that case, the complainant's lawyer contacted the Commission 11 months after her matter arose. The lawyer was initially (incorrectly) referred to the Canadian Human Rights Commission. Two weeks before the limitation expired, the lawyer again contacted the Nova Scotia Commission and requested an Intake Form. The Form was sent with a cover letter requesting that it be returned within 28 days (which was after the expiry of the limitation period.) Neither the lawyer nor the Commission referenced the looming limitation period. Some weeks after expiry of the limitation, the complainant's lawyer filed the Intake Form. A few weeks after that, the Commission advised the lawyer of the need to request an extension under s.29(3). The Commission allowed the extension on the basis that the 28 day deadline referenced in the cover letter could have caused confusion, and since the confusion came from the Commission, the complainant should not be penalized. The Court set aside the Commission's decision as unreasonable.

[53] The respondent complains that the policy of suspension of the limitation period during internal appeals renders the time period for filing a complaint "limitless." I disagree. In this case, the respondent was well aware that the complainant had approached the Commission and in fact had already provided one written response. The internal appeal process extended the period by three months. While this is not insignificant, given the legislature's choice of a 12 month limitation period, it is also far from "limitless."

[54] The respondent also argues that by creating a uniform policy of suspending the limitation period during an internal appeal rather than using extensions under s.29(3), the Commission leaves respondents without recourse to challenge the Commission on this point. I reject this argument. It was open to the respondent to challenge, and the respondent did in fact challenge, the Commission's interpretation of the *Act* at this Board of Inquiry.

Conclusion

[55] Mr. Patterson has proceeded with dispatch throughout this process. It would be manifestly unjust to deny him the ability to file a complaint due to

Commission practices entirely beyond his control. The legislature imposed a 12 month time limitation on complaints but also clothed the Commission with broad powers to administer the *Act* and to adopt policies and practices with respect to its administrative functions. Once such policy relates to suspending the limitation period during an internal appeal. The respondent has not satisfied me that this policy is inconsistent with the statutory limitation period.

[56] The respondent's preliminary objection is dismissed.

DATED at Halifax, in the Halifax Regional Municipality, Province of Nova Scotia, this 13th day of June 2013.

Cynthia L. Chewter, Chair
Human Rights Board of Inquiry