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

and

IN THE MATTER OF: Board File No. S15-1289

BETWEEN:

Roberta Kelly
("Complainant")

- and -

Cape Breton Regional Municipality & Cape Breton Regional Police Service
(hereinafter collectively called "CBRM")
("Respondents")

- and –

Nova Scotia Government and General Employees Union
(hereinafter called "NSGEU")
("Respondent")

- and -

The Nova Scotia Human Rights Commission
(hereinafter called "NSHRC@)

PRELIMINARY DECISION ON SUMMARY DISMISSAL OF COMPLAINT

CHAIR: E.A. Nelson Blackburn, Q.C.

Complainant: Roberta Kelly, self-represented

Counsel: Demetri Kachafanas, Solicitor for Cape Breton Regional Municipality & Cape Brreton Regional Police Service

David Roberts, Solicitor for Nova Scotia Government and General Employees Union

Kymberly Franklin, Solicitor for the Nova Scotia Human Rights Comission

Hearing Date: By written submissions and oral submissions on November 10, 2016

BACKGROUND:

I was appointed by the Chief Judge of the Provincial Court of Nova Scotia, Pamela S. Williams, by appointment dated May 11, 2016, pursuant to a request received from the Nova Scotia Human Rights Commission (hereinafter called NSHRC) dated April 26, 2016, with respect to a complaint filed by Roberta Kelly dated October 8, 2015, against Cape Breton Regionial Municipality and Cape Breton Regional Police Service (hereinafter called CBRM) and Nova Scotia Government and General Employees Union (hereinafter called NSGEU).

Pursuant to a letter dated June 21, 2016, the NSHRC appointed me as the Board of Inquiry on the nomination of the Chief Judge of the Provincial Court to inquire into a motion adopted by the Commissioners of the NSHRC at a meeting on April 21, 2016, pursuant to section 32A (1) of the *Human Rights Act*, for the following motion:

> The motion that based on the available information, the complaint be referred to a Board of Inquiry pursuant to section 32A (1) of the *Human Rights Act* to determine whether discrimination has occurred on the basis of sex (gender) and further to determine if there is a systemic discriminatory issue.

Following receipt of my appointment of a one member board of inquiry to inquire into this complaint, I conducted a pre-hearing conference call on July 25, 2016, with the Complainant and Counsel for the parties to set dates and deal with other preliminary matters prior to the hearing, which has been scheduled for November 28 to and including December 2, 2016, in Sydney, Nova Scotia.

I received a request from the Complainant to issues subpoenas on certain employees of CBRM as well as a subpoena for an employee of NSGEU.

On October 27, 2016, I received notification from Counsel for CBRM that he wanted to make a motion to challenge some of the subpoenas requested by the Complainant as well as making a preliminary motion seeking dismissal of the complaint prior to the start of the hearing of this matter.

With respect to the motions by Counsel for CBRM, I requested that written submissions from him be filed with me and copied to the Complainant and Counsel for the other parties by October 31, 2016, and for the other parties to respond by written brief by November 4, 2016, and Mr. Kachafanas was to have a reply by November 7, 2016. I also requested that I wanted to hear oral argument from the parties on both the motion and the challenge to the subpoenas on Thursday, November 10, 2016, at 2:00 p.m. A conference call was held on that date to hear the parties and I reserved decision on these motions.

Summary Motion for Dismissal of Complaint

I find that I have authority to deal with preliminary motions and to establish the Board of Inquiry procedure which may lead up to summary dismissal of the Complaint by virtue of, inter alia, section 34(1) of the *Human Rights Act* which provides as follows:

> A Board of Inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the *Public Inquiries Act*.

Further, section 34 (7) of the *Human Rights Act* provides as follows:

> A Board of Inquiry has jurisdiction and authority to determine any questions 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 make any order pursuant to such decision.

Further, pursuant to the Board of Inquiry Regulations made under section 42 of the *Human Rights Act*, clause 7 provides as follows:

> A Board of Inquiry may receive and accept such evidence and other information, whether on oath, affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding, however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissable in a court by reason of any privilege under the law of evidence.

Also, I refer to an *Act Respecting Public Inquiries*, R.S.N.S. 1989 c. 372 as amended, clauses 4 and 5, which provide as follows:

> *Witness and evidence*
> *4.* The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing, or on solemn affirmation if they are entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commisioners deems requisit to the full investigation of the matters into which he or they are appointed to inquire.
>
> *Powers, privileges, immunities*
> 5. The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court.

Further, I was referred to a decision of the Nova Scotia Court of Appeal in *Kaiser v. Dural, a division of Multibond Inc*, 2003 NSCA 122 (CanLII), at paragraph 31, as follows:

> The Commission has not satisfied me that the board erred in considering these and similar factors in reaching its decision. There is nothing in the Act or in any cases referred to this court suggesting the proposition that the board is required to proceed with a full hearing once it has been appointed to adjudicate a complaint. In my opinion once appointed, the board is independent of the Commission and it is appropriate for it to consider everthing relevant to lawfully adjudicating the rights and interests of the parties before it. This is particularly so when the board is required to exercise its discretion in the interests of achieving justice between the parties in the context of an application regarding issues such as issue estoppel, *res judicata* and abuse of process. It may be that only upon the appointment of the independent board will the parties be afforded an opportunity to raise and fully argue such critical, preliminary matters.

Further, at paragarph 42 in Dural supra.:

> Considering the importance of finality in litigation referred to above along with the aim of avoiding duplicity, potential inconsistent results, undue costs, inconclusive proceedings, and ensuring just results in the particular case, I am satifised the board did not err in exercising its discretion to estop the Commissioner and Mr. Kaiser from proceeding to a full hearing before the board on Mr. Kaiser's complaint.

The decision in *Dural* considered the issue of *res judicata* and issue estoppel, which is not the situation before me in this inquiry; however, it correctly stated the law dealing with the Board's authority to use its descretion whether to proceed to a full hearing, once appointed.

I was further referred to a decision of the Human Rights Tribunal of Ontario, *Philip Matthews v. Chrysler Canada Inc.*, 2011 HRTO 1939 (CanLII), as well as a decision

of the Human Rights Tribunal between *Gloria Preddie v. Saint Elizabeth Health Care*, et al, 2011 HRTO 2098 (CanLII) at paragraph 19, where the respective Tribunals referred to Ontario Tribunal's rules of procedure, Rule 19A which gave them authority to have a summary hearing into whether an application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the application or part of the application will succeed. I was referred to paragraph 18 in the *Gloria Preddie* case supra., as follows:

> Rule 19A.1 reads as follows:
> 19A.1 The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the application will succeed.

Further, in *Preddie*, the Tribunal referred also to *Dabic v. Windsor Police Service*, a decision of the Human Rights Tribunal of Ontario, reported in 2010 HRTO 1994 at paras 7-9, as follows:

> A summary hearing is generally ordered at an early stage in the process. In some cases, the respondent may not have been required to provide a response. In others, the respondent may have responded but disclosure of all arguably relevant documents and the preparation of witness statements, which generally occur following the Notice of Hearing, will not yet have happened.
>
> In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.

> In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.

Notwithstanding the *Preddie* and the *Matthews* decision, supra., which were based on the Human Rights of Ontario rules of procedure permitting such application for summary judgment on the basis there is no reasonable prospect that the application or part of the application will succeed, I find the reasoning for summary judgment is also applicable to this hearing. Further, I find the provisions I quoted from the Nova Scotia *Human Rights Act* and the Nova Scotia *Public Inquiries Act*, the provision of the Nova Scotia Court of Appeal, in *Dural* supra., together with a decision of the Court of Queens Bench of Alberta in *Beier v. Proper Cat Construction Ltd.,* 2013 ABQB 351 (CanLII) at paragraphs 56 and 60, quoting *Canada v. Laman 2008* 1 SCR at 378 the Supreme Court of Canada all endorsed the value of summary judgment protocols.

> 56. Most legal systems rercognize that there is no reason to accord every party to an action full access to all states of the ligitation spectrum. The common law principle that a person has a right to be heard or to have his day in court is not more important than speedy resolution of meritless claims or defences the continuation of which drive up the cost of litigation for everyone not just those prosecuting an action or maintaining a defence which has no real prospect of success. Justice Sanderman opined in *Richter v. Chemerinski*, 2010 ABQB 302, para 16 that a sound summary judgment rule "balances the need … to bring relief to parties who should not needlessly be forced to come to court to establish an obvious unassailable position and the need to allow those who have a tenuous but arguable position to advance it". There is a need for a

mechanism which provides a "simple, orderly and prompt presentation of the substantive issues in dispute between the parties". Clark &Samenow, "The Summary Judgment", 38 Yale L.J. 423, 471 (1929).

60. In *Canada v. Lameman*, [2008] 1 S.C.R. 372, 378 the Supreme Court of Canada endorsed the value of summary judgement protocols:

> The summary judgement rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage.

I was also referred to *Hynes et al. v. Cape Breton Regional Municipality et al.* 2013 CanLII at 86224 where the Board of Inquiry dismissed complaints of three complainants on preliminary basis because the claims were not plausible on the fact of the record. This hearing was conducted in part by written submissions of the parties. The Board Chair at paragraph 48 stated:

> Accordingly, I exercise discretion to dismiss the complaints of Ms. Coffin, Mr. Hynes and Ms. Wadden as an abuse of process. I am mindful that each of Ms. Coffin, Mr. Hynes and Ms. Wadden have or may have a residual interest in the DCP but that does not affect the conclusion as the madatory retirement provision in the DBP is enforceable. I hasten to add that there should not be anything read in the conduct of the three complaints to suggest they acted inappropriately. They simply exercised their right to file a complaint and did so in good faith.

Accordingly, from the authorities cited, I am satisified this Board of Inquiry has the authority to set its own procedure and to rule on the preliminary motion of CBRM for

dismissal of the complaint on the basis the complaint does not allege an act of discrimination as defined in the *Human Rights Act*.

The motion by CBRM was supported by NSGEU and objected by the NSHRC and the Complainant.

In addition to the main motion for dismissal of the complaint from CBRM, it objected to the issuance of a number of subpoenas on behalf of the Complainant to the following:

Mayor Cecil Clarke
Chief Administrator Officer, Michael Merritt
Gordie MacDougall
Scott Thomas
Chief Peter MacIsaac
Deputy Chief Lloyd McCormick
Superintendent Walter Rutherford

The Complainant acknowledged in oral argument that she was withdrawing the subpoena to her husband, Constable Jerome Kelly, as he would be representing her.

Further, the subpoena requested of the Complainant for Jim Gosse, an employee relations officer for NSGEU is challenged by NSGEU.

I will deal first of all with the motion of the CBRM and supported by NSGEU seeking dismissal of the complaint.

ARGUMENT OF CBRM

Demetri Kachafanas argued on behalf of CBRM in written brief dated October 31, 2016, which he reaffirmed orally on November 10, 2016, that this matter arises out of a complaint filed by the Complainant who is a Constable with the Cape Breton Regional Police Service (CBRPS), against the CBRM and the NSGEU. The Complainant alleges that she has been discriminated against in her employment on the basis of sex, contrary to s. 5(l)(d)(m) of the *Human Rights Act* which states as follows:

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

He argues the complaint has been brought as a complaint of individual discrimination, rather than as a general complaint on behalf of all female CBRPS employees.

He argued the complaint is based on the seniority system contained in the CBRPS collective agreement between CBRM and NSGEU, that the seniority system gives advantages to male police officers who were employed with pre-amalgamation Cape Breton police departments. These officers have accrued greater seniority than the Complainant and other police officers who were hired post-amalgamation, due to their longer service with CBRPS and its predecessors.

He argued the Complainant additionally believes that CBRM has not followed its Employment Equity Policy on the basis that there has not been "active utilization" of the policy by CBRM. He said the sections of the Collective Agreement and Employment Equity Policy that are relevant to the complaint were reviewed by the Human Rights Officer in her report to the Commission are as follows:

> *28. The Collective Agreement between CBRM and CBRM Board of Police Commissioners*
> *and NSGEU effective from 2014-2018 stats at Article 23.13(c);*

> *"Candidates who have attained a score of 70% or greater on the exam shall be given points for seniority. Candidates shall be given prorated points for seniority as of the exam date. The list begins with the senior candidate getting 15 points (i.e. if the senior candidate has 30 years, he shall receive IS points; an employee with 10 years shall receive 5 points.) These points shall be added to the overall mark of each candidate."*

29. The CBRM Employment Equity Policy approved by Council on June 21,2011, states in part;

> *"The Cape Breton Regional Municipality Is committed to providing a workplace that is free of discrimination, where diversity is valued, and which is demographically representative of the community it serves at all job levels."*

The Policy speaks on recruitment and selection, accommodation in the workplace and covers all areas of employment fairness within CBRM. The Policy also states;

> *"CBRM will review this policy and procedure bi-annually. All current employees and bargaining agents will be invited to contribute to the review." This review of the policy has not been followed.*

Mr. Kachafanas argued the specific discriminatory treatment that the Complainant alleges she experienced relates to three promotional routines that she competed in. The first took place in 2010, the second in 2012, and the third in 2015; however, he argued the complaints relating to the 2010 and 2012 promotional routines are outside of the twelve month limitation period established by s. 29(2) of the *Human Rights Act*.

Mr. Kachafanas argued the Complainant was not promoted in any of these promotional routines. In 2012, one female officer with the same seniority as the Complainant was promoted, as well as 4 male officers. In 2015, three male officers were promoted.

He argued it was agreed by the Complainant during investigation of the complaint that she would not have received a promotion even if seniority was not considered as a factor. This was acknowledged by the Human Rights Officer, who nevertheless recommended that the complaint be referred to a Board of Inquiry. He said HRO Tarr felt there was a "public interest" in having the complaint proceed due to the employment equity issues raised by the Complainant. At paragraph 37 of her report, HRO Tarr stated that:

37. if the points for seniority in the 2015 promotional routine were removed from the results Constable Kelly would not have been selected for promotion as she ranked 12th. This fact is agreed upon by all parties. IfCBRM had followed the employment equity policy Constable Kelly would have been promoted. The point system is a barrier for females to move ahead in the police services in CBRM and as such there is a public interest beyond that of whether or not Roberta Kelly would have been promoted if there was no point system.

He argued the Complainant does not allege that the male officers who were promoted had less seniority than her, or that she otherwise was better qualified than the male employees and should have been promoted instead of one of the male employees on the merits. She also does not allege that the seniority system denied female officers seniority or caused them to accrue seniority at a lesser rate than male officers, either directly or indirectly.

Mr. Kachafanas argued the Complainant's allegation that she was discriminated against is entirely based on the statistical allegations that there are fewer female officers employed with CBRPS than there are male officers, and that pre-amalgamation male officers have more seniority than her. For these reasons, and these reasons alone, she claims that the seniority system is tainted with systemic discrimination. There is no allegation that the seniority system treats female officers differently in any way except that the most senior officers with CBRPS are male.

Mr. Kachafanas argued the only issues that were referred to the Board of Inquiry by the Commission were those contained in the Complaint filed and signed by Cst. Kelly on Oct. 8, 2015. The Complaint form states as follows:

I Roberta Kelly, complaint against Cape Breton Regional Municipality (Cape Breton Regional Police) and/or Nova Scotia Government Employees Union, that from 2010 and continuing, the Respondent discriminated against me with respect to employment because of my sex (gender).

1. What is your protected characteristic(s)? Please explain.

I am one female police officer out of 18 female officers in a department with

200 plus members. I feel that the seniority clause in the collective agreement for promotional routine scoring gives pre-amalgamation male officers an advantage for promotion over female officers.

2. When did the alleged discrimination begin?
The discrimination began in 2010 when I had participated in a promotional routine for the rank of sergeant.

3. Please provide example(s) of discriminatory treatment you say you experienced by the Respondent.
Pre-amalgamation there were 7 individual police departments with no female police officers. Therefore, the majority of the male officers today have higher seniority than female officers. Based on current practices in the collective agreement, when an officer participates in a promotional routine, 15 points are given for seniority. It is calculated by using the amount of years served by the most senior officer participating in the promotional routine and then calculating the ratio based on that number. Female officers are already under represented and the seniority points create a distinct disadvantage. Also, there is no active utilization of the employment equity policy. Based upon that, I believe there could be systemic elements to the seniority points clause.

I applied for the promotional routine in 2010. the most senior male officer participating in the promotional routine that year had 31 years of service and I had only 10 years. At that time a maximum of 10 points could be given for seniority points. I was not successful at that promotional routine.
I participated in another promotional routine in 2012, as well as three other female officers. A female officer who has the same seniority as I received the promotion to sergeant, as well as 4 male officers. The Police Department now has 25 male sergeants and 1 female.
In 2014 seniority points were increased to 15 points. This year I participated in my third promotional routine. There were three male officers who received

promotions. The most senior officer who participated had 27 years seniority.

4. Why do you believe the treatment you received is because of your protected characteristic?

I believe the treatment I received is because of my gender due to the fact that the majority of male officers have more years served, which puts female officers at a disadvantage when applying for promotions. This appears to me to be a violation of the Employment Equity Policy that CBRM has in place. I further believe the NSGEU has not addressed this matter in a timely and appropriate matter.

5. Do you believe you are the only person who has experienced this treatment? Please explain.

No I do not believe that I am the only person who has experienced this treatment as this clause creates a barrier for all female officers who apply for promotions.

6. How did this affect you?

It has affected me in terms of lost wages and pension contributions, professional development, and career advancement. The promotion process makes me feel that females are not valued as much as my male counterparts.

7. How did you try to resolve the problem?

On July 6/15 I met with the then Director of Human Resources (Angus Flemming) and provided him with a formal letter of complaint. I explained how the seniority clause in the collective agreement was discriminatory. I also pointed out that it also seems to be in violation of the Employment Equity Agreement. Mr. Flemming stated that CBRM does not have a diversity coordinator and that they will assign someone to investigate. CBRM contracted Scot Thomas to investigate.

On August 28, 2015, Mr. Thomas met with CBRM's human resources and

legal department regarding my complaint and informed me that the Chief of Police (Peter McIsaac) was not receptive to his proposal to promote 3 female officers. The Chief called me the next day and told me that although he believes the seniority points clause was a barrier in the collective agreement, but there was a process that he had to follow in terms of promotions. I informed him that I had spoken with Union President (Joan Jessome) and she was willing to meet with CBRM to address this issue. The Chief expressed that he is willing and fully supports employment equity and diversity, but the guidance that he has been given by lawyers is that he has to abide by the police collective agreement. I discussed the recent recruitment process and the need to increase our female component was taken into consideration when a candidate, who did not pass the minimum requirements, was hired (a staff sergeant's daughter). I wanted to know why he supported employment equity and diversity for recruitment, but not for promotions. He said he consulted with three lawyers and has to follow the process that is in place a part of the collective agreement.

I filed a grievance with my union on July 13, 2015, and have received no response to date.

8. When did you last have contact with the Respondent? What happened?

I am still employed as a policy officer with Cape Breton Regional Police.

Mr. Kachafanas argued the issue is should the Complaint be dismissed on the basis that it does not allege an act of discrimination as defined in the *Human Rights Act*?

Mr. Kachafanas argued CBRM is not asking this Board to review the decision of the Human Rights Commission to refer this complaint to a Board of Inquiry. The Commission's decision to do so is administrative in nature, not adjudicative. Although the Commission has referred this complaint to a Board of Inquiry, such referral is not equivalent to a finding that the complaint is well-founded or reaches any sort of merit threshold. The Board is not bound to make any particular findings merely because the Commission has decided to refer a complaint to it, and

may adjudicate this motion on its merits. He referred to *Kaiser v. Dural*, 2003 NSCA122 (CanLII), where the Nova Scotia Court of Appeal held that the Board is independent of the Commission and is not bound to conduct a full hearing once appointed:

> *[31] The Commission has not satisfied me that the board erred in considering these and similar factors in reaching its decision. There is nothing in the Act or in any cases referred to this court suggesting the proposition that the board is required to proceed with a full hearing once it has been appointed to adjudicate a complaint in my opinion once appointed, the board is independent of the Commission and it is appropriate for it to consider everything relevant to lawfully adjudicating the rights and interests of the parties before it This is particularly so when the board is required to exercise its discretion in the interests of achieving justice between the parties in the context of an application regarding issues such as issue estoppel, res judicata and abuse of process. It may be that only upon the appointment of the independent board will the parties be afforded an opportunity to raise and fully argue such critical, preliminary matters.*

Mr. Kachafanas argued the mandate of a Board of Inquiry appointed by the NSHRC relates specifically to the investigation and evaluation of complaints of discrimination, as defined above. The mandate of the Human Rights Commission was recently described by the Commission in Adekayode v Halifax (Regional Municipality), 2015 CanLII 13866 (NS HRC) as follows:

> *14. Our provincial Human Rights Act has an important but less encompassing mandate than s.15 of the Charter. The provincial Act only authorizes us to evaluate and, where necessary, to redress discriminatory behaviours of individuals, groups, and agencies. Unlike the Ontario Human Rights Code, and the Charter itself, the Nova Scotia Act specifically defines what discrimination is for the purposes of our province and our Act. Our Act does not explicitly mandate us to look for and find historical disadvantage*
>
> *or even a stereotype. What our Act does require (and there is nothing new about this) is that the effect of differential treatment engage a component or aspect of*

> *the complainants human dignity. That is consistent, in my view, with the kind of analysis described and approved of in both Law v. Canada, and the Ontario Secondary Schools Teachers' Federation case, but still respectful of the difference in our legislation.*

Mr. Kachafanas argued employers are not obligated under Nova Scotia human rights legislation to implement affirmative action programs or give preference to women in respect of hiring. As was stated by the Board of Inquiry in Fortune v. Annapolis District School Board, [1992] N.S.H.R.B.I.D. No. 3:

> *47 One final observation. Under the Human Rights Act {Nova Scotia) no employer is obligated to hire women; similarly no employer is obligated to adopt and implement an affirmative action program or to give a preference to women in respect of hiring. However, because of the position of women in Nova Scotia as an historically disadvantaged group in respect of employment, employers must give full and fair consideration to the merits of female applicants.*

Discrimination is a specifically defined term in the *Human Rights Act*. The definition of discrimination is as follows:

> *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.*

Mr. Kachafanas argued the Complainant alleges that the discrimination in this case was systemic discrimination, also known as adverse effect discrimination. In O'Malley v. Simpsons-Sears, 1985 CanLII 18 (SCC), the Supreme Court of Canada defined adverse effect discrimination as follows:

> *On the other hand, there is the concept of adverse effect discrimination. It arises*

> *where an employer, for genuine business reasons adopts a rule or standard which is on its face neutral and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workforce.*

He argued human rights legislation does not require the elimination of all pre-existing social disadvantage. All that the Human Rights Act requires of employers is that they not engage in discriminatory conduct. In Wynberg v. Ontario, 2005 CanLII 8749 (ON SC), the court stated that:

> *[544] Section 15(1) does not create a general guarantee of equality between individuals or groups within society or a constitutional right to the remedying of social disadvantages or inequality at large. Governments have no constitutional obligation to remedy all conditions of disadvantage in our society.*
>
> *[545] A successful s. 15 claim requires claimants to establish more than their general disadvantage. Rather, they must compare their treatment to the treatment of others. As the Supreme Court of Canada said in Law at paragraph 57:*
>
> > *We must consider... the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups.*

He argued although that case dealt with claims of discrimination under s. 15 of the Charter rather than under provincial human rights legislation, there is no provision of the Nova Scotia *Human Rights Act* that would place a greater obligation on CBRM to remedy existing disadvantage suffered by women through affirmative action.

He argued unless the disadvantage suffered by a complainant arises from an act of discrimination by the respondents, a Board of Inquiry has no jurisdiction to order a remedy. The complainant must prove that the disadvantage she alleges is the result of differential treatment of her by the respondents on the basis of a protected ground under the Human Rights Act - disadvantage cannot be relied upon as proof of discrimination. In Keith v. College of Physicians and Surgeons of Ontario, 2013 HRTO1646 (CanLII), the Ontario Human Rights Tribunal stated that at paragraph 44 that:

> *[...] There must be evidence of adverse treatment or disadvantage resulting from the differential treatment. One looks to historic disadvantage to understand the impact of the differential treatment, not to eviscerate the need to prove current disadvantage In the specific case.*

Mr. Kachafanas argued CBRM submits that this complaint does not allege an act of discrimination as defined by the Act. He argued the complaint does not contain a single allegation to the effect that the seniority system made a distinction between female employees and male employees. The seniority system applies equally to all employees and only distinguishes between employees on the basis of years of service with CBRPS.

Mr. Kachafanas argued the Human Rights Act does not prohibit discrimination between employees based on their years of service with an employer. He submits other Nova Scotia legislation expressly recognizes the nondiscriminatory nature of seniority systems, such as section 57(2) of the Labour Standards Code and s.13(4)(a) of the Pay Equity Act both indicate that differences in wages between male and female employees based on a seniority system do not constitute discrimination.

He argued seniority systems are one of the core elements of labour law in Canada, and are incorporated into virtually every collective agreement in the country. They are a cornerstone employment right, often considered the most important right bargained for by unions, and have been regarded as an important tool for promoting equity in the workplace.

Mr. Kachafanas argued in *Amalgamated Transit Union, Local 741 v London Transit Commission***,** 2011 CanLII 76422 (ON LA), the arbitration board reviewed in detail the general principles pertaining to seniority and human rights:

> *(i) The General Principles on Seniority and Accommodation*
>
> *The issue at the heart of this case goes to the appropriate regulation of the tension that can arise between the seniority rights found in a collective agreement and the accommodation rights located in the applicable human rights legislation, with specific reference to an employee whose accommodation takes him or her to a position covered under a different internal seniority list within the workplace. The caselaw on this particular issue is neither plentiful nor clear. However, from the various positions taken in the arbitral, judicial and human rights tribunal caselaw over the years on the general issue of seniority and accommodation, some foundational legal principles that can serve as our starting point can be distilled.*
>
> *Seniority is entirely the bargaining table creation of the parties in a unionized workplace, and it is widely recognized in the law as a significant cornerstone of modern labour relations in Canada. In the oft-cited 1964 arbitration decision in Re Tung-Sol of Canada Ltd. (1964), 15 LAC 161, Judge Reville ruled that:*
>
> > *Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an*

> *employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement*
>
> *Also see: Battlefords and District Co-Operatives Ltd. v. R.W.D.S.U., Local 544,1998 CanLII 781 (SCC), [1998] 1 S.C.R. 1118.*

While seniority has been used in the past, on occasion, to reinforce direct discriminatory workplace practices in Canada (see, for example, Re Brass Craft Ltd. and I.A.M. (1983), 11 LA.C. (3d) 236 (Roberts), where the parties had negotiated separate male and female seniority lists, to the detriment of the female employees), this type of discrimination has since virtually vanished from the Canadian workplace.

The prevailing legal view today is that seniority is an important tool to promote equality at work. In Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital et al (1999), 1999 CanLII 3687 (ON CA), 169 D.LR. (4th) 489; 1999 CanLII 3687, the Ontario Court of Appeal, at para. 64, approvingly cited several sources, including the 1984 Royal Commission on Employment Equity, as authority with respect to seniority's equity attributes:

> *It has been said that seniority is "labour's premier equity tool and should be respected as such": the Abella Report at p. 220. "Seniority is a neutral system that is colour-blind, gender-blind, and age-blind...It also offers those with physical limitations the opportunity to insist on the right to try to perform a job.": P. Nash, L Gottheil, "Employment Equity: A Union Perspective" (1992), 2 Can. Lab. LJ. 49 at 54.*

Earlier scholarship in the mid-1990s had criticized seniority systems in Canada as unduly favouring white, non-disabled males by sustaining de facto barriers to the advancement of groups that have historically been excluded or underrepresented in the workplace, such as women, persons of colour, aboriginal peoples, and persons with disabilities: see, for example, L Delude, Seniority and Employment Equity for Women (Kingston, IRC Press, 1995). This position has been criticized by other scholars as placing too much weight on the adverse impact of seniority, and downplaying the overall positive aspects of seniority systems in the protection of disadvantaged groups: see, for example, 6. Singh 8c F. Reid, "Are Seniority-Based Layoffs Discriminatory?: The Adverse Impact of Layoffs on Designated Groups" (1998), 53 Relations

Industrielles 730; and B. Bilson, "Seniority and Employment Equity for Women" (1996), 4 Canadian Labour and Employment Law Journal 419.

However, it is clear that seniority provisions which are neutral and non-discriminatory on their face may nevertheless have a discriminatory impact against an individual or a group which is protected under our human rights laws. A review of the caselaw from the Supreme Court of Canada, labour arbitration rulings and decisions by human rights tribunals since 1990 yields the following principles on balancing the seniority provisions in a collective agreement with the accommodation duty requirements found in human rights statutes:

1. *When assessing the feasibility of an accommodation proposal, the impact of the proposal on collective agreement rights and entitlements (including seniority rights) is a legitimate undue hardship factor for unions and employers to consider: Central Alberta Dairy Pool v. Alberta (Human Rights Commission), 1990 CanLII 76 (SCC), [1990] 2 S.C.R. 489.*

2. *The accommodation duty requires an employer to conduct a genuine and thorough search for an accommodation that will not interfere with the rights and entitlements under a collective agreement. Only if that search fails to produce a suitable accommodation can an employer then seek to identify or craft an accommodation that would infringe upon a collective agreement provision, such as a seniority right. However, the employer must still ensure that this proposed accommodation would not significantly interfere with the rights of other employees: Central Okanogan School District No. 23 v. Renaud, 1992 CanLII 81 (5CC), [1992] 2 5.CR. 970.*

3. *Unions have a legal duty not to impede the creation of a reasonable accommodation, particularly one that meets the standard described in paragraph 2 above: Renaud, ibid.; B.C. Rail v. IWAWU, Local 1-424 (Lepage Grievance), [2004] B.C.C.A.A.A. No. 206 (Hope).*

4. *Even in the era of human rights in the workplace, the seniority rights of bargaining unit employees are accepted as a cornerstone provision in a collective agreement, and they cannot be lightly interfered with where other accommodation alternatives are*

available: Ottawa Hospital v. CUPE, Local 4000 (Rockett Grievance), [2010] O.LAA. 368 (Starkman); Canada Post Corp. v. CUPW (Kalinowski Grievance), [2005] CLA.D. No. 289 (Ponak); Bayer Rubber Inc. (1997), 65 L.A.C. (4th) 261 (Watters).

5. On the other hand, the seniority rights of bargaining unit employees who are entitled to a human rights accommodation are integral to their right to be treated equally in the workplace. An employer policy or a collective agreement that denies or restricts an employee's accumulation of seniority on the basis of disability has been found to constitute prima facie discrimination. As well, work days lost because of a disability are generally not permitted to adversely affect an employee's right to accumulate seniority-related benefits. "Seniority directly affects the ability of employees to access, remain in and thrive in the workplace. It is therefore a right that is at the core of human rights legislation as it affects the disabled....The right to accrue seniority is also at the core of the disabled employee's ability to integrate into the workplace." Orillia Soldiers Memorial Hospital, supra., at paras. 66 and 68. Also see: Thomson v. Fleetwood Ambulance Service (1995), 96 CLLC. 230-007 (Ont. Bd. Of Inquiry); and Riverdale Hospital and CUPE, Local 79 (1993), 39 LAC *(4th) 63 (Stewart).*

6.. The presumption in modern human rights law appears to be that a unionized employee who requires an accommodation arising from a human rights ground (mostly commonly based on a disability) should be accorded full access to seniority accrual and protection, unless doing so would amount to an undue hardship as per the accepted hardship factors.

> *Occasionally, the balancing issue arises in cases involving the accumulation or retention of seniority when an employee requiring on accommodation needs to cross seniority boundaries within a workplace in order to obtain the accommodated position. The lead decision on this issue, which both parties referred to in their arguments, is Bubb-Clarke v. Toronto Transit Commission (2002), 42 CHAM.; 2002 CanLII 46S03 (ON HRT), 2002 CanUI 46503 (Ont HRBI).*

Mr. Kachafanas argued in some cases, discrimination has been found where the seniority system was structured so as to have separate seniority lists under which female employees or predominately female groups of employees receive lesser seniority benefits than male employees (see for example Goyette v. Voyageur Colonial Ltee (No. 3), [1997] C.H.R.O. No. 8 ***(OS.))*.**

He argued in other cases, as noted in the *Amalgamated Transit Union* case, supra., neutral seniority systems have been found to be discriminatory on the basis that they fail to accommodate a complainant's disability, or fail to accommodate maternity leave for female employees, and cause female or disabled employees to accumulate seniority at a lesser rate than other employees.

Mr. Kachafanas argued the present complaint does not fall into either of these two categories. He argued there is not a single reported Canadian decision, by any court, human rights tribunal, or other adjudicative body, in which a seniority system has been found to be discriminatory by reason only of the fact that members of a protected group overall had less seniority under the system than employees who were not members of the protected group.

He argued it should be noted that what the complainant is seeking in the present case is not an "accommodation". There is no characteristic of the complainant's sex that prevents her from performing the essential duties of her employment. What the complainant seeks is to compel the respondents to adopt an affirmative action program and/or grant her a promotion to which she is not otherwise entitled under the collective agreement, solely on the basis that women are historically disadvantaged and underrepresented in the workforce.

Mr. Kachafanas argued even if this were a duty to accommodate case, the duty to accommodate under human rights legislation does not extend so far as to require an employer to grant an employee a promotion to which she would not otherwise be entitled. In *Ellis v. General Motors of Canada Ltd*.**,** 2011 HRTO1453 (CanLII), the Ontario Human Rights Tribunal stated that:

> *[28] I will next address the applicants preferred placement, which was in the Group Leader position. I have found above that the applicant was capable of performing the duties of the Group Leader position within his restrictions, notwithstanding that this position required him on an as-needed basis to perform the duties of the Wet deck Sander position. However, in my view, the duty to accommodate does not extend to require an employer to promote an individual to a higher-level position to which they would not otherwise have been promoted, whether on the basis of seniority or merit. The purpose of the duty to accommodate in an employment context is to ensure that an employee with a disability has the opportunity to continue to perform the essential duties of her or his employment if her or his needs can be accommodated without causing undue hardship to the employer. When approaching the accommodation of an employee, the first consideration is whether the employee can be accommodated in her or his home position without undue hardship. While the law is still developing in this area, it has been recognized that, if this is not possible, the duty to accommodate can extend to consideration of alternate positions. However, the duty to accommodate has not been considered to extend to granting an employee with a disability a promotion to which she or he otherwise would not be entitled. In my view, doing so would extend beyond ensuring equal treatment for an employee with a disability, which is what is protected under* s. *5(1) of the Code*.

Mr. Kachafanas argued there is no authority whatsoever for the complainant's apparent position that she should be entitled under the Human Rights Act to receive a promotion over more senior employees solely for the reason that she is a woman and women are underrepresented in the CBRPS workforce.

He argued the Canadian Human Rights Tribunal decision in Belanger v. Correctional Service of Canada & Union of Canadian Correctional Officers, 2010 CHRT 30 (CanLII), supra., is directly on point. In that case, two classes of employees, CX correctional officers and CR employees, had been merged into a single classification of CX correctional officer. One of those classes, CX correctional officers, had been predominantly male, and the other, CR employees

had been predominantly female. Subsequently, the union and employer negotiated a collective agreement which contained a seniority-based provision for granting vacation leave. The provision that was adopted only recognized seniority based on the number of years of service as a correctional officer, which effectively denied the CR employees seniority based on their years as a CR employee prior to reclassification. The complainant alleged that the seniority system had been voted on by the male CX employees for the purpose of denying seniority to the female CR employees, and that because it negatively impacted more female employees than male employees, it was discriminatory on the basis of sex.

Mr. Kachafanas submitted the Tribunal found that the complainant had not established a prima facie case of discrimination. In particular, the tribunal found that the complainant had not suffered differential treatment based on her sex. The Tribunal ruled that a claimant cannot establish differential treatment merely by showing that a provision that adversely affects both men and women has an adverse effect on more women than it does men. What must be established is that a woman affected by the provision suffers a greater adverse effect than does a man affected by the provision:

> *[111] The Complainant alleges that Article* 1-B-3 *had an adverse impact especially on women at the RRC where she worked. As we saw earlier, that assertion is more or less true. We need only examine the statistics produced by the Complainant herself (Exhibit P -1, tab 9) and admitted to by the CSC and UCCO-SACC-CSN to realize this*
>
> *[112] The statistics show that the number of men and women adversely affected by the application of l-B-3 at the RRC in the first year the new procedure for granting vacation leave was used (2007) was almost the same in 2008. To determine the effects of Article 1 -B-3, we have to consider not only women who were previously employed in the CR group, but also other men and women at the RRC who were employed in a different group before they became CXs. Exhibit P-l, tab 9, indicates that 10 employees (nine women and one man) were previously employed in the CR group and that nine employees (eight men and one woman) were previously employed in another group.*
>
> *[113] However, the fact that there were slightly more women than men at the RRC who were affected by l-B-3 does not constitute sufficient grounds to allege discrimination on*

the basis of sex. To support that assertion, we believe it is appropriate to reproduce several excerpts from the Federal Court of Appeal decision in Thibaudeau v. Her Majesty the Queen, (1994) 2 D.F. 189:

> *Page 9...*
>
> *Indeed, in my view it is not because more women than men are adversely affected, but rather because some women, no matter how small the group, are more adversely affected than the equivalent group of men, that a provision can be said to discriminate on grounds of sex.*
>
> *Accordingly, it seems to me that one cannot logically say that an otherwise neutral rule discriminates on the basis of sex simply because it affects more members of one sex than of the other. ...The focus, surely, is not on numbers but on the nature of the effect; on quality rather than quantity. If legislation which adversely affects women has the same adverse effect upon men, even though their numbers may be smaller or the likelihood of their suffering be less, it cannot logically be said that the ground of discrimination is sex.*
>
> *Note: This decision was quashed by the Supreme Court of Canada in Thibaudeau v. Canada, 1995 CanLII 99 (SCC), [1995] 2 S.C.R. 627. The decision was apparently amended, but for reasons other than those alleged above.*

[114] The evidence produced by the Complainant was not sufficient to show that there was prima facie evidence of discrimination within the meaning of paragraph 7(b) of the Act

[115] The number of women affected adversely by l-B-3 was similar to the number of men. The effects of the application of Article l-B-3 were identical for officers of both sexes.

[116] The Complainant therefore failed to show that the adverse effects were greater for women at the RRC than for male employees at the RRC who had been

employed in a different group before becoming CXs. Everyone lost recognition of his or her years of service in the Public Service prior to becoming a correctional officer.

Mr. Kachafanas argued similarly, in Matthews v. Chrysler Canada Inc., 2011HRTO1939 (CanLII), the complainant alleged, among other things, that it was discriminatory for the respondent to use seniority as a selection criterion for union positions in circumstances where an applicant had a disability that he claimed required accommodation. The Ontario Human Rights Tribunal found that the use of seniority as a criterion for selecting candidates for a position was not discriminatory per se, and that a duty to accommodate does not arise merely because an applicant to a position belongs to a protected group. The Tribunal found that this aspect of the complaint had no reasonable prospect of success:

[23] The applicant did not meet at least two of the three criteria the Union considered by the selection committee regarding the union offices for which he applied, as he was not the most senior applicant and had not participated in union activities. To get around these deficiencies, the applicant asserted that the duty to accommodate obliged the Union to appoint him to both positions. The duty to accommodate, however, only arises when a requirement or qualification is discriminatory. There is nothing discriminatory per se in using seniority as a criterion for selecting candidates for union positions. The applicant asserted that seniority adversely affected him because of his disabilities, but did not point to any evidence of such an effect. Similarly, there is no evidence supporting the applicants assertion that his disabilities prevented him from union involvement other than the applicant's bald statement to this effect In fact, the applicant did not suggest that he ever tried to become involved in the union or requested accommodation in order to become involved. CAW stated out that it has a wide range of volunteer opportunities available to Its members and that any member could become involved, regardless of functional limitations. For example, CAW explained that some activities require limited time commitment and some can be performed from home. The applicant offered no evidence to contradict this statement Consequently, there is no evidence the criteria applied by the Union discriminated against him

because of disability.

> *[24] I agree that the duty to accommodate may in some circumstances require the relaxation or non-observance of selection criteria, such as seniority. In Renaud, the complainant could not work a Friday evening shift because of his religious beliefs and therefore required accommodation in the form of alternative shifts for which he did not have the requisite seniority or which required derogation from the collective agreement. However, I also agree with CAW that the duty to accommodate does not necessarily arise merely because an applicant to a position is a person with a disability. When the applicant applied for the union positions, which was before his heart attack, he was working in an accommodated position provided by CCl. While it appears the applicant did not like this position, he made no suggestion that the position was not appropriate or that there was any reason at the time to believe he would not continue to hold it Consequently, there is no evidence the applicant required accommodation when he applied for the union positions. I conclude therefore that there is no reasonable prospect the applicant can succeed in proving CAW's decision not to appoint him to Union offices violated the Code*.

Mr. Kachafanas argued the complainant has furthermore failed to make any allegation to suggest that the sex of employees is in any way linked to the calculation of their seniority. In essence, her allegation is that because the more senior employees are male, there must be elements of systemic discrimination in the seniority system. He argued in Stalmakh v. Loblaws Supermarkets Ltd., 2012 HRTO 79 (CanLII), the complainant claimed that the seniority system of the respondent was discriminatory. The sole basis of the complainant's complaint was that another employee who had started one week before him was a Canadian citizen, whereas he was from Belarus and was not a Canadian citizen. The Ontario Human Rights Tribunal found that the complaint had no reasonable prospect of success, as there was no link between the Complainant’s place of origin and the respondent's treatment of the complainant under the seniority system:

[11] The only evidence that the applicant has to establish discrimination because of citizenship and place of origin is the circumstantial evidence that he is from Belarus and not a Canadian citizen, whereas the person with scheduling seniority is a Canadian citizen. The applicant says that the person doing the scheduling would know what his citizenship and place of origin are because they are indicated on his resume to which the scheduler would have access. When I asked for clarification about the basis of his allegation, that simply having a different place of origin and citizenship from the person granted seniority is enough to establish discrimination, the applicant clarified that it did. The applicant said that if the other employee had been a woman but not a Canadian citizen, then he would have alleged discrimination because of sex.

ORDER

[12] In my view, there is no reasonable prospect that the applicant can prove, on a balance of probabilities, that his Code rights were violated. The applicant has no evidence to demonstrate that any date other than an employee's start date is how seniority is measured. Beyond alleging that he and the Canadian employee have different places of origin and citizenship, the applicant has not demonstrated that there is a reasonable prospect that evidence he has or that is reasonably available to him can show a link between the respondents' treatment of him with respect to seniority and his place of origin and citizenship.

Mr. Kachafanas argued in the present case, it is true that female officers hired post-amalgamation have less seniority than pre-amalgamation male officers. However, male officers hired post-amalgamation also have less seniority than pre-amalgamation officers. A male officer and a female officer hired on the same date will have exactly the same seniority under the seniority system. Even if the bare fact of having less seniority than another employee due to fewer years of service could be characterized as an "adverse effect" of the seniority system, there is no adverse effect on female employees that does not also apply to male employees.

He argued with respect to the complainant's allegation that there was no "active utilization" of CBRM's employment equity policy, the complainant has not referenced any specific provision

of the policy that would require CBRM to give preference to female candidates in promotional routines. He argued that is because there is no such provision. Although the employment equity policy does contain a preamble which states that CBRM is committed to providing a workplace "demographically representative of the community it serves at all job levels, this preamble cannot reasonably be read as imposing any sort of obligation on CBRM to promote female employees ahead of more senior male employees until demographic representation is reached. He submitted that no Canadian authority exists that suggests that preambles regarding the purpose of a policy can have that effect.

He argued in University of British Columbia v. Chan, 2013 BCSC 942 (CanLll), the court found that the BC Human Rights Commission had made an unreasonable decision when it refused to dismiss a complaint that had no reasonable chance of success. Among the reasons was that the tribunal had incorrectly found that the employer had failed to follow the prescriptive process for selections under its employment equity program. The complainant had made only general allegations that the selection committee had been bound to "apply substantive equality". The policy in that case in fact contained no process that the selection committee was required to follow, and only contained a provision stating that the respondent hired on the basis of merit and was committed to employment equity. The court also found that whether a matter of public interest was raised by the complaint was an irrelevant consideration:

> *[73] First, with respect to the procedure that the selection committee followed in choosing the Lam Chair, the Tribunal noted that the committee departed from "the prescriptive process outlined in [Policy #3 on Discrimination and Harassment]": Decision at para. 71. This statement is incorrect.*
>
> *[74] There is no "prescriptive process" set out in the Policy for selecting candidates to internal endowed Chairs. Dr. Chan does not even make that allegation. Rather, her allegations about the selection committee processes are general in nature. Aside from her argument that the selection committee was bound to apply substantive equality principles, the only time she refers to any specific documents that may establish a prescribed process is in reference to UBCs*

Employment Equity Policy, which she says requires all postings to state that "UBC hires on the basis of merit and is committed to employment equity".

[75] Second, with respect to the alleged breach of the Employment Equity Policy, the Tribunal failed to consider the weak basis for finding a nexus. The Employment Equity Policy, as it read at the relevant time, did not require UBC to apply substantive equality principles in its hiring decisions.

[76] Third, whether this case raises issues important to the UBC community is an irrelevant consideration. In Telecommunications Workers Union v. Hackett (3 February 2012), Vancouver S111496 (B.C.S.C.), the Tribunal declined to dismiss the complaint under s. 27(l)(b) on the basis that it raised a novel and important issue. On judicial review, Mr. Justice Dley found that this was an irrelevant consideration, stating that simply because a complaint raises a novel or Important issue "does not cloak the Tribunal with the authority to proceed if there was no apparent breach of the Code": para. 35.

Mr. Kachafanas argued the Chan case is directly analogous to the present case. Although the complainant has made general allegations that CBRM's Employment Equity Policy was not followed and that it was not "actively utilized", there was no provision of the policy requiring CBRM to give the complainant preference in the promotional routines or otherwise requiring CBRM to "actively utilize" the policy. The allegations based on the Employment Equity Policy have no reasonable chance of success.

He argued apart from the Pay Equity Act, which does not apply in this case, there is currently no employment equity legislation in Nova Scotia. He submitted the *Human Rights Act* does not empower Boards of Inquiry to hear employment equity matters, except to the extent that matters of employment equity may overlap with matters of discrimination. In the absence of an allegation of actual discriminatory conduct on the part of CBRM, the Board of Inquiry does not have authority to direct CBRM to "actively utilize" its employment equity policy.

Mr. Kachafanas argued the complainant has done nothing more than put forward a bare allegation that "there could be systemic elements to the seniority points clause", based on

nothing more than the fact that the most senior employees with CBRPS are male. A complaint of discrimination requires something more than unsupported speculation.

He argued although subsequent decisions have indicated that it is to be used as a guideline rather than a hard rule, the test set out in the Ontario Board of Inquiry decision of Florence Shakes v. Rex Pak Limited (1982) 3 CHRR D/1001 at D/1002 is commonly cited as a reference for determining whether or not a prima facie case of discrimination has been made out by a complainant in an employment case:

> *In an employment complaint, the Commission usually establishes a prima facie case by proving:*
>
> *a)that the complainant was qualified for the particular employment;*
> *b)that the complainant was not hired; and,*
> *c)that someone no better qualified but lacking the distinguishing feature which is the*
> *gravamen of the Human Rights complaint subsequently obtained the position.*
>
> *If these elements are proved, there is an evidentiary onus on the Respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred.*

Mr. Kachafanas argued in the present case, the complainant has not alleged that the officers who were promoted were not better qualified than her. In fact, as stated in HRO Tan's report, the complainant agreed that the officers who were promoted had scored higher than her in the promotional routine, in which she only ranked 12th. He argued a bare allegation that there may be some unspecified form of systemic discrimination at play does not eliminate the need for a complainant to allege the basic elements of a prima facie case of discrimination.

He argued a respondent should not be obligated to undergo a full hearing and mount a full defence to a complaint that is based on bare speculation that discrimination may have played a factor in its decision, or where the complainant merely hopes that evidence of discrimination

will be discovered during the hearing process. In Preddie v. Saint Elizabeth Health Care, 2011HRTO 2098 (CanLII), the Ontario Human Rights Tribunal stated that:

> *[25] I accept the argument of the applicant's counsel that discrimination based on race or colour can indeed be subtle and hard to detect, but an applicant must provide some reasonable basis for making allegations of such discrimination. It is not sufficient to claim discrimination as a member of a group protected under the Code and to look to a hearing process before the Tribunal as the means to discover whether such discrimination occurred; there must be some reasonable prospect that evidence the applicant has or that is reasonably available to her can show a link between the events alleged and the alleged prohibited ground. I cannot find, based on the Application and the submissions of the applicant and her counsel, that there is a reasonable prospect that the applicant can prove that she was discriminated against by the respondents based on her race and colour.*
>
> *[...]*
>
> *[27] The applicant is clearly concerned about the treatment she received. However, the alleged treatment must be linked in a substantive way to a Code ground. As the Tribunal stated in another summary hearing, John Villella v Corporation of the City of Brampton and Susan Bauman, 2011HRT01085 (CanUI), at para. 10:*
>
> *The applicant must show more than mere subjective suspicion to establish a link between the respondent's alleged conduct and the grounds pleaded. There must be at least some objective facts and circumstances to support the theory linking the respondents' action with the Code. Here, I do not see that the applicant has alleged any facts that would be capable of establishing such a link.*

In summary, Mr. Kachafanas argued the complainant alleges that she has suffered disadvantage under CBRM's seniority system that constitutes a barrier to her advancement. However, she has failed to make any allegations that in any way suggest that this disadvantage was the result of a distinction made by CBRM or NSGEU based

on her sex, or that she was treated differently under the seniority system than any other employee. She has also not alleged that CBRM or NSGEU breached any specific provision of the Employment Equity Policy.

He argued the Complainant clearly feels that she has been treated unfairly in the promotional routines in issue, and feels strongly that female officers should have greater representation in leadership positions in CBRPS. However, he argued the *Human Rights Act* does not give the Board of Inquiry general jurisdiction over fairness or equality. In the absence of an allegation of discrimination as defined in the Act, he argued the complaint has no reasonable prospect of success and the Board has no power to grant a remedy.

Mr. Kachafanas further argued orally there has been no breach of the *Human Rights Act*, as her complaint reveals no reasonable chance of success even if all material facts are established. He further argued the NSHRC does not take any issue with the statement of facts as presented by CBRM and takes no position other than the Commission believes there should be a hearing in the interest of justice.

Mr. Kachafanas argued CBRM submits that this complaint should be dismissed on the basis that it fails to raise a significant issue of discrimination and is without merit.

ARGUMENT OF NSGEU

David Roberts argued by written brief dated November 4, 2016 and orally on November 10, 2016, on behalf of NSGEU that there are two matters to deal with, namely:

a) The preliminary motion of the Cape Breton Regional Municipality ("CBRM") seeking the dismissal of the complaint of Constable Kelly;

b) The subpoena which the Complainant seeks for Jim Gosse, Employee Relations Officer for the NSGEU.

Mr. Roberts argued NSGEU supports the motion of CBRM to dismiss the complaint of Constable Kelly, because the allegations contained in the complaint, if proven, would not make out a prima facie case that Constable Kelly has been subjected to discrimination within the meaning of the *Human Rights Act*.

Mr. Roberts argued NSGEU is a Respondent to this complaint because it is a party to a collective agreement with the Complainant's employer. He argued, the Complainant says that the NSGEU has discriminated against her on the basis of sex because the collective agreement, to which it is a party, awards points for seniority to candidates seeking promotion to the position of Sergeant.

Mr. Roberts argued, as a result, the complaint against the NSGEU should be dismissed if the Board determines that the Complainant cannot make a prima facie case that she has been discriminated against because candidates for promotion receive points for seniority.

With regard to the Authority of the Board of Inquiry, Mr. Roberts argued the referral of a complaint by the Human Rights Commission to a Board of Inquiry is not a determination that a complaint is well founded, or even within the purview of the *Human Rights Act*. He argued, those are matters for the Board of Inquiry to decide And referred to *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* 2012 5CC 10 at para. 23:

> What is important here is that a decision to refer a compliant to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the board of inquiry. In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication.

Mr. Roberts argued the *Human Rights Act* permits a Board of Inquiry to make these determinations on a preliminary basis before holding a full hearing. In *Kaiser v. Dural*, 2003 NSCA 112, the Commission appealed from a preliminary decision of a Board of Inquiry that the Complainant was estopped from taking his complaint to a full hearing. The Nova Scotia Court of Appeal dismissed the appeal, at paragraph 31:

> [31] There is nothing in the Act or in any cases referred to this court suggesting the proposition that the board is required to proceed with a full hearing once it has been appointed to adjudicate a complaint. In my opinion once appointed, the board is independent of the Commission and it is appropriate for it to consider everything relevant to lawfully adjudicating the rights and interests of the parties before it. This is particularly so when the board is required to exercise its discretion in the interests of achieving justice between the parties in the context of an application regarding issues such as issue estoppel, res judicata and abuse of process. It may be that only upon the appointment of the independent board will the parties be afforded an opportunity to raise and fully argue such critical, preliminary matters.

Mr. Roberts argued in *Hynes v. Cape Breton Regional Municipality*, 2013 CanLIl 86224 (NSHRC) the Board of Inquiry dismissed the complaints of three Complainants on a preliminary basis because the claims they advanced were "not plausible on the face of the record" (para 48 and 49):

> 48. Accordingly, I exercise discretion to dismiss the complaints of Ms. Coffin, Mr. Hynes and Ms. Wadden as an abuse of process. I am mindful that each of Ms. Coffin, Mr. Hynes and Ms. Wadden have or may have a residual interest in the DCP but that does not affect the conclusion as the madatory retirement provision in the DBP is enforceable. I hasten to add that there should not be anything read in the conduct of the three complaints to suggest they acted inappropriately. They simply exercised their right to file a complaint and did so in good faith.

> 49. In this case the Commission had an obligation to the Complainants and the Respondents to fully consider the reasons for its decision to refer the matter to a Board rather than exercising its authority to dismiss under Section 29(4) of the Act. The Board understands the Commission does not make a judgment on complaints when they are referred to a board of inquiry. The Board also accepts that in making the decision to make a referral to a board of inquiry the Commission is simply indicating that there is an issue to be tried. However in this case the basis offered for a possible review of *Talbot* was not plausible on the face of the record. In the circumstances when it ought to have been clear that there has been no change in the law or the basic facts, the decision to refer these three complaints seems ill-considered. The frustration of CBRM and CUPE is justified.

Mr. Roberts argued in this case, the Respondents submit the complaint if proven, would not make out a prima facie case that she has been subjected to discriminatory treatment just because points are awarded for seniority in promotional routines under the collective agreement. He argued this Board of Inquiry has the authority to dismiss the complaint on a preliminary basis and it ought to do so.

Mr. Roberts argued the current collective agreement between CBRM/CBRPS and the NSGEU governing seniority and promotions are the same as those in the previous agreement with one exception. The number of points awarded for seniority in promotional routines was increased from 10 points to 15 points in the current collective agreement.

Mr. Roberts argued seniority and service are governed by Article 22 of the collective agreement. Article 22.01 provides that “seniority and service shall be calculated on the same basis for all employees”.

Article 22.08 defines seniority and service to include continuous employment with CBRM and a previous municipality:

> 22.08 Previous Employment with Other Municipalities
> Employees who have been employed continuously with the CBRM and one of the previous municipalities can only receive seniority and service from the last previous municipality that employed them and cannot receive seniority and service from employment with one of the other previous municipalities.

Mr. Roberts argued Article 22.08 limits the recognition of pre-amalgamation employment to employment with the last, previous municipality. That limited recognition of pre-amalgamation employment is repeated in Article 22.10:

> 22.10 Continuous Bargaining Unit Employment with Previous/Current Municipality
> An employee shall only be entitled to seniority for continuous bargaining unit employment with the last previous municipality and/or the current municipality.

Article 22.13 describes the basis of seniority accrual going forward:

> Employees shall receive full seniority for full time continuous bargaining unit employment.

Mr. Roberts argued seniority continues to accrue when an employee:

> a) Is on leave with pay or in receipt of Workers' Compensation Benefits (Article 22.04);
> b) Is on deferred leave, political leave or LTD (Article 22.05);
> c) Is on lay-off (Article 22.07);
> d) Is on maternity leave, parental leave or adoption leave (Article 17.01);

e) Is on other forms of leave without pay for up to two years (Article 22.05).

Mr. Roberts argued Article 23 of the collective agreement deals with the transfer and promotion of Police Officers within the Police Service. The initial hiring of Police Officers is not governed by the collective agreement. Hiring is within the discretion of the management of the Police Service and the Union has no role in the hiring of the Police Officers.

Article 23.11 limits participation in promotional routines to Police Officers who have completed nine years of service with the Police Service. Constable Kelly has not complained about this provision.

Article 23.12 sets the composition of the Selection Board that will oversee promotional routines and establish the list for promotion.

Mr. Roberts argued the selection criteria are set out in Article 23.13, and they consist of a written examination worth 45 points out of 100 and an interview worth 40 points out of 100. Article 23.13 states as follows:

> 23.13 Selection Criteria
>
> The Chairperson of the Selection Board shall be the Director of Human Resources or designate. The Chairperson of the Selection Board shall only have a vote in the event of a tie in this selection of the successful candidate. The Selection Board shall prepare a promotional list in accordance with the following criteria:
>
> a) Written examination of general application of law plus modern theory of management and leadership. This examination to be conducted on a Sunday and is to be a value of 45 points out of 100. Only candidates that achieve a pass mark of 70% on the examination will move forward in the promotional routine.
>
> b) Personal interview by the selection board to be conducted. Value 40 points out of 100.

c) Candidates who have attained a score of 70% or greater on the exam shall be given points for seniority. Candidates shall be given prorated points for seniority as of the exam date. The list begins with the senior employee getting 15 (ie. If the senior candidate has 30 years, he shall receive 15 points an employee with 10 years shall receive 5 points). These points shall be added to the overall mark of each candidate.
d) An overall score of 65% or greater is required to be considered for promotion.

Mr. Roberts argued candidates who score 70% or higher in the written examination and interview are given points for seniority, with the senior employee receiving 15 points and the less senior candidates who qualify receiving points for seniority on a pro-rated basis.

He argued employees are placed on a list in the order of their overall scores but Officers must have a minimum score of 65% to be eligible for promotion. They are then promoted to Sergeant in the order they appear on a list as vacancies occur.

He argued a promotional routine conducted under Article 23 is not primarily driven by seniority. Eighty-five of a possible 100 points are awarded on merit as assessed in a written examination and an oral interview. Only candidates who score 70% or better in the first two elements of the routine have their seniority considered at all.

Mr. Roberts submitted the Complainant has not alleged that there is anything discriminatory in the manner in which seniority is accrued under the collective agreement, nor could she. Seniority accrues for all employees in the same manner regardless of their gender or any other protected characteristic.

Mr. Roberts argued the Complainant has not complained about any other aspect of the promotional routine apart from the awarding of points for seniority. He argued the consideration of seniority within a promotional routine can found a claim of

differential treatment contrary to the *Human Rights Act* if it can be shown that the seniority was acquired in a discriminatory manner, as was the case in *Ontario Nurses Association v. Orillia*, [1999] Di No.44 (Ontario Court of Appeal). He argued no such allegation has been made in this case.

Mr. Roberts argued a complaint that is referred to a Board of Inquiry should set out all the essential elements of the allegations against the Respondent, and cited *Harnish v. Halifax Regional Municipality*, 2007 NSHRC 6 at para. 37, which states as follows:

> The Board has no difficulty in determining that the legal test in determining the proper scope of the complaint is set out in *Ontario Human Rights Commission and O'Malley v. Simpson-sears*, requiring that the allegations made and particularly set out in the complaint must be "complete and sufficient". The issue of the proper scope of a complaint has been extensively canvassed by boards of inquiry. In *Halliday v. Michelin North America (Canada) Ltd. (No. 1)* (2006), CHRR Doc.06-817 (N.S.Bd. Inq.), the Board proceeded on the basis that the scope of a complaint should contain all of the "essential elements" *Neush v. Ontario (ministry of Transportation)*, [2002] O.h.R.B.I.D. No. 11 (Ontario Board of Inquiry).

He argued a Board of Inquiry has no jurisdiction to add to or alter the grounds of discrimination that are set out in a complaint and referred to *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114 at paras. 28 and 48, which state as follows:

> 28. A board of inquiry has limited jurisdiction regarding changes to a complaint. It may approve changes that particularize or clarify existing elements in a complaint. However, a board of inquiry lacks jurisdiction to approve amendments which would substantively alter the complaint and effectively add new grounds to the complaint. Again, this has been commented upon by this Court in previous decisions.

> 48. Just to be clear and to avoid any confusion on this point, a board of inquiry does not have the ability to amend complaints to something that is different than what was referred to it. Her determination that she had the power to amend the complaint was a clear departure from the law regarding the respective roles of a board of inquiry and the Commission.

He argued, in this case, the Complainant says she has been discriminated against on the basis of sex with respect to her employment because:

> ...the seniority clause in the collective agreement for promotional routine scoring gives pre-amalgamation male Officers an advantage for promotion over female Officers.

Mr. Roberts argued the Complainant expands on this in para. 3 of the complaint:

> Pre-amalgamation there were 7 individual police departments with no female Police Officers. Therefore, the majority of the male Officers today have higher seniority than female Officers. Based on current practices in the collective agreement, when an Officer participates in a promotional routine, 15 points are given for seniority. It is calculated by using the amount of years served by the most senior Officer anticipating in the promotional routine and then calculating the ratio based on that number. Female Officers are already under represented and the seniority points create a distinct disadvantage.

Mr. Roberts argued the Complainant says the discrimination she has suffered began in 2010 when she first participated in a promotional routine and continued through promotional routines in 2012 and 2015. He argued, in paragraph 4 of the complaint, she states that she has been subjected to discrimination on the basis of gender because:

> ...the majority of male Officers have more years served which puts female Officers at a disadvantage when applying for promotions.

Mr. Roberts argued, the essential elements of the complaint made by the Complainant are as follows:

a) The individual Police Departments that were amalgamated with the creation of CBRM employed no female Officers at the time of amalgamation;

b) The collective agreement recognizes seniority accrued by Police Officers through continuous employment with a previous municipality;

c) Male Officers who were employed by the individual Police Departments immediately before amalgamation have more seniority than female Police Officers, like the Complainant, who were hired after amalgamation;

d) Points for seniority are awarded in promotional routines conducted under the collective agreement;

e) Male Officers who were employed on individual Police Departments immediately before amalgamation will receive more seniority points in a promotional routine than female Officers hired after amalgamation.

Mr. Roberts argues these allegations, if proven, would not make out a prima facie case that the Complainant has been discriminated against on the basis of gender, contrary to the *Human Rights Act*. He argued, the Complainant has not alleged:

a) Seniority accrues under the collective agreement in a manner that is discriminatory;

b) She would have more seniority then she does but for discriminatory practices on the part of the Respondents;

c) Male Officers credited with seniority as a result of continuous employment with a previous municipality acquired their seniority as a result of a discriminatory practice.

Mr. Roberts argued her complaint does not provide the basis for concluding the Respondents discriminated against her when they agreed to award points for seniority in promotional routines.

Mr. Roberts argued discrimination is defined in Section 4 of the *Human Rights Act* as "a distinction, whether intentional or not, based on a characteristic or perceived characteristic...that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals".

He argued the characteristic in this case is gender. The distinction is the difference in seniority between the Complainant and certain male members of the Police Service who were employed at a previous municipality immediately before amalgamation. He argued seniority accrues under the collective agreement irrespective of the gender of the Police Officer. It is a measure of full time, continuous employment in the bargaining unit under Article 22.08 of the Collective Agreement.

Mr. Roberts, argued as such, it is a "neutral system that is color-blind, gender-blind and age-blind as stated in *Ontario Nurses Association v. Orillia*, supra, at para. 26.

Mr. Roberts argued the Complainant has not claimed that she would have more seniority than she does but for the application of some discriminatory distinction in the collective agreement. Her seniority accumulates in the same way that seniority for male Police Officers accumulates. He argued the Complainant has not suggested otherwise. Nor has she claimed she would have been hired earlier than she was hired, and therefore have more seniority than she has, but for some discriminatory action by the employer.

Mr. Roberts argued unless the Complainant can show that male Officers with continuous employment with a previous municipality acquired their seniority as a result of discriminatory practices, considering seniority in a promotional routine does not meet the definition of discrimination in the *Human Rights Act*. However, he argued her complaint does not allege the previous municipalities discriminated on the basis of gender.

Mr. Roberts argued Article 22.10 of the collective agreement recognizes continuous employment with the last, pre-amalgamation municipality in the calculation of seniority. He argued the Complainant is asking the Board of Inquiry to find that because these pre-amalgamation police departments had no female members at the time of amalgamation, the awarding of points for seniority in promotional routines under the collective agreement is discriminatory.

However, Mr. Roberts argued the Complainant has not alleged that the pre-amalgamation police departments employed discriminatory hiring practices or that the seniority credited to Police Officers who had continuous employment with a previous municipality was in any way tainted by discriminatory distinctions. Her complaint is based solely on the simple fact that male Officers with continuous employment with a previous municipality are senior to her.

Mr. Roberts argued in the absence of a claim that pre-amalgamation seniority was acquired in a discriminatory manner, the recognition of continuous employment with the last, previous municipality is an entirely neutral factor. It has the same effect on male Officers hired after amalgamation as on female Officers hired after amalgamation. He argued the Complainant cannot show that she has been effected by the recognition of seniority with a previous municipality any differently than male Officers hired after amalgamation.

Mr. Roberts argued the Complainant's situation is similar to that of the female correctional officers in *Belanger v. Canada*, [2010] CHRD No. 30, who claimed they

were disadvantaged when their union agreed that only previous seniority as a correctional officer would be recognized in the granting of vacations. Many female correctional officers had previously worked in administrative positions in government and that time would not count toward their seniority. The Canadian Human Rights Tribunal rejected the complaint, noting that male officers who had previously worked outside of Corrections were affected in the same way as female officers:

> 114 The evidence produced by the Complainant was not sufficient to show that there was prima facie evidence of discrimination within the meaning of paragraph 7(b) of the Act.
>
> 115 The number of women affected adversely by 1-B-3 was similar to the number of men. The effects of the application of Article 1-B-3 were identical for Officers of both sexes.
>
> 116 The Complainant therefore failed to show that the adverse effects were greater for women at the RRC than for male employees at the RRC who had been employed in a different group before becoming CXs. Everyone lost recognition of his or her years of service in the Public Service prior to becoming a correctional Officer.
>
> 117 The evidence produced showed that the situation was the same at all institutions in Canada.
>
> 118 Consequently, the Complainant failed to show with prima facie evidence that she was the subject of adverse differentiation in the course of employment in relation to men in a situation similar to hers.

Mr. Roberts argued in *Thibaudeau v. MNR*, [1994} 2 FCR 189, the Federal Court of Appeal rejected a claim that provisions in the Income Tax Act which required the reporting of child support payments by single, custodial parents discriminated on the

basis of sex. The court found that regardless of whether more women than men were affected by this provision, the measure had the same impact on men who were custodial parents as on women:

> The focus, surely, is not on numbers but on the nature of the effect; on quality rather than quantity. If legislation which adversely affects women has the same adverse effect upon men, even though their numbers may be smaller or the likelihood of their suffering be less, it cannot logically be said that the ground of discrimination is sex.

Mr. Roberts argued in this case, the recognition of pre-amalgamation seniority in the collective agreement has the same impact on male Officers hired after amalgamation as on female Officers. The effect of Article 22.10 is the same for both groups. They will be junior to male Officers who had continuous employment with a previous municipality. He argued because the Complainant has not claimed that seniority was acquired in pre-amalgamation police departments in a manner that was itself discriminatory, the recognition under the collective agreement of continuous employment with a previous municipality must be seen as a neutral factor. He argued the Complainant's complaint that awarding points for seniority in promotional routines is discriminatory must therefore fail.

Mr. Roberts argued in paragraph 7 of the complaint, supra., the Complainant faults the employer, and to a lesser extent the NSGEU, for failing to advance an affirmative action program to increase the representation of women in the Police Service.

He argued section 6(i) of the *Human Rights Act* exempts from the prohibition against discrimination, a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals". However, he argued, the Act does not require that such a program be implemented. The absence of such a program does not, in of itself, constitute discrimination under the Act and referred to *MacAulay v. Town of Port Hawkesbury*, 2008 NSHRC 2, at para. 120.

In conclusion, Mr. Roberts argued the complaint should be dismissed, as even if the allegations in the complaint are proven, there can be no prima facie case that the Respondents discriminated against the Complainant because they agreed to award points for seniority in promotional routines conducted under the collective agreement. There are male members of the Cape Breton Regional Police Service who are senior to the Complainant. However, the Complainant has not alleged that they acquired their seniority in a discriminatory manner. Their seniority accumulated in the same way that the Complainant's did, through continuous, full time employment with CBRM and, where applicable, the last municipality that employed them before amalgamation.

Mr. Roberts argued the Complainant has not claimed that seniority accrues under the collective agreement in a manner that discriminates directly or indirectly, on the basis of gender. He argued the Complainant has not claimed that seniority acquired through employment with pre-amalgamation municipalities was acquired in a manner that discriminated, directly or indirectly, on the basis of gender.

As a result, Mr. Roberts argued the Complainant cannot make a prima facie case that she was subjected to discrimination on the basis of gender in the promotional routines conducted under the collective agreement. Accordingly, he argued, her complaint should be dismissed.

He argued orally with respect to the cases submitted by the Complainant in the Supreme Court of Canada decision in *Canadian National Railway*, supra., dealt with section 10 of the *Canadian Human Rights Act* which is a provision that is not in the *Human Rights Act*. He argued section 4 of the Nova Scotia *Human Rights Act* is not similar to section 10 of the *Canadian Human Rights Act*. He argued that case did not deal with seniority, but dealt with harassment of female employees or applicants and the facts are totally different from this case.

He further argued, the Complainant referred to *Goyette v. Syndicate*, supra., being a decision of the Federal Court and the Court found there were separate seniority lists, one for females and the other for predominantly male groups, and he argued this case is different from that of the Complainant where there is one seniority list for both female and male officers. Further. He argued this dealt with section 10 of the *Canadian Human Rights Act* which he argued, is not found in the Nova Scotia *Human Rights Act*.

Mr. Roberts argued the Board of Inquiry has the authority to dismiss a complaint on a preliminary basis as set out in the jurisprudence he cited.

Mr. Roberts argued orally he supports fully the argument of CBRM and as the facts are not in dispute, there is no reasonable chance of success based on the complaint and, accordingly, the complaint should be dismissed.

ARGUMENT OF NSHRC

Kymberly Franklin argued on behalf of the NSHRC by written submission dated November 3, 2016, and orally on November 10, 2016. Ms. Franklin argued she does not dispute the facts expressed in the brief of Mr. Kachafanas dated October 31, 2016, on behalf of CBRM. She argued it is the Commission's position in the public interest, this matter is more properly dealt with at a full hearing of the Board of Inquiry keeping in mind the principles of natural justice and procedural fairness in administrative law. She submitted the Commission is taking no position on agreement or disagreement with the arguments advanced by the respondent, CBRM.

Ms. Franklin argued the right to be heard is part of the obligation to act fairly and referred to the following cases: *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11 (CanLII), [2002] 1 S.C.R. 249 at 75 (S.C.C.) ("Moreau- Bérubé"); *Muotoh v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1599, at 17 (CanLII) ("Fed. Crt") ("Muotoh"), mentioning *Moreau-Bérubé*.) In the administrative

context, the nature and extent of this duty is to be decided on a case by case basis. (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("S.C.C.) per Justice L'Heureux-Dubé at 21; *Moreau-Bérubé, supra*, at 35; *Muotoh, supra*, at 17, mentioning *Moreau-Bérubé, supra*, at 35.) This right to be heard is "at the heart of our sense of justice and fairness." (*Matondo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 at 18 ("Fed. Crt.") (CanLII).

Ms. Franklin argued only in rare and exceptional cases should the complaint be dismissed without hearing the merits and referred to (*Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission, 2006 NSCA 63 (CanLII)*, at 65.) She argued the Courts have cautioned Board Chairs to be wary of staying proceedings before hearing a complaint on the merits and referred to (*Redden v. Saberi* [1999] N.S.H.R.B.I.D. She argued these cases indicate there may be extreme cases where you can stay proceedings without hearing the merits of the case - this is considered to be consistent with *Blencoe* per Board Chair Bankier in *Davison*. She argued these cases also indicate human rights processes are the only forum in which a complainant can address the harms resulting from discrimination. She argued in such a case, a complainant should not be prevented from having her/his "day in court," as this would be highly inequitable.

Ms. Franklin argued in, *First Nations Child & Family Caring Society of Canada v Canada (Minister of Department of Indian Affairs & Northern Development)*, 2011 CHRT 4, 2011 TCDP 4, the court also dealt with this issue stating;

> The *CHRA* does not require that the Tribunal hold a hearing with witnesses in every case. The onus is on the Crown in this motion to demonstrate that this is the case here. The Tribunal must be satisfied that the parties have had a full and ample opportunity to be heard and to present their evidence. The Tribunal will only entertain a motion to dismiss a complaint wherein more evidence could not conceivably be of any assistance: where the Crown has shown that the facts are clear, complete and uncontroverted, or where the Crown has

> shown that the issues involve pure questions of law. If the Crown meets this onus, the Tribunal may decide the substantive questions in a motion forum. [in other words, they were alleging no discrimination]
>
> The complainant parties appeared to accept the idea that the Tribunal may dismiss a complaint on a preliminary basis where it is "plain and obvious" that the complaint cannot succeed. This legal threshold appears to originate from jurisprudence decided under rules of civil procedure allowing for the striking of a claim that did not disclose a reasonable cause of action (*Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.)). I agree with the Crown, that it is not appropriate to import such tests from the civil courts, which have a very different legal foundation, into the legislative scheme of the *CHRA.*
> 62 I return to the test as being that if the objection can be fully and amply answered in motion on the basis of the record generated by the motion and without having recourse to a full *viva voce* hearing, then the motion will be decided on such a basis. I find that the *Act* authorizes the Tribunal to deal with the Crown's objections in the context of a motion at this stage by determining — on an issue by issue basis — if the motion process was sufficient to accord the parties their rights to present their case, in particular their evidence, as contemplated by the Act

Ms. Franklin argued it is important to note that the Canadian Human Rights Tribunal's ruling was overturned at the Federal Court (affirmed by the Federal Court of Appeal) but not in relation to the proper general analysis applicable to motions to dismiss for lack of cause at the tribunal/board stage. The Federal Court and Federal Court of Appeal felt that the Canadian Human Rights Tribunal had just come to the wrong conclusion in answering the question.

Ms. Franklin argued In the present case it is reasonable to say that all of the facts of this matter are known as both parties intended to call witnesses with viva voca evidence. That evidence would not be heard in a motion to dismiss.

In addition, Ms. Franklin argued the complaint form does not contain enough information to determine whether or not a party has been discriminated against. The complaint form is one tool used in this process to advance a claim to the next stage. Its contents are not determinative of a claim of discrimination. It is not for the Commission or the investigator to determine if there was discrimination. That is the question to be answered by the Board of Inquiry by allowing both parties the chance to present their respective cases.

Ms. Franklin argued it is for the above reasons the Commission can not support a motion to dismiss this matter without a full Board of Inquiry hearing.

Ms. Franklin argued she takes no issue with the facts set out in the argument and the brief of CBRM and takes no issue with the legal analysis. She argued she represents the public interest and does not pick sides and leaves it up to the Board of Inquiry to look at all the aspects of the complaint whether the Complainant should have her rights heard in a full hearing.

ARGUMENT OF THE COMPLAINANT, ROBERTA KELLY

Ms. Kelly filed a written submission dated November 4, 2016, and also argued orally on November 10, 2016. She argued Counsel for the CBRM indicated it had made written submissions to the Nova Scotia Human Rights Commission for the dismissal of her complaint, and were made prior to the appointment of a Board of Inquiry; however, she argued his submissions were not substantively addressed. She argued the elements of her complaint have remained unchanged and have met the standards necessary to proceed to a Board of Inquiry. She argued Mr. Kachafanas is attempting to circumvent the process of a full hearing that is scheduled to take place on November 28, 2016, in an effort to put forth a motion for dismissal as well as challenge the issuance of her subpoenas.

The Complainant argued, Mr. Kachafanas has stated she has not disclosed allegations of a complaint, nor alleged any contravention of the *Human Rights Act*. She argued Mr. Kachafanas has failed to demonstrate a true understanding of the meaning of "Systemic Discrimination" resulting in his inability to acknowledge the awarding of prorated points for seniority in the CBRPS promotional routine process indeed reflects this manner of discrimination.

The Complainant argued the Nova Scotia Human Rights Commission prepared a pamphlet entitled " Race Relations, Equity & Inclusion Division - *Human Rights in the Workplace, Glossary of Terms,* Spring/ Summer 2011, Volume 1, Issue 6 (Crown copyright 2011). She argued within this pamphlet are a number of definitions relevant to her complaint, namely,

> Discrimination: Treating an individual or members of a particular group differently (by intention or otherwise) based on one of more of the protected characteristics (perceived or actual) in the *Nova Scotia Human Rights Act,* which results in a disadvantage to that person or individuals.
> Discrimination in an organization often occurs when policies and practices represent the perspective of the dominant cultural group. Discrimination can result in accessibility of opportunities to jobs and career advancement, rights and privileges (such as benefits and ergonomic workplaces) as well as lower wages.
>
> > *Direct discrimination* - discrimination against a particular group which is explicit, purposeful and intentional, e.g. "No blacks allowed".
> >
> > *Indirect/ Adverse Effect Discrimination* - a policy which is neural on its face can impact individuals in a differential fashion. Such policies provide for "equal treatment", but under unequal social conditions. For instance, when one group is the norm for whom institutional rules policies and practices are formulated, these are then applied to "everybody else" including groups which have other (cultural, religious, etc.) norms.
> >
> > *Systemic Discrimination* - A pattern throughout a place of employment, service or program which is a result of pervasive and

interrelated actions policies or procedures.

Barrier- An overt or covert obstacle, used in employment equity to mean a systemic obstacle to equal employment opportunities or outcomes; an obstacle which must be overcome for equality to be possible.

The Complainant argued it is important to have an understanding of these terms in order to fully grasp the nature of systemic discrimination as it applies to female police officers within the CBRM.

She argued in 1995 amalgamation of the former city of Sydney and outlying towns/ villages of Glace Bay, North Sydney, Sydney Mines, New Waterford, Dominion and Louisbourg took place and formed what is now known as the Cape Breton Regional Municipality. With amalgamation came the formation of the Cape Breton Regional Police Service (CBRPS). Prior to amalgamation the above communities were independent of each other in providing policing services. She argued the CBRPS currently has approximately 216 members, many of whom have service with smaller pre-amalgamation police departments. In 2000, she argued she joined the CBRPS, and at that time the police service had only 2 female officers. The CBRPS currently employs 16 female officers, less than 8% of the total workforce. She argued there are no pre-amalgamation female officers employed with the CBRPS.

The Complainant argued it is obvious that male police officers greatly outweigh the number of female officers. She argued female officers seeking promotion to the rank of sergeant find themselves competing with male officers who have service prior to amalgamation, some with 30 plus years.

The Complainant argued points for seniority as they pertain to the promotional routine process are prorated with the senior most applicant receiving 15 full points. All other officers competing have their points based on the service of the senior applicant. She argued, for example a member with 30 years service receives 15 full points and an applicant with 10 years service receives 5 points. These points are added to percentage points calculated from scores in written (45 %) and oral interviews (40%).

She argued, to illustrate, an applicant who scores 100 on the written portion would receive a score moving forward of 45. If this same applicant scores 100 on the oral interview phase the score becomes 40 moving forward. Even with a perfect score the total moving forward is only 85 with the balance of the points coming from the pro-rated points for seniority component.

The Complainant argued the minimum years of service necessary to participate in the promotional routine is 9. In this scenario a female officer with 9 years of service would only be granted 4.5 points for seniority (9/30 = .3 X 15 = 4.5) if competing against a male with 30 years of service, the male would receive 15 points for his portion of the seniority component.

She argued there are no pre-amalgamation females employed with the CBRPS, and therefore cannot compete for promotion on a level playing field with male officers who have pre-amalgamation service.

The Complainant argued to take this demonstration further and place it into context of the CBRPS 2015 promotional routine, the highest level of service of the only 3 female officers who competed is 15; the highest level of service of male officers competing is 27. The male officers are awarded 15 points, the females 8.3 (15/27 X 15 points = 8.3). If one of these female officers has a perfect score in the written and oral phase the highest score that can be achieved is 93.3. She argued male officers with pre-amalgamation service who compete for promotion have a distinct advantage over female officers before any form of formal testing begins. She argued the promotion process is unfair, inequitable and not merit based.

The Complainant argued the CBRPS senior management team is fully aware that this situation places female officers at a disadvantage. She argued they know there are male officers who participate can easily rank higher than any female because female officers only have service dating from the year 2000.

She argued the points for seniority in the promotional process was already a barrier to advancement of female officers in the 2013 promotional routine, as the collective

agreement at that time outlined the criterion for promotion with only 10 pro-rated points awarded for seniority, the balance of points were distributed as 30 points for work performance assessment, 30 points for written test, 30 points for oral interview. In 2013 three female officers participated in the promotional routine, only one female officer was promoted.

The Complainant argued many officers who participated in the 2013 promotional routine complained that the work performance assessment was subjective and therefore the decision was made to eliminate this from future promotional routines. She argued the all male executive/ bargaining team along with the all male senior police management/ CBRM agreed to remove the work performance assessment and incorporate these points into the remaining components. The written portion would then be valued at 45, oral phase at 40 and pro-rated points for seniority increased to 15.

She argued it is unfortunate that the inequity female members face when seeking promotion was not taken into consideration and identified as area that required corrective measures. All points or at least a portion thereof that were allocated for work performance assessment should have been directed toward equity and diversity to reflect the demographics of the CBRM at all job levels as the CBRM Employment Equity Policy states.

The Complainant argued the pro-rated points for seniority clearly meets the definition of a barrier as defined above; a barrier that is part of a process that undoubtedly has inhibited the advancement of female officers through the ranks of the CBRPS. She argued it is systemic discrimination that could be addressed through the CBRM Employment Equity Policy. She argued the tools are already in place and outlined in the policy, however, when the individual/ individuals who have the power to make change by their own choosing fail to implement a policy that not only serves to benefit women in occupations where they are underrepresented but visible minorities, aboriginal people and persons with disabilities serves only to propagate discrimination.

The Complainant argued there are Human Rights Tribunal rulings and cases that share similarities to her complaint in that they focus on the adverse effect of seniority as well as matters of employment equity and diversity, and referred to:

> *Canadian National Railway Co. v. Canada (Human Rights Comm.) and Action travail des femmes (1987)*

She argued the Canadian Human Rights Tribunal ruled that Canadian National Railway had discriminated against women in the St. Lawrence region who were seeking employment in non-traditional blue-collar jobs. Women held only 0.7 percent of the blue-collar jobs in the region, and the Tribunal found that CNN Rail's recruitment, hiring and promotion policies prevented and discouraged women from working in blue-collar jobs. As part of a comprehensive remedial order, the Tribunal ordered CN Rail to hire one woman in every four new hires into blue-collar positions until the representation of women reached 13 percent, which is the national percentage for women working in equivalent jobs.

She argued CN Rail appealed this decision to the Federal Court of Appeal which ruled that the Tribunal did not have the authority to impost a hiring quota on CN Rail because s. 41(2) (a) allows the Tribunal to prescribe measures which will prevent discriminatory practices from occurring in the future, but not to remedy the consequences of past discrimination.

She argued the Supreme Court of Canada overturned the decision of the Federal Court, ruling the Tribunal was within its jurisdiction under s. 41 (2)(a) of the Act in making the order it did. She argued the measures ordered by the Tribunal were designed to break a continuing cycle of systemic discrimination against women. She argued when confronted with this type of systemic discrimination the type of order issued by the Tribunal was the only means by with the purpose of the Canada Human Rights Act can be met. It went on to state there is no prevention without some form of remedy.

A cross-appeal by CN Rail was dismissed.

Further, the Complainant referred to *Goyette v. Syndicat des employe(e)s de terminus Voyageur Colonial (Pinard) Nov.* 5,*1999.* She argued this case pertains to union responsibility with respect to systemic discrimination and was published in the Canadian Human Rights Tribunal Annual Report 1999.

She argued on October 14,1997, a Tribunal upheld a complaint against the Union of Voyageur Terminal Employees by Mme. Lise Goyette. The Tribunal found that the Union, by negotiating departmental seniority clauses in the collective agreement, had created a situation of systemic discrimination whereby women were prevented from accumulating enough seniority to be promoted permanently from less advantageous female-dominated positions. The Union sought judicial review in the Federal Court of Canada.

She argued on November 5,1999, the Federal Court Trial Division upheld the Tribunal's decision. The Court found that there was evidence in the record to support the Tribunal's findings of fact. It also found that there was no legal impediment to holding a Union solely liable for an act of discrimination it had committed, without making findings against the employer. The Court further found that the Tribunal did not err by ordering the Union to repay the Complainant's lost wages, even though employers are usually responsible for paying an employee's wages.

She argued the Federal Court of Canada concluded that it was a discriminatory practice for an employee organization to enter into an agreement that deprived a class of individuals of employment opportunities on a prohibited ground of discrimination, in this case, gender.

The Complainant further referred to *National Capital Alliance On Race Relations (NCARR) v. Canada (Health And Welfare) Interested Party: Professional Institute Of The Public Service Of Canada Canadian Human Rights Tribunal- 1997- Issue Systemic Discrimination.*

She argued the National Capital Alliance on Race Relations ("NCARR") filed a complaint of systemic discrimination against Health and Welfare Canada, now Health Canada ("HC"). It alleged that Health and Welfare Canada discriminated against visible

minorities by establishing employment policies and practices that deprived or tended to deprive this group of employees of employment opportunities in management and senior professional jobs on the basis of race, colour and ethnic origin.

She argued the Canadian Human Rights Tribunal agreed with the Complainant and found that visible minority groups in HC were being affected in a disproportionately negative way and were victims of adverse impact discrimination. There was a significant under-representation of visible minorities in senior management in HC.

She argued remedies were identified and included an employment equity program to prevent future systemic discrimination and eliminate past barriers arising out of the discriminatory practices that were identified.

She argued while this case pertains to discrimination against persons who are visible minorities the fundamental elements of the discriminatory practice outlined above is comparable to the policies and practices in place within the Cape Breton Regional Police Service in terms of the advancement of female officers.

The Complainant submitted the current points awarded for seniority poses a barrier for female officers seeking promotion as they are at a disadvantage when competing with male officers who have acquired service with police departments prior to the amalgamation of the C.B.R.M. in 1995. Furthermore, she argued that seniority is the determinant used by the C.B.R.P.S. in the "acting sergeant" capacity that ultimately favours male officers who have a higher level of service than female officers. She argued the experience the male officers' gain through the "acting role" also provides an advantage from first hand knowledge to draw upon in the promotional process.

The Complainant argued appointments to senior management positions with the C.B.R.P.S can only be achieved through promotion to the rank of sergeant. She argued the current collective agreement does not identify the requirements for promotion to rank above sergeant and advancement to these confidential positions is subject to the discretion of the Chief of Police. She argued barriers such as those identified above are indicative

of the lack of female representation in the five levels of senior management, Staff Sergeant, Inspector, Superintendant, Deputy Chief and Chief.

The Complainant further referred to the case *Ranjit Katkur v. Peel District School Board.* She argued Ranjit Khatkur filed a human rights application against her employer, the Peel District School Board, alleging that they had failed to promote her to the post of Vice-Principal because of her race. The Toronto Star covered the hearing and reported in November 2012 that the application asked the Tribunal to order the Board to:

- Develop equity policies inclusive of marginalized groups;
- Review the hiring, promotion and retention process with representation from visible minority groups;
- Ensure better reflection of visible minorities within senior administration;
- Train senior staff, including principals and vice-principals, in the area of equity inclusion and challenges facing visible minorities.

She argued the Star article noted that the available data (from 2007-08) indicated that only five of 235 principals — 2 per cent — in the board were of South Asian background, while close to 30 per cent of Peel Region residents were South Asian.

She argued the Centre negotiated a confidential settlement of Ms. Katkur's application before her hearing was completed. On January 22, 2013, the Peel District School Board issued a media release with details about their new Action Plan for equitable hiring and promotion.

The Complainant argue the CBRM Employment Equity Policy also states that the CBRM is committed to providing a workplace that is free of discrimination, where diversity is valued, and which is demographically representative of the community it serves at all job levels. The most recent census that took place in 2011 recorded the population as 52% female. The CBRPS has approximately 216 officers, less than 8% are female. There are currently 25 male sergeants and no representation of females at this rank. The CBRPS does demographically represent the population of the community at the lowest ranking level of constable let alone the unionized supervisory

level of sergeant or the non-unionized senior management level.

The Complainant argued while Mr. Kachafanas is correct in stating that she made no allegations of harassment in the workplace he has demonstrated a lack of understanding of her complaint as a form of systemic discrimination. She argued the CBRM Respectful Workplace Policy and Workplace Accommodation Policy are at Mr. Kachafanas' disposal for reference. She argued written within these policies are definitions that help to identify the elements of her complaint as discrimination, namely:

Respectful Workplace Policy - Discrimination:

> Treating an individual or member of a particular group differently based on one or more of the protected characteristics in the Nova Scotia Human Rights Act, which results in a disadvantage to the person or individuals.
>
> Discrimination in an organization often occurs when policies and practices represent the perspective of the dominant cultural group. Discrimination can result in inaccessibility of opportunities to jobs and career ad.

She argued the practice of awarding points for seniority as related to clause 23.13 of the promotional routine process constitutes discrimination as defined within the Policy to Advance Respect in the Workplace.

She argued the CBRM Workplace Accommodation Policy provides further definitions that pertain to her complaint, namely:

CBRM Workplace Accommodation Policy - Barrier:

> Individuals can experience discrimination as a result of physical (building design), attitudinal (stereotypes or prejudices) or systemic barriers. Systemic barriers in the workplace are both formal and informal policies, practices or rules which, when applied in the same way to everyone, may have the effect of unfairly excluding or restricting the participation of some qualified individuals.

She argued the points for seniority awarded to the male members with police service dating prior to amalgamation (1995) have restricted female members from advancing their career.

The Complainant argued Mr. Kachafanas has indicated in his letter of October 27 that the conduct complained of is outside the scope of the Human Rights Act. She argued the NSHRC's mission as stated in the Race Relations, Equity and Inclusion Division pamphlet noted above reads as follows:

> *The Nova Scotia Human Rights Commission's mission is to reduce individual and systemic discrimination in support of a society characterized by equity and inclusion.*

The Complainant argued systemic discrimination exists within the CBRPS. She submitted it is unfortunate that she has not been successful in addressing this matter and have had to resort to making a formal complaint to an outside agency - Nova Scotia Human Rights Commission for assistance.

She argued from the onset of this process, she was informed that it was not necessary for her to retain a lawyer. She argued, she accepted this and felt as though she was the best person who could speak to the discrimination she has faced. She argued, furthermore, to the discovery of the CBRM Employment Equity Policy that was by all accounts kept hidden from employees. She argued this policy if implemented would have addressed the systemic discrimination that prevails within the CBRPS. Barriers would have been identified and corrective measures would have been implemented. Measures such as diverting the points assigned for work performance assessments that were once part of the promotional routine process. She submitted these points could have easily been allocated toward improving equity and diversity within the police service. She argued this type of remedial action would have served to benefit not only her but also other members of "designated groups" within the CBRPS as well as other employees who are seeking to become members of the CBRPS.

The Complainant argued questions as to whether CBRPS female officers face systemic discrimination can easily be answered by the lack of representation in general. She argued there are virtually no mentorship opportunities for female officers and little chance of advancing through the ranks. She argued this is evidenced by the non-existence of female officers holding the rank of sergeant. She argued the disparity female officers face is not as a result of a lack of competence but by the presence of policies and practices that represent the perspective of the dominant cultural group i.e. "Male". She argued her scores for the 2015 promotional routine were respectable and were documented as 86 in the written portion and 90 in the oral interview phase. She argued outside of her Police Science education, she also has a Diploma in Business Management as well as a Bachelor of Arts Degree in Community Studies. She argued Chief Mclsaac, himself has acknowledged that she, along with the other 2 female officers that participated in the 2015 promotional routine, would be good sergeants.

The Complainant argued she is a layperson; she has no experience in matters such as this, and she has done her very best to prepare her submission with hope for a resolution that is not only beneficial to her but to others who may find themselves facing a similar discriminatory practice.

The Complainant argued in addition to her brief, she should have a right to present evidence and be heard in a hearing. She argued her brief does disclose discrimination, especially systemic discrimination, as female officers who do not have the seniority of male officers at the time of amalgamation would not be on equal footing for promotions as they more senior officers would have a higher set of points.

The Complainant conceded, however, the facts as presented by the Respondents were not in dispute and that seniority should be based on merit and not on a point system.

REPLY ARGUMENT OF CBRM

Mr. Kachafanas argued in written reply dated November 7, 2016, as well as orally, men are treated the same as women for promotional routine, and in the case of the Complainant, even if seniority was a factor, she still would not have been promoted due to not having the qualifications. He argued seniority is a neutral factor and applies equally to both males and females and all are treated the same and they have to meet the qualifications to be promoted.

Mr. Kachafanis in reply to the NSHRC, argued it is CBRM's position that this matter can be fully dealt with on a preliminary motion. He argued this is a complaint that alleges the seniority policy contained in the collective agreement between CBRPS, CBRM and NSGEU is tainted by systemic discrimination. There is no dispute over what the terms of the collective agreement says with respect to seniority.

He argued there is also no real dispute as to the facts in issue. The key facts as alleged and as agreed by the parties during the Commission's investigation can be briefly summarized as follows:

1. A promotional routine was held in 2015. The Complainant participated in this routine.

2. Prorated points based on seniority were one of the criteria.

3. Male police officers hired prior to amalgamation have more seniority than officer hired after amalgamation. The Complainant is one such officer hired after amalgamation. There are no female officers who were hired before amalgamation.

4. Cst. Kelly was not selected for a promotion. It is not alleged that she would have been promoted if seniority were not considered, and it was agreed that she would not have been selected for promotion even if points for seniority had not been considered in that promotional routine, based on the merit criteria.

Mr. Kachafanas argued essentially, what is in dispute is the legal characterization to be given to these agreed facts. He argued, the complainant's position is that because the most senior officers are male, the seniority system is a barrier to the advancement of female officers, and should therefore be characterized as systemic discrimination.

He argued CBRM's position is that because the seniority system does not treat female officers differently than male officers in any way, either directly or indirectly, and distinguishes between employees only on the basis of their years of service, it cannot constitute discrimination as defined in the *Human Rights Act*, which requires differential treatment based on, in this case, sex.

Mr. Kachafanas argued the Complainant also makes allegations to the effect that CBRM should have applied its employment equity policy and granted her a promotion regardless of seniority. He argues CBRM takes the position that this is not an allegation of discrimination, and that general matters of employment equity are not within the jurisdiction of the Board. He argued there is no factual dispute as to what the employment equity policy says. The issue with respect to the employment equity policy is whether the alleged failure to actively utilize the policy could constitute a violation of the *Human Rights Act*.

Mr. Kachafanas argued this is a matter that can be decided on the basis of the uncontested facts and law. The mere fact that the complainant intends to call witnesses does not mean that there is a significant dispute as to the key facts in issue. He argued, as stated in the *First Nations Child & Family Caring Society of Canada* decision supra., relied on by the Commission:

> *The Act does not require a viva voce hearing in all cases. The presentation of further evidence is not required where the material facts are not in dispute and where pure questions of law are to be decided. Such a process does not violate procedural fairness.*

Mr. Kachafanas argued CBRM submits that the approach that should be taken on a motion of this nature should be that which was adopted by the Ontario Human Rights Tribunal in *Dabic v. Windsor Police Service*, 2010 HRTO 1994 (CanLII) under that tribunal's rules of

procedure:

> *[7] A summary hearing is generally ordered at an early stage in the process. In some cases, the respondent may not have been required to provide a response. In others, the respondent may have responded but disclosure of all arguably relevant documents and the preparation of witness statements, which generally occur following the Notice of Hearing, will not yet have happened.*
>
> *[8] In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a Code violation.*
>
> *[9] In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her Code rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.*

Mr. Kachafanas argued in the present case, the focus should be on the legal analysis as to whether or not the complainant's allegations, if proven to be true, could reasonably be considered to amount to a violation of the *Human Rights Act*. If the complaint could not reasonably amount to a violation even if the complainant successfully proves the entirety of her case, it would not be in the interest of justice to proceed to a hearing merely for the purpose of being seen to allow her a "day in court".

He argued in *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (CanLII), the court stated that:

> *[56] Most legal systems recognize that there is no reason to accord every party to an action full access to all stages of the litigation spectrum. The common law*

principle that a person has a right to be heard or to have his day in court is not more important than speedy resolution of meritless claims or defences the continuation of which drive up the cost of litigation for everyone not just those prosecuting an action or maintaining a defence which has no real prospect of success.

Mr. Kachafanas argued the "right to be heard" referred to in the cases cited by the Commission is not a right to a full hearing with viva voce evidence in all cases. The complainant is not being denied the right to be heard on this preliminary motion. She is being given full opportunity to make both oral and written submissions to the Board on the issue of whether her complaint properly alleges a violation of the *Human Rights Act*.

He argued with respect to paragraph 8 of the NSHRC's response, if by this paragraph the Commission simply means that the evidence to prove the Complainant's allegations are not yet before the board, this is true but irrelevant. This motion is concerned with the allegations if assumed to have been proven, not the evidence by which the complainant intends to prove them.

He argued, if however the NSHRC is suggesting that the allegations of discrimination before the Board will not be fully defined until viva voce evidence has been given at the Board of Inquiry hearing, it is a matter of serious concern. It may have been true during the investigative stages of this complaint that the complaint form filed by the Complainant was not determinative of the issues. However, the NSHRC referred that complaint form, without amendment, to the Board of Inquiry following its investigation of the Complaint.

Mr. Kachafanas argued the complainant is not the only party who is owed a duty of procedural fairness. The Commission has a duty to frame the complaint so that the respondents know charges against them. He referred to *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2015 NSSC 118 (CanLII), the Nova Scotia Supreme Court summarized the duty of the Commission:

[43] In Pink v. Davis, Justice Warner helpfully summarized the principles for establishing the content of the duty of fairness arising from Canada (Attorney General) v. Mavi, 2011 SCC 30 (CanLII): para. 67. It was the commission's role to

investigate Sergeant Atwell's information, decide whether to advance a complaint, and, if so, frame the complaint. The framing of a human rights complaint should tell the respondent the charge they will face before the Board of Inquiry.

He argued, if the NSHRC is now taking the position that it did not frame the complaint to include all of the charges of discrimination against the respondents, and is in essence relying on the Board of Inquiry to determine what charges have been referred to it, then CBRM intends to immediately apply for judicial review of the NSHRC's decision to refer the complaint to a Board of Inquiry.

Mr. Kachafanas in reply to the Complainant argued the Complainant's response makes clear that there is no dispute as to the material facts for purposes of this motion. CBRM takes no issue with the Complainant's characterization of the operation of the seniority system in her response.

He argued the issue in this motion is whether these agreed facts could reasonably be considered a violation of the *Human Rights Act*. CBRM submits that they could not.

Mr. Kachafanas argued CBRM takes no issue with the definitions cited by the Complainant. They are the definitions applicable to this complaint. Where the parties differ is in their interpretation of how those definitions apply in this case.

He argued the *Human Rights Act* does not require that all employees be on a "level playing field" in a promotional routine, in the sense that all candidates must have exactly equal chances of receiving the promotion. It is entirely acceptable for employers to distinguish between candidates on the basis of non-discriminatory criteria "Barriers to advancement" are not discriminatory unless they are the result of discrimination.

Mr. Kachafanas argued discrimination requires there to be an element of differential treatment based on one of the grounds in s. 5 of the *Human Rights Act*, in this case sex. He argued it is not discriminatory to consider a male employee's 30 years of seniority more favourably than a female employee's 9 years of seniority, so long as both of those employees are genuinely entitled to those years of seniority and the female employee has not been

denied seniority because of a characteristic of her sex. The basis of the distinction is not sex, but years of service. The Human Rights Act does not prohibit employers from making distinctions based on years of service.

Mr. Kachafanas argued in order to establish a violation of the *Human Rights Act*, the Complainant has to do more than simply show that the most senior employees of CBRPS are male and not female. What she would have to establish is not just that they are male and more senior, but that they are more senior because they are male. To establish systemic discrimination she would have to establish that the seniority system treats male employees, as a class, differently and more favourably than female employees, as a class. He submitted she has made no allegations to suggest that this is the case.

He argued, under her example scenario, a male employee with 9 years of seniority would also be at a disadvantage as compared to the male employee with 30 years of seniority, and would be in no better or worse a position compared to a female employee with 9 years of seniority. The 30-year employee would be in a more favourable position not because of his sex, but because he has served for 30 years.

Mr. Kachafanas argued in the absence of an affirmative action program specifically permitting CBRPS to do so, choosing to promote a female employee in preference to a more senior male employee purely because of the female employee's sex would be discrimination against the male employee under the Act.

He argued the cases referred to by the Complainant are all distinguishable from the present case. In all of them, there were clear allegations of actual differential treatment. He argued the *Canadian National Railway* decision supra., did not deal with the use of a seniority system. In that case, the discrimination took the form of widespread and pervasive harassment and oppression of female employees or applicants, intended to drive them out of the workplace and discourage them from seeking 'non-traditional' employment. There are no such allegations in the present case.

Mr. Kachafanas argued in the *Goyette* decision supra., the respondents had negotiated departmental seniority lists which placed the predominantly-female employee groups on a

separate list from the predominantly male employee groups. This had the effect of preventing employees on those lists from earning seniority that would apply toward positions in the more desirable male-dominated employee groups. There is no allegation in the present case that the seniority system places female employees in a different group or tier from male employees under which they earn inferior seniority benefits.

He argued in the *NCARR* decision, the allegations were not about the use of a seniority system. The basis on which the tribunal found that discrimination had occurred was not merely that visible minorities were underrepresented in management positions. The tribunal found that the employer's practices resulted in "ghettoization", by which visible minorities were funneled into dead-end 'feeder' positions that had no prospect of promotion. There is no allegation to suggest that any similar practice is taking place in this case. The Complainant has not been placed in a position that is disadvantaged or with less likelihood of promotion compared to male employees with a similar degree of seniority.

He argued the *Ranjit Khatkur* case ended in a confidential settlement agreement. It is not clear from the website referenced by the Complainant what the precise nature of the alleged discrimination was. He submitted, no decision was issued and no useful legal principles can be derived from the settlement of the case.

Mr. Kachafanas argued none of these decisions are similar to the present case. In all of them, the practices of the employer went far beyond merely having in place a seniority system. In all of them, there were actual allegations of differential treatment.

With respect to the employment equity allegations, he argued although employment equity remedies were granted in several of the cases cited by the Complainant, it must be stressed that in all of those cases, jurisdiction to grant an employment equity remedy flowed from the finding of discrimination. In Nova Scotia, the Board of Inquiry has no power to grant a remedy except to the extent necessary to remedy a contravention of the Act.

Mr. Kachafanas argued the Board has no free-standing authority to direct an employer to implement affirmative action measures in order to promote the advancement of women or increase demographic representation. It has no authority to conduct a general inquiry into an

employer's employment equity policy. All of the powers of the Board of Inquiry flow from the complaint of discrimination referred to it by the Commission.

He argued, for these reasons, CBRM believes that it is in the interest of justice to determine whether the complaint properly alleges a violation of the *Human Rights Act* that is within the jurisdiction of the Board. If the complaint does allege a violation of the *Human Rights Act*, clarifying the nature of the alleged violation will ensure that the evidence presented at the hearing remains focused on the alleged discrimination, rather than on issues that are not properly within the Board's jurisdiction.

DECISION & REASONS

I have given full consideration to arguments of Counsel, in both written briefs and oral submissions, as well as from the Complainant who is self-represented.

I am further mindful of the authorities cited by Counsel for NSHRC with respect to the right to be heard being at the heart of our sense of justice and fairness as referred to in *Matondo v. Canada* supra., and the obligation to act fairly and to be heard, referred to as well in *Moreau-Berube v. New Brunswick* supra., and the argument referred to in *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, supra.. Ms. Franklin argued only in rare and exceptional cases should the complaint be dismissed without hearing the merits. She argued courts have said Board Chairs should be wary of staying proceedings before hearing a complaint on the merits and referred to *Redden v. Saberi* supra. In essence, she argued that the complaint should not be dismissed in a summary manner without a full hearing and denying the Complainant from having her day in court.

Ms. Franklin further referred to a decision of the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada v. Canada*, supra., which stated in essence that Tribunals are not required to hold a viva voce hearing in all cases,

but she argued the Tribunal should only entertain a motion to dismiss a complaint where more evidence cannot conceivably be of any assistance or it is shown that the facts are clear, complete and not controversial or the issues involve pure questions of law.

I find notwithstanding the arguments of the Complainant and Counsel for NSHRC, the Nova Scotia Court of Appeal in *Kaiser v. Durel* supra., at paragraphs 31 and 42 stated as follows:

> 31. The Commission has not satisfied me that the board erred in considering these and similar factors in reaching its decision. There is nothing in the Act or in any cases referred to this court suggesting the proposition that the board is required to proceed with a full hearing once it has been appointed to adjudicate a complaint. In my opinion once appointed, the board is independent of the Commission and it is appropriate for it to consider everthing relevant to lawfully adjudicating the rights and interests of the parties before it. This is particularly so when the board is required to exercise its discretion in the interests of achieving justice between the parties in the context of an application regarding issues such as issue estoppel, *res judicata* and abuse of process. It may be that only upon the appointment of the independent board will the parties be afforded an opportunity to raise and fully argue such critical, preliminary matters.
>
> 42. Considering the importance of finality in litigation referred to above along with the aim of avoiding duplicity, potential inconsistent results, undue costs, inconclusive proceedings, and ensuring just resuls in the particular caase, I am satifised the board did not err in exercising its discretion to estop the Commissioner and Mr. Kaiser from proceeding to a full hearing before the board on Mr. Kaiser's complaint.

Further, in *First Nations Child and Family Society of* Canada supra., the decision stated the Act does not require a viva voce hearing in all cases.

I further find I agree with the authorities referred to me in *Preddie*, and *Dabic* supra, which support the proposition that if the focus is generally on legal analysis, assuming all the allegations in the application are true, is there a reasonable prospect of success. The issue then would be whether there was reasonable prospect of evidence the application has or has reason available to show a link between the event and the alleged prohibited ground. In determining the motion to dismiss the complaint summary, I was referred to *Beier v. Proper Cat Constructions Ltd*. supra., where the Queens Bench in Alberta stated as follows:

> 56. Most legal systems rercognize that there is no reason to accord every party to an action full access to all states of the ligitation spectrum. The common law principle that a person has a right to be heard or to have his day in court is not more important than speedy resolution of meritless claims or defences the continuation of which drive up the cost of litigation for everyone not just those prosecuting an action or maintaining a defence which has no real prospect of success. Justice Sanderman opined in *Richter v. Chemerinski*, 2010 ABQB 302, para 16 that a sound summary judgment rule "balances the need … to bring relief to parties who should not needlessly be forced to come to court to establish an obvious unassailable position and the need to allow those who have a tenuous but arguable position to advance it". There is a need for a mechanism which provides a "simple, orderly and prompt presentation of the substantive issues in dispute between the parties". Clark &Samenow, "The Summary Judgment", 38 Yale L.J. 423, 471 (1929).

Further, the Supreme Court of Canada in *Canada v. Lameman*, supra., the court endorsed the summary judgment rule to prevent claims for defences that have no chance of success from proceeding to trial.

Finally I was referred to a Decision of the Nova Scotia Board of Inquiry in *Hynes et al. v. Cape Breton Regional Municipality*, supra. The Board of Inquiry in that case dismissed three complaints on a preliminary basis as they were not plausible on the facts of record.

I find the Board can exercise its discretion in the interest of achieving justice between the parties and there is no requirement to proceed to a full hearing.

Taking these legal principles referred to by Counsel for the parties into account, I have to determine whether or not the Complainant's allegations, if proven to be true, could reasonably be considered to amount to a violation of the *Human Rights Act*.

The substance of the complaint form has been reproduced earlier (supra.) and in particular, her two main areas of complaint are set out in paragraph 1 of her complaint where she states that she is 1 female officer out of 18 in a department of 200 plus members and feels the seniority clause in the Collective Agreement for promotional routine scoring since pre-amalgamation gives male officers an advantage for promotion over female officers. Thus, she believes in paragraph 3 of her complaint there are systemic discriminatory elements to the seniority points clause in the Collective Agreement.

Further, at paragraph 7 of her complaint she states the treatment she received with respect to promotional routine advancement were due to her gender, as the majority of male officers have more years served which puts female officers at a disadvantage when applying for promotions. She states there appears to be a violation of the employment equity policy that CBRM has in place, and NSGEU has not addressed the matter in a timely and appropriate manner.

I find further the Complainant as well as Counsel for the NSHRC conceded the factual allegations as stated by NSGEU and CBRM are not in issue.

I find the essence of the argument of the Complainant as stated in her complaint form is that female officers seeking promotion to the rank of sergeant, can apply after serving approximately 9 years and male officers who have service prior to amalgamation (and some have over 30 years with the force) are not on an equal playing field, as the more senior applicants receive15 full points for seniority, and thus a female officer with 9 years service would only receive 4.5 years for seniority if competing with a male officer with 30 years of service who would receive 15 points for his portion based on seniority. Further, as there are no pre-amalgamation females, that is prior to 1995, with CBRPS, the females cannot compete with male officers on a level playing field who have pre-amalgamation service.

I find the Complainant joined CBRPS in 2000 and at that time, the police service had 2 female officers and currently they employ 16 female officers which is less than 8 percent of the total work force. I further find there are no pre-amalgamation female officers employed with CBRPS. I further find, and again these facts are uncontradicted, the number of points awarded for seniority in promotional routines was increased from 10 points to 15 points in the current Collective Agreement. The Complainant did not take issue with what is stated in the Collective Agreement; however, she argued when the points were negotiated for seniority, females were in the minority and are still in the minority in the police force.

I find Article 22.01 of the Collective Agreement provides that “seniority and service shall be calculated on the same basis for all employees”. Article 22.08 states that seniority and service is to conclude continuous employment with CBRM and a previous municipality. Article 22.08 limits the recognition of pre-amalgamation employment to employment within the last previous municipality. I find that is repeated in Article 22.10.

I find Article 23 of the Collective Agreement deals with the transfer and promotion of police officers within the police service and the initial hiring of police officers is not

governed by the Collective Agreement. Hiring is within the discretion of the management of police service and the Union has no role in the hiring of police officers.

I find Article 28.3 (11) limits participation in promotional routines to police officers who have completed 9 years of service with the policy service. Article 23.13 of the Collective Agreement indicates the criteria which consists of a written examination worth 45 points out of 100 and an interview worth 40 points out of 100. One has to obtain a score of 70 percent or higher on the written examination and points are given for seniority with senior employees receiving 15 points and less senior candidates who qualify receiving points for seniority on a pro-rated basis. I find employees are placed on the list with their overall scores and officers must have a minimum score of 65 percent to be eligible for promotion. They are then promoted for sergeant in the order they appear on the list as vacancies occur.

I find under Article 23 of the Collective Agreement, the promotional routine is not primarily driven by seniority, as a candidate has to obtain 85 of a possible 100 points on merit from a written examination and an oral interview. They have to score 70 percent or better on the first 2 elements of the routine to have their seniority considered at all.

The Complainant alleges the aspect of promotional routine is discriminatory based on gender. I find the complaint form does not reveal that seniority was acquired in a discriminatory manner, but the basis of her complaint is that the awarding of points for seniority is discriminatory, as indicated in paragraph 1of her complaint, namely,

> 1. What is your protected characteristic(s)? Please explain.
> I am one female police officer out of 18 female officers in a department with 200 plus members. I feel that the seniority clause in the collective agreement for promotional routine scoring gives pre-amalgamation male officers an advantage for promotion over female officers.

The Complainant indicates in her complaint form at paragraph 3, as follows:

> 3. Please provide example(s) of discriminatory treatment you say you experienced by the Respondent.
> Pre-amalgamation there were 7 individual police departments with no female police officers. Therefore, the majority of the male officers today have higher seniority than female officers. Based on current practices in the collective agreement, when an officer participates in a promotional routine, 15 points are given for seniority. It is calculated by using the amount of years served by the most senior officer participating in the promotional routine and then calculating the ratio based on that number. Female officers are already under represented and the seniority points create a distinct disadvantage. Also, there is no active utilization of the employment equity policy. Based upon that, I believe there could be systemic elements to the seniority points clause.
>
> I applied for the promotional routine in 2010. The most senior male officer participating in the promotional routine that year had 31 years of service and I had only 10 years. At that time a maximum of 10 points could be given for seniority points. I was not successful at that promotional routine.
> I participated in another promotional routine in 2012, as well as three other female officers. A female officer who has the same seniority as I received the promotion to sergeant, as well as 4 male officers. The Police Department now has 25 male sergeants and 1 female.
> In 2014 seniority points were increased to 15 points. This year I participated in my third promotional routine. There were three male officers who received promotions. The most senior officer who participated had 27 years seniority.

The Complainant argued the discrimination that she suffered began in 2010 when she first participated in the promotional routine and later when she applied in 2012 and again in 2015. In paragraph 4 of her complaint, she says the treatment she received is because

of gender due to the fact that the majority of male officers have more years served, which put senior male officers at an advantage in applying for promotions. She states, this appears to be a violation of the employment equity policy CBRM has in place. I further believe CBRM has not addressed this matter in a time appropriate manner.

Section 5.1 (d) (m) of the *Human Rights Act* states as follows:

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

The essential facts are not in dispute namely:

a) individual police departments that were amalgamated with the creation of CBRM employed no female officers at the time of amalgamation;

b) the Collective Agreement recognized seniority accrued by police officers who had continuous employment with the previous municipality;

c) male officers who were employed by the individual police departments before amalgamation have more seniority than female officers such as the Complainant who were hired after amalgamation;

d) points for seniority are awarded in promotional routines conducted under the Collective Agreement and male officers who are employed on individual police departments before amalgamation would receive more seniority points in the promotional routine hired after amalgamation.

I do not find the Complainant says seniority accrues in a discriminatory manner under the Collective Agreement or she would have more seniority, but for the discriminatory practices. The real issue that I have to determine on the face of the complaint is whether the complaint has any basis to reveal the Respondents discriminated against her when they award points for seniority in promotional routines.

I have no authority to amend the complaint or to alter the grounds of discrimination and I refer to the Nova Scotia Court of Appeal at paragraph 37 of the *Nova Scotia (Environment) v. Wakeham*, 2015, NSCA 114, at paragraphs 28 and 48 which provides as follows:

> 28. A board of inquiry has limited jurisdiction regarding changes to a complaint. It may approve changes that particularize or clarify existing elements in a complaint. However, a board of inquiry lacks jurisdiction to approve amendments which would substantively alter the complaint and effectively add new grounds to the complaint. Again, this has been commented upon by this Court in previous decisions.
>
> 48. Just to be clear and to avoid any confusion on this point, a board of inquiry does not have the ability to amend complaints to something that is different than what was referred to it. Her determination that she had the power to amend the complaint was a clear departure from the law regarding the respective roles of a board of inquiry and the Commission.

Section 4 of the *Human Rights Act* states as follows:

> 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.

Thus, the main issue that I have to determine is whether the disadvantage alleged by the Complainant is the result of differential treatment by the Respondents on the basis of

gender under the *Human Rights Act* as stated in *Keith v. College of Physicians and Surgeons of Ontario*, supra. The Human Rights Tribunal stated at paragraph 44 of that decision, "there must be evidence of adverse treatment or disadvantage resulting from the differential treatment. One looks to historic disadvantage to understand the impact of the differential treatment, not to eviscerate the need to prove current advantage in the specific case."

The Complainant has argued the pre-amalgamated police departments had no female members at the time of amalgamation in 1995 and the awarding of points for seniority in promotional routines under the Collective Agreement is discriminatory. I find as the facts are not in dispute, the Complainant's seniority accumulates the same way as seniority for male officers. There has been no allegation by the Complainant in her complaint the male officers with continuous employment with the previous municipalities acquired their seniority as a result of discriminatory practices.

I find she has made no allegation that the previous municipalities discriminated on the basis of gender. The Complainant has argued the pre-amalgamation police departments had no female members at the time of amalgamation and the awarding of points in promotional routines is discriminatory. I find in her complaint she has alleged the police departments employed discriminatory hiring practices, as senior officers can obtain 15 full points for seniority on promotional routines and as they are basically all male because there were no female officers pre-amalgamation, and by awarding these points, it is not based on merit and it is discriminatory to female officers.

I find the complaint does not contain any allegation that the seniority system makes any distinction between female and male employees. In fact, I find the seniority system applies equally to all employees and only distinguishes between employees on basis of years of service with CBRPS.

I further find the *Human Rights Act* does not prohibit discrimination based on years of service and section 57 (2) of the Labour Standards Code, R.S.N.S., 1989, c. 246, as amended, recognizes the discriminatory nature of seniority systems as well as the *Pay Equity Act*, R.S.N.S., 1989, c.337 as amended, section 13.4 (a) difference in wages between male and female employees based on a seniority system do not constitute discrimination.

Section 57(2) of the Labour Standards Code states as follows:

> 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
>
> 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 sec,
>
> 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.

Section 13.4(a) of the *Pay Equity Act* states as follows:

> In making a comparison required by this Section, there is no sex discrimination in pay where a pay difference is the result of
>
> (a) a formal seniority system that does not discriminate on the basis of sex;

Further, I find there is ample jurisprudence that seniority systems are the core elements of Labour Law in Canada and worked into most Collective Agreements, as stated in *Amalgamated Transit Union, Local 741 v. London Transit Commission*, supra., "seniority is entirely the bargaining table creation of the parties in a unionized work place, and is

widely recognized in the laws in the cornerstone of labour relations in Canada." It goes on to say "seniority is an important tool to promote equality of work".

Further, that decision indicates in the era of human rights in the work place, the seniority rights of bargaining unit employees are accepted as a cornerstone provision in the Collective Agreement and cannot be interfered with where other accommodational terms are available.

The Complainant referred to a decision in *Goyette v. Voyageur Colonial Ltte*. 3, [1997] CHR 8 (QL). That decision is distinguished from this case in that the respondents had negotiated departmental seniority lists which placed predominantly female employee groups in a separate list from the predominantly male employee groups and it had the effect of vetting employees on those lists from earning seniority in the more desirable employee dominated groups. In this case before me, I find there is no allegation the seniority system places female employees in a different group or tier from male employees.

The Complainant also referred to the *NCARR v. Canada (Health and Welfare)*, supra., a case of discrimination against physical minorities establishing employment policies and practices that deprived that group of employment opportunities on the basis of race, color and ethnic origin. Again, that differs from the case before me as there is no allegation the Complainant has been placed in a position that is disadvantaged or with less likelihood of promotion compared to male employees with a similar degree of seniority.

The Complainant also referred to *Ranjit Katkur v. Peel District School Board*, supra., which case involved the complainant alleging the School Board failed to promote her to position of vice principal because of race. That case was settled by a confidential settlement agreement and I find it differs from this case, as we do not know the particulars of the settlement.

I find the decisions quoted by the Complainant are dissimilar from the facts of this case.

Further, I find the Complainant is not seeking an accommodation as there is nothing preventing her from doing her duties of her employment. She is seeking an Order to compel the Respondents to adapt what is akin to an affirmative action program to grant her a promotion to which she is otherwise not entitled to under the Collective Agreement. She argued women are historically disadvantaged and unrepresented in the work force.

The Ontario Human Rights Tribunal in *Ellis v. General Motors of Canada Ltd*. supra., found the duty to accommodate in Human Rights Legislation does not extend to require an employer to grant an employee a promotion to which they would not otherwise be entitled.

Further, I was referred to a Canadian Human Rights Tribunal decision in *Belanger v. Correctional Service of Canada* supra. The Complainant in that case alleged the seniority system had been voted on by a male CX employee for the purpose denying seniority to the female CR employees and because it negatively impacted more female employees than male employees, it was discriminatory on the basis of sex. The Tribunal found the Complainant had not established a prima facie case of discrimination. It was found the Complaint in that case had not suffered differential treatment based on her sex. The Tribunal ruled the Complainant cannot establish differential treatment merely by showing a provision adversely affects both men and women and has an adverse effect on more women than it does men.

Further, I was referred to *Matthews v. Chrysler Canada Inc*. supra., where the Ontario Human Rights Tribunal found the use of seniority as a criteria for selecting candidates for a position was not discriminatory per se.

The Complainant argued because more senior employees are male, there must be elements of systemic discrimination in the seniority system. I was referred to *Stalmakh v.*

Loblaws Supermarkets Ltd., supra., where the Ontario Human Rights Tribunal found the complaint has no reasonable prospect of success as there was no link between the complainant's place of origin and the Respondent's treatment under the seniority system. The basis of the Complainant's complaint was that another employee who had started one week before him was a Canadian citizen, where he was from Belarus and was not a Canadian citizen. The Tribunal found the applicant had no evidence to demonstrate that no date other than an employee's start date is how seniority is measured.

I find from the undisputed facts in this case that female officers hired post-amalgamation have less seniority than pre-amalgamation male officers. However, male officers hired post-amalgamation also have less seniority that pre-amalgamation officers and, accordingly, a male officer and a female officer hired on the same date would have exactly the same seniority under the seniority system. I find any adverse affect on female employees would also apply to male employees.

Further, I was referred to *Thibodeau v. MRN* supra., where the Federal Court of Appeal rejected a claim which required reporting child support payments by single custodial parents discriminated on the basis of sex. The court said the focus really is not on numbers, but on nature of the effect, on quality rather than quantity. Legislation which adversely affects women has the same adverse affect upon men, even though their numbers may be smaller or the likelihood of their suffering less, it cannot logically be said that the ground of discrimination is sex.

I find pre-amalgamation seniority in the Collective Agreement has the same impact on male officers hired after amalgamation as on female officers. I find accordingly, the Complainant has not stated in her complaint or argument that seniority in pre-amalgamated police departments was itself discriminatory, or the recognition in the Collective Agreement of continuous employment with the previous municipality was discriminatory, but it is the point system awarded to pre-amalgamated officers that she

says is discriminatory for promotional routines and argued it should be based solely on merit.

Further, with respect to the allegation in paragraph 4 of the complaint wherein she alleges there appears to be a violation of the employment equity policy that CBRM has in place, she says that policy was not followed. I find there was no reference to any specific provision of the policy indicated in her complaint that would require CBRM to give preference to female candidates in promotional routines. I find the preamble in the employment equity policy indicated CBRM was committed to providing a workplace demographically well represented of the community it serves at all job levels.

I find section 6 (i) of the *Human Rights Act* states as follows:

> To preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individual or classes or individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

I find the Act does not require that such a program be implemented. I was referred to *McCauley v. Town of Port Hawkesbury*, supra., at paragraph 120, where the Board of Inquiry stated,

> By way of comment, I would reiterate the observation of the Board of Inquiry in Fortune v. Annapolis District School Board, [1992] N.S.H.R.B.I.D. No. 320, para 47:
>
> Under the *Human Rights Act* (Nova Scotia), no employer is obliged to hire women; similarly no employer is obliged to adopt and implement an affirmative active program or to give a preference to women in respect of hiring. However, because of the position of women in Nova Scotia as an historically disadvantaged group in respect of employment, employers must give full and fair consideration

> to the merits of female applicants. This is particularly so when the position has been dominated over the years by males. Such has been the case with respect to spare school bus drivers in the Annapolis Royal area. In my view, the essence of what happened in the present case is that neither the School Board nor Mr. West (nor Mr. Hannam acting as Mr. West's delegate) gave full or fair respect and consideration to Ms. Fortune and the merits of her application. In my view they were required to fully and fairly consider whether she was the best qualified applicant and whether she could do the job. The School Board must ensure that its employees are properly instructed in the process of giving such full and fair consideration to all qualified applicants who seek employment. This obligation is heightened when the applicant is a member of an historically disadvantaged group. To discriminate, the mind need not be deliberate in inflicting poisoned arrows. Disrespect and unjustified rejection directed toward the historically disadvantaged can be sufficient indices that discrimination is at work.

Further, I was referred to the *University of British Columbia v. Chan*, supra., where the British Columbia Court of Appeal found the Human Rights Commission made an unreasonable decision when it refused to dismiss a complaint that had no reasonable chance of success, and the reason was that the Tribunal had incorrectly found the employer had failed to follow the prescriptive process of selections under its employment equity program. I find there was no indication in the complaint that CBRM's employment equity policy had a provision requiring CBRM to give the Complainant preference in the promotional routines due to her sex (gender) or otherwise requiring CBRM to implement such a policy.

I was referred to the Ontario Board of Inquiry decision of *Florence Shakes v. Rex Pak Ltd.*, supra., as to whether or not a prima facie case of discrimination has been made out by a complainant in an employment case, "by proving a) that the complainant was qualified for the particular employment; b) that the complainant was not hired; and c) that someone no better qualified but lacking the distinguishing feature which is the gravamen

of the human rights complaint subsequently obtained the position. If these elements are proved, there is an evidentiary onus on the Respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred."

I find in this case, the Complainant has not alleged that the officers who were promoted were not better qualified than her, as stated in HRO Tar's Report, the Complainant agreed the officers who were promoted had scored higher than her on the promotional routine in which she only ranked 12th.

I was referred to *Preddie v. Saint Elizabeth Health Care*, supra., an Ontario Human Rights Tribunal stated at paragraph 25 that there must be some reasonable prospect that evidence the applicant has or had reasonably available to her can show a link between the events alleged and the alleged prohibited grounds. The applicant must show more than mere subjective suspicion to establish a link between the respondent's alleged conduct and the grounds pleaded. There must be at least some objective facts and circumstances to support a theory linking the Respondent's actions with the code. The Human Rights Tribunal in *Preddie* found the Respondent should not be obligated to undergo a full hearing and amount a full defence to a complaint based on mere speculation that discrimination may play a factor in the decision, or where the Complainant merely hopes that evidence of discrimination will be discovered during the hearing process.

Accordingly, on review of the briefs filed by the parties and upon hearing oral arguments, I find on the balance of probabilities the complaint should be dismissed on the basis of failing to show discrimination. I find even if the allegations in the Complainant's complaint are proven, there can be no prima facie case that the Respondents discriminated against her because they agreed to award points for seniority in promotional routines conducted under the Collective Agreement.

I find the complaint failed to make any allegation that suggests the Complainant's disadvantage under the CBRM's seniority system was as a result of a distinction made by CBRM or NSGEU based on her sex or that she has been treated differently under the seniority system than any other employee.

I find the Complainant has not identified in her complaint any specific provision of the employment equity policy that CBRM or NSGEU has breached.

I further find the points for seniority in promotional routines under the Collective Agreement applies equally to male and female officers. I find the Complainant does not argue seniority was acquired in a discriminatory manner. I find seniority for both males and females are accumulated the same way, through years of employment with CBRM and/or with the last municipality that employed them before amalgamation.

I find the Complainant has not claimed that seniority accrues under the Collective Agreement in a manner that discriminates directly or indirectly on the basis of gender or seniority acquired through employment with pre-amalgamation with the municipality was acquired in a manner that discriminated directly or indirectly on the basis of gender.

Further, I find from the authorities cited, seniority systems are core elements of labour law in Canada and are incorporated in most Collective Agreements and are an important tool to promote the quality of work. I find the point system provided for in the Collective Agreement for seniority of officers applies equally to male and female officers. I find for the Complainant to establish discrimination, she would have to establish that the seniority system in the Collective Agreement treats male employees as a class differently and more favorably than female employees as a class. The Complainant has not alleged this in her complaint form.

The Complainant as well as a male employee with 9 years of seniority would be at the same disadvantage as compared to any employee with 30 years of seniority. The 30 year

employee would be in a more favorable position, not because of his sex, but because he has served for 30 years.

With respect to the Complainant's allegation of violation of employment equity violations, there were no particulars provided, and if there were, I find for the reasons stated there is no violation of section 5 (1)(d)(m) of the *Human Rights Act* supra., which is the basis of her complaint.

Accordingly, I find for the reasons stated, having given the Complainant full opportunity to make both written and oral submissions, on whether her complaint alleges a violation of the *Human Rights Act*, supra., I find even if all the allegations in her complaint to be true, there is no reasonable prospect of success that her human rights were violated for the reasons stated.

I find for the reasons stated, the main issue dealing with the points awarded for seniority applies equally to both male and female officers which is the basis of her complaint and there was no violation of Section 5 (1)(d)(m) of the *Human Rights Act,* supra., as alleged.

Notwithstanding my decision to dismiss the complaint for the reasons stated, I find that the concerns raised by the Complainant would be better addressed through an affirmative action program that would be implemented by CBRM and/or through the collective bargaining process and be included in the next Collective Agreement.

As indicated by the Federal Court of Appeal in *Thibodeau v. MRN*, supra., the focus surely is not on numbers, but on nature of the effect; on quality rather than quantity. If legislation which adversely affects women has the same adverse affect upon men, even though their numbers may be smaller, or the likelihood of their suffering be less, it cannot logically be said that the ground of discrimination is sex.

Further, as referred to in *Belanger v. Canada* supra., the Human Rights Tribunal rejected

the complaint from female corrections officers who claimed they were disadvantaged when the union agreed only previous seniority as a correctional officer would be recognized in the granting of vacations. Any female corrections officer that had previously worked in administrative positions in Government at that time would not count toward their seniority and the Tribunal rejected the complaint and indicated that male officers who had previously worked outside of corrections were affected in the same way as police officers.

I find from review of the authorities cited, the awarding of points for seniority applies equally to male and female officers and the points are accumulated in the same manner through their full time employment with CBRM and the last municipality that employed them before amalgamation.

CONCLUSION:

The Board finds from the written and oral submissions from the parties, and for the reasons stated, it is appropriate to exercise the Board's discretion and dismiss the complaint as, even if the allegations in the complaint are proven, there can be no prima facie case that the Respondents discriminated against the Complainant because they agreed to award points for seniority in promotional routines under the Collective Agreement. I find seniority accumulated in the same way for males as for females and applies equally to both male and female officers. I find also, as indicated, the Complainant has not indicated seniority acquired through employment with pre-amalgamation CBRM was acquired in a manner that discriminated on the basis of gender.

Accordingly, for the reasons stated, the complaint is dismissed.

As the Board has dismissed the complaint, both of the Respondents' motion on the challenge of the subpoenas requested by the Complainant is moot. Accordingly, I need not decide on that matter.

Dated at Bedford, Nova Scotia, this 23rd day of November, 2016.

_____

E.A. Nelson Blackburn, Q.C.
Chair of Board of Inquiry