

**IN THE MATTER OF THE HUMAN RIGHTS ACT, RSNS 1989, c.214 as
amended SNS 1991, c. 12**

BETWEEN

Kathleen Viner, Complainant

- and -

Hudson Bay Company (Zellers Greenwood), Respondent

NOVA SCOTIA BOARD OF INQUIRY

UNDER THE HUMAN RIGHTS ACT

Heard Before: Dennis James, Chair

Location: Wolfville, NS

Date Heard: January 18 and 26, 2012; March 30, 2012

**Counsel: Shelley and Donna Viner, for the Complainant
David Miller, Q.C./Mr. Tipper McEwan, for the Respondents
Ms. Lisa Teryl, for the Human Rights Commission**

1. According to her obituary, Kathleen Viner, was a mother of 10 children and 13 grandchildren. She worked for the Adult Residential Centre in Bridgetown for 30 years. It goes on to say that she loved cooking family dinners and spending time with her family. She is described as having a very strong will, willing to fight for anything she believed in.
2. Mrs. Viner died on Friday, September 23, 2011. She was 81 years old.
3. The Board was appointed to inquire into the complaint of Mrs. Viner against the Respondent, Hudson Bay Company (Zellers Greenwood). Mrs. Viner alleged in her complaint that the Respondent discriminated against her on the basis of race and colour contrary to sub-section 5 (1)(a) (i) and (j) of the *Human Rights Act*, RSNS 1989, c. 214 as amended ("*NS Act*"). The discrimination, according to the complaint, related to an accusation of shop lifting a new rug against her even though the sales clerk was aware Mrs. Viner had paid for the item. The allegations arise from a visit by Mrs. Viner to Zellers in the Greenwood Mall, Greenwood, Nova Scotia on April 16, 2008.

Procedural Background

4. The Human Rights Commission at a meeting of April 20, 2011 referred Mrs. Viner's complaint to a Board of Inquiry. By letter dated July 8, 2011 this Board was appointed.
5. There were several scheduled preliminary phone conferences arranged between July 8, 2011 and Mrs. Viner's death. The first conference call was scheduled for August 9, 2011. A second date was set for September 13, 2011 and a third one scheduled for September 20, 2011. On each date Mrs. Viner's failing health prevented her from participating in the phone call. On advice from the family that she was again ill and could not participate in the September 20, 2011 scheduled call, a new date of September 30 was set. Mrs. Viner died on September 23, 2011.
6. Upon learning of Mrs. Viner's death the Board invited counsel for the Commission, for the Respondent and Ms. Shelley Viner on behalf of the Viner family, to address the impact of Mrs. Viner's passing on her complaint. A pre-hearing was held by teleconference dated October 19, 2011.
7. Ms. Shelley Viner attended on the conference call on behalf of her family and indicated that she and her sister Donna were the Co-executrixes for their mother's estate. It was their position the Board should continue with the inquiry into their mother's complaint. The Respondent took the position that as a result of Mrs. Viner's death the Board had no jurisdiction to continue with the inquiry. At that time, Ms. Teryl indicated that the Commission was not taking a position but would file a brief addressing the current state of the law on the issue.
8. January 18, 2012 was the scheduled date for the hearing for the Board to consider the issue of its jurisdiction to proceed with the inquiry. Unfortunately due to a death in the family, Ms. Shelley Viner and her sister Ms. Donna Viner forgot about the hearing date

which caused a further adjournment to January 26, 2012. The Respondent requested the matter be dismissed but the Board set the date of January 26 with the advice the hearing would proceed on that date without further delay. It was only from subsequent communication that the Board and the parties became aware of the reason that caused Shelley Viner and Donna Viner to miss the preliminary hearing.

9. Prior to adjourning on January 18, the Board drew to the attention of Ms. Teryl for the Commission and Mr. Miller for the Respondent two decisions from Human Rights Tribunals in Ontario on the jurisdictional issue of the status of the complaint upon Mrs. Viner's death. The decisions were *Morrison v Ontario Speed Skating Association*, 2010 HRTO 1058 and *Estate of Pinder Roy v Wal-Mart Canada Corp. et al*, 2010 HRTO 1517. The Board invited the parties to comment on the decisions.
10. The parties did convene on January 26, 2012. A joint affidavit from Shelley Viner and Donna Viner filed in advance of the hearing attached a redacted version of the Last Will and Testament of Kathleen Viner. It appeared from the Will that Donna Viner was the executrix and Shelley Viner was the alternate Executrix. Donna Viner was sworn and gave limited testimony on the status of the estate. It appears and the Board finds that Donna had not taken steps to formally open an estate in Probate Court; rather she and Shelley were attempting to carry out their mother's wishes without an estate being opened.
11. The Board finds for its purposes that the fact that no estate was opened for Mrs. Viner's Estate was not detrimental to the complaint. Given the purpose of the *NS Act*, the Board was satisfied on the evidence that Donna Viner was an appropriate representative and had standing to address the issue of the Board's jurisdiction. The Respondent did not contest Ms. Donna Viner's standing.
12. Also on January 26, 2012 the Board considered portions of the affidavit filed jointly by Shelley Viner and Donna Viner. Such an affidavit was contemplated during the October 19, 2011 conference call for the purpose of assisting the Board and parties have evidence of Mrs. Viner's death, her Last Will and Testament and the status of the Estate. The filed affidavit contained information that went beyond those limited issues. The Respondent objected to most of the Affidavit as inadmissible on the narrow issue of jurisdiction. The Board ruled that Paragraphs 4 to 9 (other than the first line) were to be struck from the affidavit.
13. As it turned out the preliminary hearing was adjourned yet again. The reason for the adjournment was a change in the position advanced by the Commission. Although not finally stated, Ms. Teryl, indicated that she was expecting to receive instructions from the Commission to advance a position in support of the Viners' desire to see the Board continue with the inquiry. She asked for an adjournment to confirm her instructions. Although the Commission had given neither the Board nor the Respondent notice prior to the January 26 of its possible new position, the Board granted the adjournment.

14. In granting the adjournment the Board directed the Commission to advise of its position on the issue of jurisdiction no later than February 3, 2012. A phone conference was scheduled for February 14, 2012.
15. By letter dated February 3, 2012, the Commission filed a supplemental brief and confirmed it was taking a position that the Board did retain its jurisdiction to inquire into Mrs. Viner's complaint despite the fact that Mrs. Viner had died.
16. March 30, 2012 was the date chosen for the Board and the parties to reconvene to hear argument on the issue of jurisdiction. The preliminary hearing did proceed and concluded on March 30.

Affidavit of Shelley Viner and Donna Viner

17. During the March 30 hearing the Board was asked to reconsider the contents of the Affidavit of Shelley and Donna Viner. The contentious paragraphs were 4, 5, 6, 7 and 9:

4. Our mother made a human rights complaint against the respondent ("Zellers") dated March 29, 2009. Our mother told us, and we do verily believe, that she was very upset and heartbroken that she was stopped by the security clerk and made to feel she had stolen a rug. She provided proof that she paid for the rug.

5. She was a long-time shopper at Zellers. Afterward, she never went back to shop there. She repeatedly cried about this incident. She lost sleep and had a loss of appetite, all which was not good for her general health. It also bothered her greatly that the security officer yelled at her during the course of her being stopped and questioned.

6. As daughters of the complainant, we are personally concerned by the comments made by the security officer to the human rights investigator about our family. These comments apparently reflected the discussions of the staff at Zellers.

7. In an email to the Commission, Peter Simpson, the security officer, reportedly said he had no previous knowledge of our mother "but other staff members [of Zellers] were aware of this woman and the 'far from law-abiding habits of her extended family'." These statements by the security guard were very emotionally distressing to her. She commented to us afterward that she, "worked hard all of my life and raised my children well." We believe that the emotional stress and unfairness of the encounter bothered her deeply.

8. Were this matter to proceed, we would be requesting compensation for our family members for loss of reputation, training for Zellers' security personnel on the harms of racial profiling and a requirement that Zellers begin to keep statistics on the race of the shoppers they detain. My family, of course, also wishes to claim compensation for the loss of reputation and wrongful detention of my mother.

9. We also have a concern that there appears to be very few workers of African Nova Scotia decent at the Greenwood and New Minas stores.

18. The Commission's position was that most of the content of the Affidavit previously struck on January 26 should be reintroduced. Ms. Teryl considered the evidence in paragraph 6, 7, 8 and 9 relevant in light of the Commission's new position. The Commission did not request that those portions of Paragraph 4 previously struck or Paragraph 5 be reinstated. The Respondent resisted the resurrection of paragraphs 6, 7, 8 and 9 arguing the evidence was not relevant to the question of jurisdiction and some of the evidence would be prejudicial to Respondent.
19. The Board considered the Commission's argument that the Board can accept into evidence that otherwise may not be admissible in a court of law. Even taking that into account the Board was concerned that the evidence exceeded the issue of jurisdiction that was under consideration and at least in regard to Paragraph 9, would prejudice Respondent at this point in the process. The Board did permit the reintroduction of Paragraph 8 as it was limited to the Viners' desire to see the proceeding advance.
20. The Board is required to determine whether it has jurisdiction to proceed with the complaint filed by Mrs. Viner on March, 2009, pursuant to Section 29 of the *NS Act*.

Position of the Viners

21. Shelley Viner addressed the Board at the March 30 hearing on her behalf and on behalf of her sister, Donna. She indicated the family was very concerned that Mrs. Viner's complaint be heard despite her death. Ms. Viner indicated that comments allegedly made by the Respondent's personnel in the Zellers Greenwood revealed significant discrimination and displayed a negative view of the Viner family. Ms. Viner indicated that the conduct of the Respondent continues to be a problem.
22. The Respondent took issue with some of the statements made by Shelley Viner in her submission referring to allegations of current discriminatory conduct. The Respondent contended the matters referred to are not relevant to Mrs. Viner's complaint and would, if accepted, be prejudicial to the Respondent. The Board recognizes that Ms. Viner's comments did not constitute evidence rather it reflected her view that there are ongoing significant issues with the conduct of the Respondent's staff that may have bearing on

her mother's complaint. The Board recognizes Ms. Viner is not a trained lawyer and was raising issues in the context of argument to explain her and her sister's position and places no greater weight on the comments.

Position Advanced by the Commission

23. The Commission advances the position in support of the Viners' request for the complaint filed by Mrs. Kathleen Viner to continue. In making the submission that this Board has jurisdiction to continue the inquiry, the Commission makes the following arguments:
- a) The decisions in *Morrison, supra* and *Wal-Mart, supra* correctly distinguished cases like *British Columbia v Gregoire*, 2005 BCCA 585. The Commission says the *Gregoire* case can be distinguished as it was reliant on the line of cases applying decisions involving challenges to legislation as violating provisions of the Charter of Rights. The Commission argues that "the principles applicable to extinguishment of the *Charter of Rights* in a civil action are not transferrable to Human Rights regimes."
 - b) The Commission says it is important that its role as a separate party to complaints before Boards of Inquiry pursuant to Section 33 of the *NS Act*. This role, says the Commission, is to protect the interest of the public in the enforcement of human rights. It says in the normal course of a human rights inquiry, the Board would have jurisdiction to order remedies unrelated to Ms. Viner.
 - c) The Commission noted that the *NS Act* provides for broad remedial authority suggesting a broad mandate for the Commission.

The Respondent's Position

24. In reply to the Commission, the Respondent makes a number of points:
- a) The Board's jurisdiction is derived solely from the *NS Act*.
 - b) The Respondent says that Ms. Viner claimed Zellers' violated her personal rights and the rights do not pass to her Estate or heirs. The Respondent says that absent the statutory provisions, the rights under the *N.S. Act* abate upon death of the individual.
 - c) The Respondent contends that a notion of public interest as described and advocated by the Commission cannot be the basis to expand the jurisdiction of the Board in a complaint which relates to an individual.
 - d) It says that the Commission cannot "work back" from its broad remedial authority to expand its jurisdiction beyond the scope of the individual complaint.

The Board's Jurisdiction

25. The Respondent correctly asserts the Board's authority is derived only from the statute under which it is created. The Board is a creature of statute and has no inherent or equitable jurisdiction. The Board has only the powers conferred on it by the *NS Act*. Quoting from the Respondent's Brief:

"24. The concept of jurisdiction was also discussed in the landmark decision of *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC (Tab 2). There the majority made these comments:

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution...

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.

25. The Court in *Dunsmuir* went on to give the following definition of jurisdiction:

59... 'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction..."

Issues

26. There are two questions that need to be answered:
- a) Does the Estate of Kathleen Viner have standing to continue the complaint?

- b) Does the Human Rights Commission have standing to continue the enforcement of the complaint?

The Standing of the Estate of Kathleen Viner

27. The case law appears clear that the Estate in this case does not have a right to continue the claim of the Complainant for compensation of recovery of damages under the *NS Act*. The case law is compelling as set out in *Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429, 2007 SCC 10. In that case a class of plaintiffs sought to have declared invalid sections of the Canada Pension Plan including Section 60 (sub. 10). The Court identified that threshold issue in the challenge to Section 62 is “whether the estates of those survivors who died more than 12 months before the coming into force of the *MBOA* amendments to the CPP may have standing to claim a section that s. 15(1) *Charter* right on behalf of the deceased survivor.”
28. In dealing with the issue of standing the Court found at paragraph 73:
- “In our opinion, the Government’s submissions had merit. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term ‘individual’ in Section 15 (1) was intentional. For these reasons, we conclude that estates do not have standing to commence Section 15.1 *Charter* claims. In this sense, it may be said that Section 15 rights die with the individual. “
29. The Court set out two exceptions. First the Court determined that when a judgment is obtained, the cause of action upon which the judgment is based is merged in the judgment. It is said as such, where a party dies pending appeal, the appeal survives even if the original cause of action would not. Similarly, the Court found an exception would apply where a Plaintiff has died after the conclusion of argument and before judgment was entered. The present case does not fit within either of these exemptions.
30. A similar sentiment was applied in a human rights context in *British Columbia v. Goodwin Estate*, 2005 BCCA 585. In that case the Court considered whether a human rights tribunal was without jurisdiction to continue to entertain a complaint where the person on whose behalf the complaint was made died before a hearing could be held. In reaching its conclusion the Court said at paragraph 9,
- “...but I do not see, in what has been cited, any basis upon which it can be said the Judge’s conclusion is at odds with those provisions in the legislation. It is well established that Human Rights legislation is to be purposively construed in a broad manner. But that does not mean that the *Code* is to be interpreted so broadly as to exceed the limitations imposed by the fact that it

has personal rights that are protected under Section 8 of the *Code* under this Ms. Gregoire filed the complaint on behalf of her son alleging that his ‘basic human rights were violated’.”

The Court went on at paragraph 11 and found:

“...it is only the person whose rights have been violated who can seek a *Charter* remedy. But, as the Province points out, the provisions of the *Code* that permit representative complaints to be filed do not create any substantive rights. They are procedural. The substantive rights are those of the person or persons who have suffered the Human Rights violation. Once this is recognized, the constitutional cases cited by the judge are somewhat analogous and instructive with respect to granting a remedy once a person whose rights have been infringed has died.

31. As mentioned earlier the Board asked the parties to consider the effect, if any, of decisions by two Ontario Boards in *Morrison, supra*, and *Walmart, supra*.
32. The *Walmart* decision it is dependent on the rationale in *Morrison* for distinguishing the decision in the *Goodwin Estate, supra*, and determining that the Board had jurisdiction to deal with the complaint even though the complainant had died before the hearing commenced.
33. The Board in *Morrison* suggested that a private human rights claim should be viewed differently than claims under S. 15 of the *Charter*. The Board in that case suggested that the private claim of discrimination, where no government act was involved and the employment context is more like a breach of contract claim and should survive death. The Board chooses not to follow the rationale of the Board in *Morrison, supra*, or in *Walmart*.
34. In reaching this conclusion the Board relies on the decision in *Carrigan v Nova Scotia (Department of Community Services)* 1997 CarswellNS 131, 157 N.S.R. (2d) 307 (NSCA). The Court considered the question of the applicability of jurisprudence interpreting the *Charter of Rights* on issues under the human rights legislation. At paragraph 6, the court stated:

Rhyno was a *Charter* challenge, as opposed to a claim of discrimination under the *Human Rights Act*. It was alleged that s. 20 of the Regulations was contrary to the equality rights provisions of the *Charter*. There is, however, a relationship between s. 15 of the *Charter* and the discrimination provisions of the *Human Rights Act*. In fact, *Andrews*, one of the seminal decisions of the Supreme Court of Canada on s. 15 of the *Charter*, is the source of the definition of discrimination in s. 4 of the Nova Scotia *Human Rights Act*. Further, it is clear that the jurisprudence

pertaining to the interpretation of s. 15 of the Charter can be relied on in interpreting guarantees in provincial human rights legislation (See *University of Alberta v Alberta (Human Rights Commission)*, (sub. nom. *Dickason v. University of Alberta*) [1991] 2 S.C.R. 1103; and *Roberts v. Ontario* (1994), (sub. nom. *Ontario Human Rights Commission v. Ontario*) 19 O.R. (3d) 387 (C.A.)) (emphasis added)

35. The Board finds the principles set out in *Hislop, supra*, and *Goodwin Estate* apply in the circumstance and are determinative of the issue raised by the Estate of Kathleen Viner. It follows that Ms. Viner died before the hearing was commenced, let alone concluded, that any right that she had for relief under the *N.S. Act* died with her.

The Standing of the Human Rights Commission to Continue the Enforcement of the Complaint

36. In addressing the issue of standing, it is essential that the Board look at the Commission's role and authority as set out in the *NS Act* especially as a party to a proceeding in respect to a complaint. When one does review the Commission's role as outlined in the Statute it is clear that the Commission has significant authority to deal with complaints including its participation in every hearing before a Board. Its role in the hearing appears to be a substantive one and not merely a procedural one.
37. In interpreting the *NS Act*, the Board followed the modern approach to interpretation. The modern approach to statutory interpretation was first described by Elmer Driedger. Driedger's comments are set out in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. [Butterworth Group of Companies, 2002] page 1:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

38. This approach was identified as the preferred method of statutory interpretation by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, 1996 CanLII 186 (SCC), [1996] 3 S.C.R. 550; *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103.

39. Driedger's modern approach was further explained and developed by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. At page 3 of that text, Sullivan states:

At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, the promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms: it is reasonable and just.

40. Along with being plausible, efficacious and acceptable, an interpretation under the modern approach should be based on the following points (*Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 195):

(1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

(2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of a text's meaning.

(3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

41. Especially relevant to this case is the fact that Sullivan approves of using the modern approach to assist in determining how to exercise discretion granted by legislation (*Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 229):

Purposive analysis is also relied on by the courts to guide the proper exercise of discretion.

42. Further, Sullivan makes it clear that the modern approach encourages the use of other provisions to help inform a provision in question (*Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 283):

In adopting a contextual approach, the courts focus on any provision or series of provisions that in their opinion is capable of shedding light on the interpretive problem at hand. Looking to other provisions is useful because courts make certain assumptions about the way legislation is drafted.

43. This harmonious approach also emphasizes the importance of purpose statements when interpreting the meaning of legislation. The importance of purpose statements was discussed by the Supreme Court of Canada in *R v. T.[V.]*, [1992] 1 SCR 749. In that case, Justice L'Heureux-Dubé made it clear that purpose statements are binding statutory provisions. Speaking about the *Young Offenders Act*, Justice L'Heureux-Dubé said:

I am unable to accede to the submission of the appellant that s. 3(1) is merely a 'preamble' and does not carry the same force one would normally attribute to substantive provisions, especially since Parliament has chosen to include the section in the body of the Act.

44. The reason for considering purpose statements is to ensure that the statute is read in its entire-context in a harmonious way, and with a view to the statute's purpose. In *Willick v. Willick*, [1994] 3 S.C.R. 670, at para. 25:

the objective is to interpret statutory provisions to harmonize the components of legislation inasmuch as is possible in order to minimize internal inconsistency.

45. Further, one needs to be mindful of the approach taken in the interpretation of human rights legislation. In *O'Malley v Simpsons-Sears Ltd.* (1958), 23 DLR (4th) 321 (SCC), the Supreme Court of Canada at pp. 328-9 emphasizes the importance of interpreting the provisions of the Code in a manner which will serve the policy goals of the legislation:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment...and give it an interpretation which will advance its broad purposes.

46. Further, in *Canadian National Railway v. Canada (Human Rights Commission)*(1978), 40 DLR. (4th) 193 (SCC) by Dickson C.J.C. at p. 206:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the *Act* must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

47. According to the *NS Act*, the Commission has a number of significant roles which are detailed in s 24. In particular, according to s 24(1): “The Commission shall administer and enforce the provisions of this *Act*”.
48. As part of its duty to administer and enforce the provisions of the *Act*, the Commission has a mandate under s. 29 to inquire and endeavour to effect a settlement of any complaint of an alleged violation of the *NS Act* or one of two conditions are satisfied. First, the person aggrieved makes the complaint in writing or second, the Commission has reasonable grounds for believing that a complaint exists. The Commission retains the sole authority and discretion to dismiss complaints without reference to a Board of Inquiry: s 29(4).
49. The Commission also retains the authority to approve or reject settlements reached after the complaint but before the commencement of a hearing: s 32 (1).
50. Pursuant to s 33, the Commission is automatically a party to any proceeding as are the person named in the complaint, any person named in the complaint and alleged to have been dealt with contrary to the provisions of the *NS Act*, any person named in the complaint and alleged to have contravened the *NS Act*, and any other person specified by the Board. The language of s 33 is:

The parties to a proceeding before a board of inquiry with respect to any complaint are

- (a) the Commission;
- (b) the person named in the complaint as the complainant;
- (c) any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act;
- (d) any person named in the complaint and alleged to have contravened this Act; and

(e) any other person specified by the board upon such notice as the board may determine and after the person has been given an opportunity to be heard against joinder as a party. *R.S., c. 214, s. 33.*

51. The Board inquired of the Respondent what significance, if any, is to be given to the role of the Commission in its role as a party to the proceeding. The Board asked this question because of one of the arguments advanced by the Commission in its supplemental brief is that it is important that it has a role as a separate party to complaints before Board of Inquiry. Its role, says the Commission, is to protect the interests of the public in the enforcement of human rights.
52. The Respondent indicated that there was no substantive significance to the Commission's role as a party to the proceeding as it relates to the question at hand. It drew the distinction between a party to the complaint and a party to the proceeding and contended the Commission's role was procedural in nature to assist the advancement of the complaint. Following that logic, the Commission's involvement in any complaint is entirely dependent on the continuation of the complaint by the individual and that there is no separate right of the Commission to advance the complaint or to continue it upon the death of the person. Below is a series of questions and answers on the issue.

THE CHAIR: What is the role...what is the purpose of the Nova Scotia Act when it makes the Commission a party to a proceeding in the matter of a complaint? How do we deal ...and I'll ask you to address that point about Section 33, but is default that the Commission is brought into it as opposed to the two tracks I saw in Ontario and I don't know existed in B.C. at that time. I don't think the case informs us whether the Commission was made part of every proceeding automatically in B.C. at that time regardless of the gatekeeper role, but I might look at that. But what is the role of the Commission to a proceeding? What's the effect of that?

MR. McEWAN: Zellers would submit that for our purposes on this jurisdictional motion for what you might decide, Mr. Chair, that it has no effect on determining whether or not a complaint should continue to survive the death of the complainant. In Zellers' submission, the jurisdiction of this Board is framed by the complaint itself.

THE CHAIR: Yeah, I understand that's your position, I'm just curious of what role...what's the purpose of Section 33 when it makes a Commission a part of proceeding in a matter of a complaint? What's...what happens there, what's the relationship of the Commission to the complaint by virtue of Section 33?

MR. McEWAN: I see here...I see your...your point now, Mr. Chair. It would be Zellers' submission that the Commission is able to make arguments, make submissions and call evidence but it would be our submission that the status of being a party to the complaint doesn't bestow upon the Commission any substantive rights in respect to the complaint. And in the absence of the Commission having substantive rights, if I may use the parlance of the common law cause of action, whether the Commission is or is not a party should not bear, in our submission, on the decision whether or not a complaint brought by a complainant survives the death of the complainant.

Now we would submit, Your Honour, perhaps the circumstances might be different if it was a complaint filed by the Commission and there is a procedure for that under Section 29(1) (b) of the *Act*. That's not the procedure that is engaged here. That's not ...

53. In considering the role of the Commission as a party to a proceeding before a board of inquiry with respect to a complaint, the Board took into account the Ontario Court of Appeal decision in *Tilberg v McKenzie Forest Products Inc.* 2000 OJ No 1318. The *Tilberg* decision is instructive as it deals with a legislative structure which appears comparable but not identical, to the *NS Act*. In *Tilberg*, the Commission was automatically a "party to the proceeding before a Board of Inquiry" by virtue of Section 39(2):

The parties to a proceeding before a board of inquiry are:

- (a) the Commission, which shall have the carriage of the complaint;
- (b) the complainant;
- (c) any person who the Commission alleges has infringed the right;
- (d) any person appearing to the board of inquiry to have infringed the right...

54. In *Tilberg*, the Ontario Commission made the decision to withdraw from the proceeding prior to the second mediation. Mr. Tilberg asserted his right to advance as a complainant which right was recognized by the Court of Appeal decision.
55. In the reasoning of the Court in *Tilberg*, one can see the integrity of the independent interests of the parties in the dissenting decision of Justice Ferrier of the Divisional Court, which decision was endorsed by the Court of Appeal:

[23] Ferrier J. agreed that the applicable standard of review of the decision of the Board of Inquiry is correctness.

[24] He did not agree with Crane J. that the public interest necessarily prevails over the private interest. He expressed the view that the public interest is connected with the private interest and that the latter is also integral to the *Code*.

[25] Ferrier J. also drew the following distinction between the role of the Commission and the status of a complaint after referral to the Board:

Upon referral, the Commission in effect passes the wand of decision-making authority to the Board. The Board must and does have independent authority to consider the interests of the Commission, complainant and respondents, all of whom are accorded independent party status. Pursuant to the *Statutory Power Procedures Act*, the Board has a duty to hold a hearing once the matter has been referred to it, unless all parties consent to a disposition without a hearing. *The dispute may remain alive even after the Commission withdraws, for the complainant is a separate party and the Commission's carriage of a complaint is only a procedural, not a substantive, matter.* [emphasis added]

[26] Ferrier J. concluded that the phrase “carriage of the complaint” in s. 39(2) refers to “procedural leadership” on the part of the Commission and not total effective control of the Commission over the complainant’s rights.

56. Further the Court said:

[34] The Commission does, of course, have a responsibility to advocate its view of the public interest and in so doing, may also advocate for the interests of the individual complainant. However, the Commission’s role as a party to the proceeding cannot derogate from the independent status of an individual complainant.

[35] Under s 39(1) of the *Code*, it is the Board of Inquiry which determines if a right of a complainant has been violated and, if so, the appropriate remedies under s 41, both in respect of individual interests and of any broader public interest.

57. The *Tilley* decision was considered but distinguished in *British Columbia (Human Rights Commission) v British Columbia (Human Rights Tribunal)* (2001) BCSC 721. In that case the

complainant settled with the employer and withdrew the complaint. The BC Commission wished to continue the hearing notwithstanding the complainant's withdrawal after the settlement was reached.

58. According to that decision, a complaint could have been initiated by an individual or by the Deputy Chief Commissioner. Further, the Deputy Chief Commissioner had two options once an individual filed a complaint. Under Section 21(3) the Deputy Chief Commissioner could require the Commissioner of Investigation and Mediation to add him as party to a complaint. Alternately, Section 36 permitted the Tribunal the discretion to add the Deputy Chief Commissioner as a party to the hearing pursuant to Section 35. The Deputy Chief Commissioner was added as a party to the hearing pursuant to these latter provisions. The Court found the purpose of adding the Deputy Chief as a party to the hearing was so the Tribunal could "inform the Tribunal of the broader policy implications arising out of individual complaints".
59. The Court decided that as a party to a hearing pursuant to Section 35, the Deputy Chief Commissioner had no right to continue the individual complaint once settled by the complainant. The Court left unanswered the issue of the Commission's right if it had been made a party to the complaint. At paragraph 47 and 48:

47. The addition of the Deputy Chief as a party to a hearing under s. 35 does not result in the creation of a complaint initiated by him. The addition does not result in him becoming party to a complaint initiated by someone else as might be the case were he to join in a complaint as permitted by s. 21(2). The complaint in respect of which the Tribunal has jurisdiction is that initiated by the individual which has been referred to it by the Commissioner of Investigation and Mediation. Once the complaint that was referred has been withdrawn, there is nothing in respect of which the Tribunal has jurisdiction. Indeed, had the Tribunal attempted to adjudicate in relation to the public interest concerns of the Deputy Chief once the Shannon complaints had been withdrawn, it would have exceeded its jurisdiction.

48. In present circumstances, I need not consider whether the Tribunal would be obliged to adjudicate in relation to an individual's complaint in which the Deputy Chief had jointed as a party pursuant to s. 21(2) when the individual has withdrawn the complaint after reference to the Tribunal. That determination should be made in the context of an application where the issue is squarely raised.

60. Applying the principles of *Tilberg* and *BC (Human Rights Commission)*, the Board agrees that the role of the Commission and the role of the Complainant are independent of each other under the *NS Act*. The *NS Act* does not have a comparable provision to Section 21

and Sections 35 and 36 of the BC Act as reviewed in *BC (Human Rights Commission)*. Rather, Section 33 of the *NS Act* makes the Commission a party to every proceeding without the election of being added to the complaint or alternate standing.

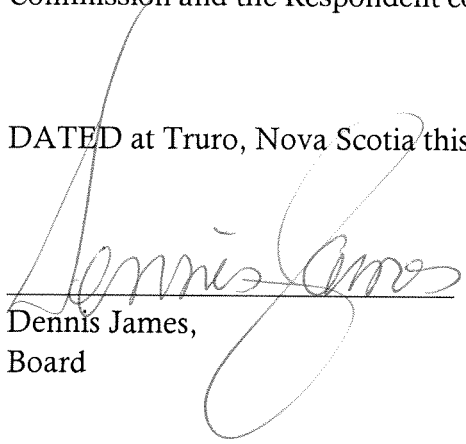
61. To understand the Commission's role as a party to the proceeding with respect to a complaint, the Board considered other portions of the *NS Act* especially sub-sections 34(5), (6), (7) and (8).
62. Upon accepting the co-existing private interest and the public interest in a complaint, the Board cannot reconcile the role of the Commission as set out in the *NS Act* with the assertion by the Respondent that the Commission's right as a party is procedural only. That proposition is only sustainable if one takes a narrow interpretation of Section 33 and ignores other provisions of the legislation which taken together gives a more complete perspective on the issue. The case law appears clear that this would be contrary to the principles of statutory interpretation that are to be applied.
63. From a review of the *NS Act* the following appears. A complaint can be filed either by a person aggrieved or by the Commission. Once the complaint is filed the Commission is charged with the investigation of the complaint and has control over any settlement until the matter is referred and the hearing before a Board of Inquiry begins.
64. When the matter is referred by the Commission to a Board of Inquiry, the Commission's role changes as discussed in *Tilberg*. Once the complaint is referred to a Board, the Board is under an obligation to conduct the inquiry unless there is settlement by all parties. This provides very clear direction that the Commission's role in respect to a complaint is separate from the private interest of the person aggrieved. Also, the mandate of the Board is stated more broadly than considering the matter of the complaint. The Board's mandate expressly stated is to make findings of law and fact to reach a decision whether there has been a breach of the *NS Act*.
65. Further, the principle of compliance with the *NS Act* is a remedial power set out separately from the authority of a Board to repair injury to a person or class of persons. The remedial power authorizes the Board to order any party who has contravened the *NS Act* to do any act or thing that constitutes full compliance. As a second articulated remedial power a Board has the authority to order the repair of injury caused to any person or class of persons.
66. Considering the express language of the mandate of the Board and the responsive remedial authority, the Board concludes that the *NS Act* did not intend the jurisdiction of the Board in making inquiry into a complaint to end upon the death of the person. The Board's jurisdiction to determine whether there has been a breach of the *NS Act* in the circumstances of the complaint continues given the Commission's standing as a party.

67. In reaching this conclusion the Board considered what would result if a complaint before a Board started as a result of a filing by the Commission. The language of the *NS Act* does not restrict the Commission's discretion to file a complaint, so that it may file a complaint in respect of a breach of the *NS Act* based on the suspected violation of even one person's rights. If the Commission filed the complaint on its own volition, can it reasonably be suggested that the Board's jurisdiction to inquire into the complaint would end if the person, who may have been injured, dies? The answer to that must be no. If the Board is correct in that answer, then given the Commission has a mandatory involvement as a party to any proceeding with respect to a complaint, why would the Board lose jurisdiction based on the distinction that a person filed the complaint rather than the Commission? There does not appear to be any justification for the different result.

Conclusion

68. For the reasons set out herein, the Board accepts that it has no jurisdiction to deal with the private interests of Kathleen Viner advanced by her Estate. However, the Board concludes that under the *NS Act* it retains jurisdiction to continue with the inquiry into the complaint to determine whether there has been a breach of the legislation, with the Commission and the Respondent continuing as parties.

DATED at Truro, Nova Scotia this 27 day of July, 2012.


Dennis James,
Board