IN THE MATTER OF: The Nova Scotia *Human Rights Act*, R.S.N.S.1989, c.214, as amended

-and-

IN THE MATTER OF: Board File No.51000-30-H19-1027

BETWEEN:

A.B.

Complainant

-and-

C.D. Law Office Inc. o/a CD Law

Respondent

-and-

The Nova Scotia Human Rights Commission

Party

DECISION

1. A.B. is a paralegal who was hired to work at CD Law Office Inc. commencing June 25, 2018.[1] Ms A.B. became pregnant and informed her employer of her status around the end of January, 2019. She told her employer about an expected due date of September 21, 2019. By late February Ms B became aware of medical concerns with her pregnancy. Assessing those difficulties involved some medical appointments during regular office hours.

2. As the pregnancy evolved, Ms B and C.D. both understood and discussed the challenges of the pregnancy, the issue of pregnancy termination, and the taking of time off. Those discussions initially included how Ms B's absence might be managed if the pregnancy was productive of a child, and later related to Ms B's physiological and psychological responses to the termination of the pregnancy. In that regard C.D. acknowledged that from her discussions

[1] The Employment Agreement was signed June 27, 2018, but recited that employment "will begin on June 25, 2018."

with Ms B, and her own personal experience, "I knew what would be involved." The termination of the pregnancy happened on April 23, 2019. Ms B was off work effective April 12, and, without returning to work, was terminated on May 6 with an eventual effective date of May 17, 2019.

3. On July 2, 2019, A.B. found other employment as a paralegal. On August 20, 2019, she made a complaint to the Nova Scotia Human Rights Commission that she had been discriminated against on the grounds of sex (pregnancy) and mental disability with regard to her employment at CD Law. On March 22, 2022, the Chief Judge of the Nova Scotia Provincial Court appointed me to inquire into that complaint. Once disrupted by Covid-19, the in-person hearing of this matter was completed on December 14, 2022, with an extension to January 13, 2023, for the filing of further legal submissions.

Background

4. The complaint before this Board Inquiry in substance relates to what happened after Ms B and C.D. discussed the "time off" related to the termination of Ms B's pregnancy. There had been a general notification during a February 26, 2019 staff meeting that "Any excessive amount of time missed for medical appointments will have to be taken as vacation time." Given Ms B's developing and known pregnancy situation at that time, she felt "very targeted" by the staff-wide statement of that policy. However, there was nothing in the evidence of C.D. or others to directly suggest that Ms B's medical appointment time was viewed at the time as excessive or inappropriate. While that policy caused apprehension on the part of Ms B, it was not acted upon, and is not a factor in what is to be decided here.

5. The more important "time off" discussion involving Ms B and C.D. occurred face to face on April 16, 2019. At that time it was common knowledge among both, and both agree, that Ms B had been given medical advice about terminating her pregnancy, and had decided to do so.

While both understood and appreciated that Ms Bwould need time off to recover from the termination procedure, there were two uncertainties. First, there was not yet a date identified for the termination. Second, C.D. and Ms B could not agree about how much time away from work might be appropriate. Ms D initially suggested a month off. Ms B did not feel that she could afford a month off, and was thinking in terms of "two weeks maybe."

6. Ms D felt that she needed certainty for her business. Ms B was already having difficulty concentrating on her work. On that same day, April 16, Ms D created a Record of Employment (ROE) identifying April 12, 2019, as Ms B's last day worked. That ROE fixed an anticipated return date of April 29, 2019 – effectively Ms B's proposed 2 weeks. Ms D explained her thinking at that time in an email to Ms B as follows:

> . . . we do not have short term disability, only long term disability. Employment insurance is utilized for short term disability. So, I have issued an ROE for you from Monday, April 15 to Friday, April 26, with a return date of Monday, April 29th. . . .
>
> I want you to know that I really feel this will help you get through this time and come back with a fresh perspective. I encourage you to seek counselling to help you through it. As I said, we have benefits for exactly this reason, so take advantage of it.
>
> Take care and I will see you on April 29th.
>
> C.

As C.D. explained during the course of her evidence, she too had had personal experience with an unproductive pregnancy, and so believed that she understood both the physiological and psychological kinds of things that Ms B would be facing In the near term.

7. The appointment for the pregnancy termination happened quite promptly after the April 16 meeting, and was accomplished on April 23, 2019. At that time Ms B received a medical note from the IWK Health Centre recommending that she be off work until April 30, 2019. She does not recall whether or not she shared a copy of the note, or the information in the note,

with C.D. At that point, the note from the IWK and Ms D's draft of Ms B's ROE were essentially consistent with each other.

8. Unfortunately there were medical complications arising directly from the termination of Ms B's pregnancy. These required two courses of antibiotics for infections. Ms B communicated to Ms D by email on April 28 indicating her infection status, and the fact that she had a medical appointment scheduled for April 29 to perhaps get more antibiotics. She also stated that she still expected to be back at work on Tuesday, April 30, 2019. Ms D replied to that information with an "okay" on Monday morning, April 29.

9. That same afternoon, April 29, Ms B followed up her doctor visit by informing Ms D that her physician had put her off "for another week." Ms B identified the cause of the health concern and its treatment, and reiterated her intention:

> . . . I will be back soon and will be the old [A.] that you first hired.

Within the hour Ms D had again replied:

> Okay, thanks for letting me know [A]. I'll issue you an amended ROE (or a new one!), I'm not sure what is required. Looking forward to having you back.
>
> . . .attached is your amended ROE that has been submitted to CRA.
>
> See you soon, C.[2]

10. The next date of interest for a return to work therefore became Monday, May 6, 2019. Ms B testified that the termination of the pregnancy was "mentally a lot harder than I

[2] Although the copy of the email image in Exhibit C-1 suggested that a pdf of the "Amended roe – medical leave" had indeed been attached to the email, that ROE itself was not put in evidence before me.

expected. I was numb crying." She testified that she was put on anti-depressants. Ms B advised C.D. by email on May 5, 2019, as follows:

> Hey [C.],
> I'm not able to come back for tomorrow unfortunately. My mental health is not in a very good place. I am trying to get in touch with my family doctor to have him put me off of work longer and I'm also going to be going to meetings at the IWK for dealing with the loss of the baby. I will keep you posted and let you know what my doctor says as soon as I get in touch with him.[3]

11. At the Inquiry, Ms B said the she did not feel "mentally prepared" to return to work on May 6 because she was "still dealing with the loss of my baby." This position was not contested by anyone. There was a Health/Absence Certificate in the name of Dr O dated May 7, 2019, indicating that Ms B would be absent from "work/school" from May 6 to June 17, 2019. Ms B had a counseling appointment scheduled for June 25, 2019, which she described as having been for her "mental health," and "for the loss of my baby." She maintained contact with her physician, and had started a course of anti-depressant medication – which she says never rose to full dosage because her drug benefits through her CD Law drug plan ended before that could happen.

12. By the time of the hearing of this Inquiry in December 2022, more than 3 years after the unproductive 2019 pregnancy, Ms B observed that in relation to her own integration of the termination experience, "I still haven't got to the end of that yet." This remained so despite having managed a new pregnancy which was productive of a live, healthy child.

13. Ms D read Ms B's May 5 email that same evening, but did not reply until the morning of May 6. Her reply was sharp. She stated. that she had been expecting Ms B's return, and that Ms

[3] The "IWK" is a reference to the Izaak Walton Killam Hospital for Children located in Halifax.

B's continuing absence from work had created "a very bad situation regarding the firm." Ms D continued:

> I was waiting to hear from you last week regarding your medical condition. You did not provide me with any explanation as to your diagnosis or prognosis which, as your employer, I am entitled to know so that I can plan. When I didn't hear from you and you had promised to be back today I was expecting you back.

14. Ms D went on to point out that Ms B's "last minute" email about her inability to return "shows a lack of respect for me as your employer as well as the lawyers you work for." She then continued:

> I know you have to look out for yourself, but I have to look out for my business. I wanted to provide you with as much time for medical/bereavement as possible. Legally I am only required to provide you with 1 week bereavement leave which you have already had. In fact, the last 3 weeks have served as both medical and bereavement leave. I understand that you are having a tough time dealing with this, but I will not be able to keep the position open for you. I'm sorry it has come to this, but I simply cannot continue with an employee who has become unreliable and disrespectful by not providing me with timely notice, updates on your condition and your expected return to work.

Ms D then referenced "other issues" relating to Ms B's "inappropriate actions on two previous occasions," apparently as further support for her termination decision.

15. Ms B was terminated that day, which was still a week short of the month's leave which C.D. had initially proposed on April 16. Ms B's final Record of Employment, dated May 13, 2019, stated that the employee would ***not*** be returning to work. Ms B's final pay period was noted as ending May 17, 2019. That was a consequence of the fact that on May 10 Ms B asked for a "statutory 2 weeks pay in lieu,", which C.D. agreed to pay "although I don't owe you anything."

16. As stated earlier in these reasons, on August 20, 2019, A.B. complained to the Human Rights Commission about her treatment by CD Law Office Inc o/a CD Law. In particular, that complaint began as follows:

> My protected characteristics are my sex (pregnancy) and my mental disability. I was pregnant. However it went from bad to worse really quick when I had complications from with the pregnancy and had to terminate at 18 weeks. I was also prescribed anti-depressants and placed on medical leave by my physician to help manage my depression and cope with the loss of my baby.

On March 22, 2022, the Chief Judge of the Nova Scotia Provincial Court appointed me to inquire into that complaint.

Scope of Complaint

17. There was discussion and argument at the hearing as to whether or not this Inquiry should look into the allegation of discrimination based on mental disability. The argument on one side is that because the Chief Judge referred the August 20, 2019 Doucet complaint to me for inquiry, that is the complaint which I should address. That would be consistent with a decision I reached in the case of *Re Brothers and Black Educators' Association,* 2014 CarswellNS 947, 80 C.H.R.R. D/1, at para.12.

18. Counsel for CD Law takes the view that the Nova Scotia Human Rights Commission has control of which complaints get referred for hearing: *e.g., Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364, at paras.20 – 21. Counsel pointed out that in this case there were essentially two complaints, and that the Commission only referred the complaint of discrimination on the ground of sex (pregnancy) – not the complaint about discrimination on the basis of mental disability. Counsel points out that none of the parties currently before this Board of Inquiry challenged the appropriateness of that choice by

the Commission. Counsel says that because of that, the only complaint properly before this Board of Inquiry relates to the allegation of discrimination on the basis of sex (pregnancy).

19. If Counsel's view is correct, the role of the Chief Judge of the Provincial Court in making an appointment to inquire under the *Board of Inquiry Regulations*[4] is purely administrative with respect to the complaint, while more substantive with respect to whom the Chief Judge nominates. This appears to be consistent with the reading of sections 1, 2, and perhaps particularly s.3 of the *Regulations,* which reads in part:

> Upon receipt of *a request* from the Nova Scotia Human Rights Commission, the Chief Judge of the Provincial Court shall nominate a person . . . for appointment by the Commission to a Board of Inquiry to inquire into the complaint to which *the request* relates. [Emphasis added]

20. Because of the view I take of the scope of the ground of sex (pregnancy) in the *Human Rights Act*, which I will explain below, I find it unnecessary to make a decision about whether there was discrimination on the basis of mental disability here. Therefore, it is also unnecessary to make a choice between the view that I took in *Brothers*, and the view ably pressed by Ms MacNevin in this case.

Scope of Sex (Pregnancy) Discrimination

21. The *Human Rights Act,* R.S.N.S.1989, c.214, provides in s.4 that:

> 4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to

[4] O.I.C. 91 – 1222, N.S.Reg.221/91, which are made pursuant to the *Human Rights Act,* R.S.N.S.1989, c.214, s.42

> opportunities, benefits and advantages available to other individuals or classes of individuals in society.

22. The *Act* also provides in s.5 that:

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

23. The *Act* defines "sex" in s.3(n) as follows:

> "sex" includes pregnancy, possibility of pregnancy and pregnancy-related illness.

24. Most of the human rights jurisprudence relating to "sex" and "pregnancy" has involved situations where the question was whether the pregnancy itself was a factor in a negative employment decision, such as termination: *e.g., Brooks v. Canada Safeway Ltd*., 1989 CarswellMan 160, at para.41. See also: *Hazelwood v. Mondart Holdings Ltd.*, 2005 NSHRC 3; 2005 CarswellNS 861, at paras.68 - 70; *Redden v. Saberi*, 1999 CarswellNS 486; [1999] N.S.H.R.B.I.D. No.3, at para.29; *Sievert v. Roycom Realty Ltd*., 1994 CarswellNS 784; [1994] N.S.H.R.B.I.D. No.8; 22 C.H.R.R.D/391, at para.70; and *Wratten v. 2347656 Ontario Inc*., 2015 HRTO 1041 (CanLII), at para.88.

25. This case is different in the sense that it raises the question of whether certain stages of pregnancy, and the effects of certain events that can happen during, as well as a consequence of the end of a pregnancy, are still "pregnancy" for human rights purposes. Addressing this question requires a deeper evaluation of the stages that Ms B journeyed through between the decision to terminate her pregnancy, and C.D.'s decision to terminate Ms B's employment.

26. The evidence on this hearing from Ms B, concurred in for the most part by all parties, supports the conclusion that the termination of a pregnancy, whether spontaneously or by authorized medical intervention before term, or by the production of an independent living human being, can result in a continuation of the physical, physiological, and psychological experiences for the person who had become pregnant. I specifically engaged the parties at the conclusion of the hearing on this point so that I could gain a better grasp on whether there was a common appreciation about the prospect of physiological and psychological effects being a contemplated part of a pregnancy's conclusion.

27. It seems clear that not everyone who becomes pregnant will suffer a pregnancy related illness, and not everyone who becomes pregnant will necessarily suffer disruptive physiological and psychological consequences that sometimes flow as a consequence of being pregnant. However those possible disruptive and negative kinds of consequences of being pregnant are common enough and well-known enough that they are within the reasonable contemplation of anyone who becomes pregnant. That being so, those possible consequences of pregnancy should also be within the reasonable contemplation of employers. In this case those potential consequences were in fact contemplated and foreseen by C.D., and then actually experienced by Ms B.

28. I believe that the current jurisprudential view of pregnancy by our legal system is consistent with that perspective. As long ago as *Brooks v. Canada Safeway Ltd*., 1989 CarswellMan 160 (S.C.C.), Chief Justice Dickson pointed out, at paras.31 - 32:

> 31 . . . I agree entirely that pregnancy is not characterized properly as a sickness or an accident. It is, however, a valid health-related reason for absence from the workplace and as such should not have been excluded from the Safeway plan. That the exclusion is discriminatory is evident when the true character, or underlying rationale, of the Safeway

> benefits plan is appreciated. The underlying rationale of this plan is the laudable desire to compensate persons who are unable to work for valid health-related reasons. Pregnancy is clearly such a reason. By distinguishing "accidents and illness" from pregnancy, Safeway is attempting to disguise an untenable distinction. It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult. To equate pregnancy with, for instance, a decision to undergo medical treatment for cosmetic surgery — which sort of comparison the respondent's argument implicitly makes — is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context, pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace.
>
> 32 Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose, which was noted earlier in the quotation from *Andrews*, supra, is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus, in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers this purpose.

29. The significance of the *Brooks* decision for pregnancy rights adjudication in Canada was expressly acknowledged five years later in *Seivert v. Roycom Realty Ltd*., 1994 CarswellNS 784, [1994] N.S.H.R.B.I.D. No.8; 22 C.H.R.R. D/391, at para.78:

> 78 Obviously, excessive absenteeism is problematic for employers. However, employers must ensure that when they have policies (written or unwritten) in relation to time off, these policies are administered fairly to all employees, and that the same standards are used for all employees. In particular when an employee is taking time for pregnancy-related reasons, an employer must be sensitive to the fact that while childrearing is a role played by women, larger societal issues come into play. This view is articulated by the Supreme Court of Canada in *Brooks v. Canada Safeway Ltd.* (1989), 26 C.C.E.L. 1[10 C.H.R.R. D/6183 at D/6198, paras. 44392 and 44394], . . .

30. Then *Schafer v. Canada (Attorney General)*, 1997 CarswellOnt 2744, at para.68, cited *Brooks* for the following proposition:

> 68 To summarize, it is not necessarily discriminatory for governments to treat biological mothers differently from other parents, including adoptive parents. In order to cope with the physiological changes that occur during childbearing, biological mothers require a flexible period of leave that may be used during pregnancy, labour, birth ***and the postpartum period***. Indeed, such leave provisions may be necessary in order to ensure the equality of women generally, who have historically suffered disadvantage in the workplace due to pregnancy-related discrimination: see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.). [Emphasis added]

31. In *Redden v. Saberi*, 1999 CarswellNS 486 (NS BOI), at paras.31 and 33, Board Inquiry Chair Phil Girard explained:

> 31 It is important to emphasize what is at stake here. It is common knowledge that one of the biggest social changes of the past thirty years has been the rapidly increasing participation of married women and women with children in the paid workforce. Public policy has supported this trend and changes to labour law, employment law and human rights law have tried to remove barriers to the full participation of women in the labour market. Along with these changes have come new obligations for women; provincial family law now requires mothers to support their children, and married women and female cohabitees are subject to a support obligation owed to their husbands or male cohabitees. None of these obligations existed at common law. In effect, adult women are now required by law to be self-supporting regardless of marital status.
>
> . . .

> 33 Either women could be forced to conform to the male breadwinner model pursuant to a formal equality model, or changes to the male breadwinner model itself could be demanded, thus moving society more in the direction of substantive equality. Over the years public policy has moved from a position where pregnant women could be treated disadvantageously without legal consequence, to a position where they were afforded formal equality, and finally in recent years to the point where substantive equality must be afforded. . . . In response to *Brooks* , the Nova Scotia *Human Rights Code* was amended in 1991 to state specifically that discrimination on the basis of sex "includes pregnancy, possibility of pregnancy and pregnancy-related illness" (s. 3(n)), and the *Labour Standards Code* was amended in the same year to guarantee unpaid maternity leave and the right to return to work for all women employed for over a year with the same employer. . . .

32. Another full decade after *Schafer*, the Federal Court of Appeal in *Tomasson v. Canada (Attorney General)*, 2007 CAF 265, 2007 FCA 265, evaluated the constitutionality of employment insurance provisions making distinctions between biological and adoptive mothers. The Court engaged with the issue of rights discrimination in relation to pregnancy at paras.99 – 100:

> 99 Another persuasive indication that the purpose of the maternity benefits provisions is to support the mother's recovery from pregnancy and childbirth is the fact that the benefits are also available to birth mothers who give up their children for adoption. Consistent with the view that maternity benefits are intended to alleviate the physiological and psychological limitations resulting from pregnancy and childbirth is the fact that birth mothers may claim up to eight weeks prior to the expected date of birth.
>
> 100 I conclude on this point that the purpose of the maternity benefits provisions of the Act is to replace the income of insured ***pregnant women and biological mothers while they undergo the health and other stress of giving and recovering from birth.*** As a result, these women suffer no disadvantage when they return to the workforce. Hence, the purpose of the provisions is clearly not the encouragement of bonding or attachment. The focus of the legislation, taken as a whole, concerns the circumstances surrounding employment and unemployment. [Emphasis added]

33. The Court in *Tomasson* continued, at paras.116 – 118:

> 116 Although the applicant concedes that birth mothers have physical needs which differ from those of adoptive mothers, she nonetheless argues implicitly, as was argued

> in *Schafer*, *supra*, that the 15 weeks of maternity benefits exceed the actual time required for biological mothers to recover. On that premise, the applicant argues that the effect of section 12 of the Act is to allow biological mothers to take advantage of maternity benefits to bond with their children.
>
> 117 In my opinion, this submission fails to consider the unpredictable and unique circumstances surrounding pregnancy and childbirth. The fact that some women recover fully in less than 15 weeks does not counter the fact that other women require much longer time to recover because of conditions such as diabetes or postpartum depression. ***Abnormal or multiple pregnancies, for instance, may result in complications before and after birth. Thus, biological mothers require a flexible period of leave that may be used during pregnancy, labour, birth and the postpartum period.*** [Emphasis added]
>
> 118 Even in the best of circumstances, i.e. healthy pregnancies and deliveries, it seems clear to me that it is more difficult for biological mothers to cope with motherhood than for adoptive mothers who do not have to recuperate from pregnancy and childbirth. In fact, "no woman (...) was at full functional status at 6 weeks postpartum and several had not yet resumed all usual activities by 6 months after the birth of their infants". (see the Affidavit of Cassandra Kirewskie, para. 39).

34. All of that ultimately led the Court in *Tomasson* to the conclusion, at paras.122 – 123:

> 122 There can be no doubt, in my view, that ***pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partum period***. Thus, there are distinct purposes for each of the two income-replacement benefits: one is to provide income while a woman is incapacitated from work due to pregnancy or recuperation; the other is to provide income while parents are caring for and bonding with their children.
>
> 123 In my view, it is impossible to set a length of maternity leave that will universally meet the physiological needs of all pregnant women. As the evidence of Dr. Enkin eminently demonstrates, 15 weeks of maternity leave is in no way unreasonable so as to accommodate the needs of most women. [Emphasis added]

35. I hasten to point out that I am not relying here on the affidavit and medical information relied upon to support the constitutional decision made in *Tomasson.* I instead have the benefit of the direct evidence of Ms B, observed and recognized by C.D., about Ms B's physiological and emotional experience of the early termination of her pregnancy in April 2019. At the Inquiry

hearing Ms B described, and demonstrated in a fashion more compelling than the simple words on the page can convey, her experience. It was, she said:

> . . . mentally a lot harder than I expected. I was numb crying. I was told I had post partum without the baby. I was put on anti-depressants by Dr [O].

Ms D saw all of that clearly, explaining in her own evidence:

> I wasn't surprised that she was still emotional because it doesn't go away completely ever. So I wasn't surprised but people can get back to work. It's different for everybody. . . .

What Ms B honestly and credibly described at this Board of Inquiry was entirely consistent with what the Federal Court of Appeal observed in the evidence that was on the record before it in *Tomasson*.

36. The Federal Court of Appeal's appreciation of the nature of pregnancy in *Tomasson* was that for purposes of the unemployment insurance regime, pregnant women had an obvious, and significant, and different physiological experience than adoptive mothers who had not been pregnant. As a society we recognize that those physiological consequences extend beyond the survival of a fetus to a productive birth. It is common knowledge in society, just as it was among the parties to this proceeding, that experiences of pregnancy do not always conclude with the production of a birthed, living child. We also know that the economic concerns of pregnant women in relation to their ability to function in the workplace are not limited to the time of active gestation concluding with a live birth.

37. The scope of the meaning of "pregnancy" and "pregnancy-related illness" in the Nova Scotia *Human Rights Act* must therefore be co-extensive with the time that a woman is experiencing any physiological or psychological effects which may prevent her from working during her pregnancy *and her recuperation from pregnancy*: *e.g., Tomasson v. Canada, supra*, at

paras.100, 117. Therefore, it is my view that the range of potential physiological and psychological experiences of pregnancy that can be reasonably contemplated by a pregnant woman ought also to be within the reasonable contemplation of anyone who employs people who can become pregnant. Anyone who is in a position to make employment decisions about people who can become pregnant should have those same potential outcomes within their reasonable contemplation as well. Here Ms D probably recognized those potential outcomes sooner, and more fully, than Ms B.

C.D.'s Decision to Terminate B

38. I now return to the evidence presented at this Board of Inquiry about Ms B's termination on May 6, 2019. Ms B described for the Board her experience of learning about the viability and likely outcomes of her pregnancy, her decision in relation to termination of her pregnancy based on medical advice, and then her experience of coping with both her emotional as well as her physiological response to the termination of her pregnancy. Ms B shared her medical information in support of each development in her condition – even if it was not as prompt as her employer would have preferred. Her employer acknowledged an understanding of what Ms B was going through in terms of infections and the emotion of bereavement. It is also clear from all of the evidence that the employer very quickly became impatient with the time it was taking for Ms B to deal with the consequences of the pregnancy and its termination, and her ability to return to work.

39. Ms B was a trained paralegal. Trained paralegals are widely used within the legal profession for various tasks that might otherwise be performed by lawyers themselves. The economic idea about hiring paralegals like Ms B is that by employing paralegals, lawyers can better leverage the value of their own time. Lawyers can concentrate their own hours on client work where a lawyer's training and licensing is essential. Lawyers can also focus on work that is more lucrative for the lawyer, while delivering legal services in a way that can be more

financially reasonable for the client. The employment of paralegals allows lawyers to get some work done for clients at a lower hourly rate than if those lawyers chose to do the work at their own regular hourly lawyer rates. However the fact remains that there is nothing that a paralegal can do that a lawyer can not do. Any work that Ms B was expected or relied upon to do could also be done – and apparently was done - by licensed lawyers in the CD firm.

40. At the hearing of this matter, C.D. and other lawyers who worked at her firm spent some time discussing how reliant the firm was on paralegals in meeting client needs and expectations. Ms B had arrived at the firm at a time when a backlog of "paralegal" work existed. Through Ms B's diligence, much of the backlog had been recovered by the time of her pregnancy termination leave in April, 2019. However, her continuing absences and degraded functioning leading up to the termination of her pregnancy and the uncertain duration of her recovery, contributed to a new backlog of "paralegal" work. Clients were beginning to complain about service delays. Those delays in being able to provide client service to C.D.'s expected standards caused her frustration with the delays in Ms B's recovery from the termination of her pregnancy. In my view, that frustration became impatience. The outcome of all of that was a decision by C.D. to terminate Ms B's employment.

41. I am satisfied based on the evidence that the decision to terminate Ms B's employment occurred on May 6, 2019 - just 3 weeks after the initial decision to place Ms B on pregnancy leave on April 16 (effective April 12). It should be recalled that C.D.'s original advice to her pregnant employee on April 16 was to take a month off. At that time C.D. seemed prepared to manage a month absence by the firm's only paralegal. Ms B's expressed desire though was to return after 2 weeks. That would have benefitted both C.D. and Ms B economically. Their hopes were not realized.

42. C.D. testified that she didn't know whether she would have even been able to hire a replacement paralegal if the timing of leave had been more predictable. There had been a brief

discussion between Ms B and C.D. when both were contemplating a productive pregnancy about perhaps covering Ms B's maternity leave with an articling clerk. At the time of C.D.'s decision to terminate Ms B it was early May. It was a time of year when articling clerks would have been imminently available. That talk between C.D. and Ms B about an articling clerk possibly covering a live-birth maternity leave reinforces my understanding that the scope of paralegal work to be done in no way precluded the performance of the same work by legal professionals, or even future legal professionals working under articles of clerkship.

43. Were there other reasons to terminate Ms B? The employment contract signed by Ms B provided, in paragraph 11, that a disability that caused an employee absence from work "for any reason for a continuous period of over one (1) month" would trigger the law firm's ability to terminate the employee's employment: Ex.C-1, p.7. CD Law Inc. did not rely upon this clause to justify the termination of Ms B. C.D. identified two "other reasons" in justification for termination in her email of May 6, 2019.

44. First, during the course of her 8 - 9 months of employment at CD Law, Ms B twice became vocal (some might say strident) about when her bi-weekly pay would arrive in her bank account by direct deposit. C.D. found this irritating on both occasions, and inappropriate in the second instance. While I can understand Ms B's financial concerns as a single mother provider for herself and her daughter at the time, the fact is that she was never left unpaid, and on the first occasion temporarily overpaid. Ms B's anxiety about receiving her pay by a particular time may have been better directed towards her creditors rather than her employer. However, her expressions of financial anxiety to her employer on two occasions were not any kind of justification for termination. C.D. responded to both complaints with compassion and firmness. Although justifiably irritated on the second occasion, she did not threaten termination.

45. The second issue raised in support of some cause for termination related to a post that Ms B made on Facebook. She had posted about finding a vulnerable person locked in an

unattended vehicle. Her post attempted to shame an identified person. That person retained counsel, and Ms B was tracked down to CD Law. A demand was made to CD Law to take down the post, which Ms B did at CD Law's request. The incident was acknowledged by C.D. to have embarrassed the firm within its community, even though there was never any realistic liability that might have attached to CD Law even if the complainant had actually been unjustly identified by Ms B. C.D. responded to this particular incident by creating a policy about social media posts by firm employees, but never took it any further. I would describe the institution of this new policy as staff guidance rather than specific discipline for Ms B.

46. Even if considered collectively and cumulatively, neither of these "other reasons" that existed in May, 2019, resemble "just cause" for termination. However, at the Inquiry Hearing Ms B was also confronted with assertions that there were "performance issues" with her work at CD Law.

47. Ms B acknowledged that there was an issue about how a particular file had been handled with a lawyer who is now C.D.'s partner. The issue in relation to that one file had, according to the evidence, been discussed and concluded in a meeting on February 19, 2019. To the extent that both Ms B and the lawyer described it in evidence, the alleged trouble was trivial.

48. Ms B was also confronted with a complaint that she had been called away from work on April 16 to deal with an issue at her daughter's school. She acknowledged that, as well as having been emotional at work that day. That was the same day that C.D. suggested Ms B take a month off to deal with the approaching termination of her pregnancy. C.D. then placed Ms Bon medical leave effective April 12, meaning in retrospect that April 16 was not even regarded as an expected work day for Ms B.

49. The Inquiry heard from E.F., a lawyer who previously worked at CD Law. She overlapped all of B's time at the firm before leaving in July 2019. She worked closely with Ms Band found her work to be of good quality. Although Ms F had some concerns about delays and bottlenecks in the workflow, she felt that the absence of Ms B could be addressed, and accommodated. I appreciate that Ms F's relationship with C.D. and C.D.'s firm was beginning to disintegrate at about the same time in 2019, but I had no doubt about Ms F's evaluation of the ability to work around the absence of Ms B in late April and May of 2019.

50. The Inquiry also heard from C.D.'s current legal partner, who also had some working relationship with Ms B. The evidence showed that this lawyer worked primarily on her own. She said that she had some difficulty getting Ms B to work on her files, and didn't know how to fix that. The complaints she did have about Ms B's work related to timing, and "sometimes" the quality of it.

51. There was evidence from C.D. about time missed by Ms B, which she documented as the equivalent of 17 days. She made that evaluation after receiving notice of the *Human Rights Act* complaint. According to Exhibit R-5, 8 of those 17 days were Ms B's vacation day entitlement. One day (April 12) was classified as personal by C.D.: Ms B had presented herself for work the day after her ultrasound, but due to her emotional state relating to the confirmed unhappy status of her pregnancy was obviously not functional in her role. C.D. also included 5.5 hours from April 16 – which was the date of her meeting with Ms B to place her on medical leave effective April 12. Ms B was never told that her absences were excessive, or inappropriate. Even if C.D. had been concerned about them prior to April 16, they were not a cause for termination even then.

52. The evidence of all who testified at this Inquiry was given with an earnest desire to tell the truth. There were no real conflicts in the evidence requiring a choice as to whose evidence was more reliable and trustworthy than that given by others. Instead, different witnesses had

different perspectives on facts that were not really in dispute. Certain decisions were made at certain points and the decision-maker (C.D.) explained her reasoning, while Ms B explained the effect of those decisions on her. Having considered the reasons offered as "just cause" for termination, I was not satisfied on the balance of probabilities that there was any such just cause, or even discipline, for individual or cumulative "performance issues."

53. C.D.'s evidence about her efforts to assist Ms B through the process of a complicated pregnancy, its early termination, and managing the "emotional" aftermath was candid and forthright. There was, initially, apparent wisdom to her response as well – offering Ms B the benefit of C.D.'s own previous experience. Perhaps because of the wisdom derived from her own experience, C.D. chose to define Ms B's situation and needs according to C.D.'s own standards.

54. C.D. said that she received Ms B's May 5 email that same evening. She understood that Ms B was no longer having medical issues but was "going through a grieving process." She appreciated that Ms B had had complications connected to the termination of the pregnancy and that she had been given time "to address those issues." It was time, C.D. felt, to consider any further leave as bereavement leave, and that provincial labour standards legislation mandated 5 days. C.D. explained that Ms B "had already been off 3 weeks."

55. C.D.'s acknowledgment that she believed that Ms B was still going through the grief process, and her awareness that Ms B had not yet had counseling for that grief process, is important. She had advised Ms B in April that such counseling "would be a good idea for what she was going through." My hearing notes record that C.D. said – and I accept:

> I wasn't surprised that she was still emotional because it doesn't go away completely ever. So I wasn't surprised but people can get back to work. It's different for everybody. I guess at that point I had to decide how I was going to handle it. I'd given her 3 weeks,

> which was more than the week under the Code. I had a decision to make. I had to decide whether to hold her position and give her further bereavement leave.

56. Since the "bereavement" process was taking longer, C.D. felt that she had to make a decision. In my view that was what resulted in the decision to terminate. During further cross-examination, C.D. said that the termination "was because she was not returning when she said she was going to." She continued:

> I did not terminate her when she didn't take the 30 days. I terminated her when she did not return from medical leave. She asked for 2 weeks. She asked to extend that for medical issues. Then she asked for a further extension, and I didn't grant that because there were no medical issues. She had said in her email that she would be back to her normal self. I understood from that that there were no mental health issues.

That declaration about "no medical issues" and "no mental health issues" is not consistent with her other evidence about her conversations with Ms B, nor with her own experience of what might be reasonably contemplated for recovery from an unproductive pregnancy.

57. C.D. explained that when Ms B did not return from medical leave "because of her emotional state, I couldn't hold her position." Due to the perceived pressure on workflow within the office, and her frustration with yet another delay in Ms B's scheduled return, C.D. terminated Ms B's employment. It was abrupt, but clients were concerned that their work wasn't getting done.

58. No one has contested the fact that on May 6, 2019, Ms B was not mentally fit to perform the tasks that her job as a paralegal required. I find that she was not mentally fit to perform her job because of the continuing and persistent psychological effects related to the termination of her pregnancy. Ms B's inability to show up for work, which is what distressed C.D., was related to Ms B's pregnancy within the meaning of "pregnancy and pregnancy-related

illness" in the *Human Rights Act*. Ms B's "pregnancy and pregnancy-related illness" was therefore a factor in C.D.'s decision to abruptly terminate Ms B's employment.

59. Ms B said at the hearing that she had been diagnosed with post-partum depression. This was a self-report, which does appear in the actual August 2019 complaint. However, that assertion was made without the support (even after nearly 4 years) of a medical opinion by either written report or *viva voce* evidence. I do acknowledge the respectful approach taken by C.D. and her counsel on this point in not challenging the claim. I am mindful that this diagnosis was never shared with C.D. at the time. I am not relying upon that diagnosis for the decision I am making.

60. There is, of course, a duty on employers to accommodate protected characteristics defined in the *Human Rights Act*. Once it was apparent that Ms B may have been unable to recover from her pregnancy sufficiently to resume her employment tasks as quickly as C.D. (and Ms B) hoped she might, C.D. was obligated to accommodate Ms B to the point of undue hardship: e.*g., Renaud v. Central Okanagan School District No.23 and BC Human Rights Commission,* [1992] 2 S.C.R. 970, at p.984. C.D. said that she had not considered getting a temporary replacement for Ms B for the initial 2 week period, nor for the third week. She didn't even know if she could get a paralegal on that kind of temporary basis. Ms F testified that she believed an accommodation could have been made. The nature of the "paralegal" job itself should concede an acknowledgment that Ms B was not essential for getting the actual work done. The lawyers at CD Law would simply have had to work differently for a time.

61. There was no barrier to C.D. extending Ms B's layoff on May 6 for another week or month. That would have allowed C.D. to monitor Ms B's progress on recovery. C.D. did not need to continue to pay anything while she waited for Ms B to sort out the emotional and physiological consequences of her pregnancy, and its termination, so that she could again be a productive employee. C.D.'s choice, instead, to terminate Ms B in the midst of Ms B's efforts to

manage the physical and psychological consequences of the termination of her pregnancy was a hasty over-reaction. It was also discriminatory in its effect.

62. The cause of the termination was, in employment terms, based predominantly on the fact that Ms B was not able to present herself for work because she was continuing to suffer from some disabling effects of her terminated pregnancy. The decision made about Ms B's employment based on that reason had the effect of imposing a disadvantage upon her based on a protected characteristic (sex, including pregnancy and pregnancy-related illness) which I have found includes recovery from pregnancy.

63. I appreciate that Ms McNevin stated clearly on behalf of C.D. that none of us are exempt from the experience of loss and grief in our lives. Her client's position was not intended to downplay how women in Ms B's situation don't "recover" from this kind of experience of pregnancy termination. C.D.'s position recognizes that recovery is not linear. However, the position put forward on behalf of C.D. was that grief is not a protected ground under the *Human Rights Act*. The conclusion argued on C.D.'s behalf was that Ms B was not pregnant at the time of her employment termination, and so was not subject to discrimination on the basis of "sex" as defined in the *Human Rights Act*. I disagree with that characterization of Ms B's "pregnancy" being over on May 6, 2019.

64. Before concluding these reasons there is one point requiring further comment. That relates to C.D.'s assertion to Ms B on May 6 that Ms B had already received her full entitlement to "bereavement" leave. I am not comfortable with the apparent assumption that all emotional or psychological consequences of having endured an unproductive pregnancy can be classified under the heading of "bereavement." I have not had to make a decision about the precise nature or diagnosis of the psychological burdens that Ms B suffered as a result of the termination of her pregnancy in this case. However even as the evidence stands, I have difficulty assuming that the phenomenon of post-partum depression is properly contained

within the idea of "bereavement," or that any chemical disequilibrium in the brain consequent on the termination of pregnancy should be understood as "bereavement," or indeed that any other mental health issue related to recovery from pregnancy is encompassed in the idea of "bereavement." The loss of a parent or adult child or spouse or partner could certainly initiate a bereavement. Those kinds of losses strike me as fundamentally quite different from the combined emotional and physiological loss, even if by choice, of part of one's own physical being because of an early termination of a pregnancy.

Conclusion

65. Having found a violation of the *Act*, I turn this matter back to the parties to consider among themselves what the appropriate remedy ought to be. For purposes of guidance, I am aware of the evidence of Ms B that she found alternate employment in her field as of July, 2019. I do not have clear evidence as to when Ms B asserts that she would have been able to return to work. I do not have any evidence as to the level of income that she enjoyed between May 17, 2019, and July, 2019, except Ms B's comment that it "wasn't much."

66. I remain available if necessary to adjudicate the remedy issues at the call of any one of the parties. If the parties are able to come to a resolution without further need for my intervention, I would be happy to receive and report such a settlement to the Commission.

DATED at Halifax Regional Municipality, the _____ day of January, 2023.

_____
Donald C. Murray, K.C.
Board of Inquiry Chair