

# NOVA SCOTIA HUMAN RIGHTS BOARD OF INQUIRY

BETWEEN:

Sandra Wakeham

(the "Complainant")

Nova Scotia Department of Environment

(the "Respondent")

-and-

Nova Scotia Human Rights Commission

(the "Commission")

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INTERIM DECISION

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Nova Scotia Human Rights Board of Inquiry:

Kathryn A. Raymond, Chair

Date of Written Submissions:

Complainant, September 17, 2015  
Commission, September 18, 2015  
Respondent, September 18, 2015  
Complainant, September 18, 2015  
Commission, September 21, 2015  
Respondent, September 21, 2015  
Commission, October 2, 2015  
Complainant, November 2 & 4, 2015

Date of Decision:

November 27, 2015

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## Introduction

1. This is an interim decision of the Nova Scotia Human Rights Board of Inquiry (the “Board”) respecting an issue that has arisen respecting the choice of hearing room in the Halifax Regional Municipality, Nova Scotia, for a hearing into a complaint of alleged discrimination. The primary issue is whether the hearing should be held at a neutral location or at the premises of one of the parties to the proceeding.
  
2. The issue has arisen by reason of a request by the Nova Scotia Human Rights Commission (the “Commission”) that the Board change its selection of hearing room to a hearing room at the Commission’s offices. The Complainant originally objected. The Board received written submissions from the parties. The Complainant has now consented to the hearing being held at the Commission’s offices. For the reasons which follow, the Board is making an interim ruling that the hearing will be held at the hearing room at the Commission’s offices in Halifax, Nova Scotia, based upon the Complainant’s consent. However, this decision is subject to certain conditions. Given the significance of the issues and the inclusion of conditions in the decision, written reasons are being issued.

## The Commission’s Request that the Hearing Room Be Changed

3. This matter is scheduled to proceed to hearing on January 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27 and 28, 2016. The Board’s office made arrangements to

have the hearing at a neutral location in the Halifax Regional Municipality, where all the parties are situated. The Commission pays for the cost of hearing rooms as part of its responsibility for administering the *Human Rights Act*, RSNS 1989, c 214, (the "*Act*"). The Board's office provided the contracts for the reservation of the hearing room to staff at the Commission for purposes of having the Commission arrange for payment of the hearing room. This communication occurred in accordance with section 34(2) of the *Act*, which permits unilateral discussions between a Board of Inquiry and the Commission respecting arrangements for a hearing room, but not otherwise.

4. The Board's office was advised that the Commission had recently moved its offices to Park Lane Terrace, 5657 Spring Garden Road, in Halifax, and had acquired a boardroom suitable for hearings at its offices. The Commission advised that this would be the "first preferred" location for Board of Inquiry hearings, assuming that the boardroom was available. The Commission requested that the Board's selection of hearing room be changed to this hearing room.
  
5. As a result, the Board of Inquiry wrote on notice to all parties on September 17, 2015. The parties were advised that the Board was considering two locations for the hearing, namely, the boardroom available at the Commission's offices and a boardroom available at a local hotel. As the Commission is a party to this proceeding pursuant to section 33 of the *Act* and has taken an active role respecting other preliminary issues, the parties were asked to

advise whether they were comfortable holding a hearing at the Commission's offices. The Board indicated that it wished to ensure that the selection of hearing place was not a concern for the parties from the perspective of preserving the Board's appearance of neutrality, impartiality and separation from the Commission. The Board indicated that it would only proceed to book the boardroom at the Commission's offices if the parties were in agreement.

### Positions of the Parties

6. The Complainant took the position by email dated September 17, 2015 that the hearing should not take place at the Commission's offices, "in the circumstances", without offering detailed reasons.
7. That same day, counsel for the Commission wrote to the Board, on notice to all parties, to advise that the Commission had booked the hearing at its new offices. The Board was asked to contact in-house counsel for the Commission about the use of the Commission's space.
8. The Board wrote to the parties in reply on September 18, 2015 stating:

*...No doubt the Commission was intending to be helpful and would understandably prefer to avoid the costs of a hearing room for such a lengthy hearing.*

*For the sake of transparency, the Board is learning for the first time that the Commission made arrangements for a hearing room at its offices and [the Board] did not request that this occur. As a Board of Inquiry, my practice has always been to determine where the hearings will be held as part of the Board's responsibility for procedural decisions at the hearing stage. Some parties may not be concerned about where the hearing is held, other parties may be quite sensitive to that fact. The Commission and the Complainant have taken conflicting positions in this matter. It may be that the Complainant is not comfortable having the hearing at the Commission's offices and wants the hearing to be held on neutral ground.*

*I suggest that the parties have a discussion today to determine what the underlying issues are and whether their differences on this point can be resolved. If there is agreement, the Board will make every effort to accommodate the result. If there is no agreement, I will book the neutral location....*

*...*

*It is not clear whether [in-house counsel for the Commission] wished to discuss administrative arrangements respecting the place of the hearing based on the presumption that there was no issue in this respect or whether she wished to discuss the Commission's preference respecting the location of hearings. If it is the latter, it would not be appropriate for the Board to engage in communications with Commission's legal counsel without the inclusion of the other parties....*



9. In-house counsel for the Commission subsequently advised in the course of submissions that her request to speak with the Board of Inquiry respecting the hearing place was strictly administrative.
  
10. The Respondent submitted that there should be no objection to using the offices of the Commission. Counsel for the Respondent submitted that, “This matter has already been and continues to be an enormous cost to the taxpayers of this province, and having a potentially month-long hearing at a private facility when there are perfectly serviceable public-sector boardrooms available would be an unnecessary further use of public funds.”
  
11. In reply, counsel for the Complainant submitted that hearings are normally conducted on neutral ground. Counsel submitted that, in the circumstances, he would prefer neutral ground because of the issues with the Commission. [During this time, an appeal was pending before the Nova Scotia Court of Appeal respecting an earlier preliminary decision by the Board to allow amendment of the complaint of discrimination by the Complainant. The Respondent and the Commission are adverse in interests from the Complainant respecting the issues to be determined by the appeal.]
  
12. Counsel for the Complainant submitted that:

*...The guiding principle for the Board should be to provide a fair hearing and the appearance of a fair hearing and that in practice, this means that the hearing should be on neutral ground. This is normal procedure.*

*[Counsel for the Respondent] is inviting the Board to act in the financial best interests of the Province of Nova Scotia but this is an improper consideration for a neutral Board of Inquiry.*

### The Board's Decision of September 18, 2015

13. As the parties were unable to reach agreement, the Board directed on September 18, 2015 that it would proceed with the arrangements for a neutral location. In so deciding, the Board referred the parties to the principle in *R. v. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256, where it was famously stated: "Not only must justice be done; it must also be seen to be done." In the Board's view, it was in no one's interest to go through the expense of a hearing, which is costly for all participants, with a legitimate issue hanging over the proceedings and the Board's decision respecting the fairness of the hearing and the neutrality and impartiality of the Board. The Board concluded that there was a legitimate issue in this regard, given the well-established practice of holding a hearing at a neutral location rather than at the premises of one party to the proceedings. However, the Board indicated that, if the parties were able to reach agreement respecting the place of hearing, the Board was prepared to revisit the issue.

## The Board's Agreement to Reconsider Its Decision

14. In-house counsel for the Commission wrote to the Board and to the other parties on September 21, 2015 to ask the Board to reconsider its decision and to further explain the Commission's position. The Board agreed to hear further from the parties.
  
15. In-house counsel advised that the hearing space is located on the same floor as the new Commission's offices but is a hearing space built specifically for Boards of Inquiry. Counsel advised that the hearing space has its own signage and a separate entrance from the Commission's offices. Counsel stated that one does not have to enter the Commission's office space to utilize the hearing room and that there is no interaction with Commission staff. Counsel for the Commission submitted that there was "no justification for holding the hearing in a different location unless the hearing room is previously booked or the hearing must take place in a different town due to the origins of it." Counsel advised that the Complainant can be assured that there is no conflict by the hearing being conducted in the space built for it. Counsel indicated that the Commission could not approve a different venue, with this one sitting open for the allotted time.
  
16. Counsel for the Respondent provided further submissions on September 21, 2015. Counsel submitted that holding a hearing at the location designed for hearings does not indicate bias. Counsel submitted that, "By way of an analogy, it would not be appropriate or correct to

allege bias against a Crown prosecutor at a trial in a provincially funded court house. Nor would it be necessary to hold a civil court hearing in a board room if the Provincial Crown was named a defendant.”

17. It should be noted that, in its communications with the parties, the Board had specifically suggested the possibility of holding the hearing at some other public sector boardroom, not associated with the business premises of the parties. However, no alternative suggestions were offered.

#### The Issues

18. The Board identified that there were three issues that the Board should consider in reconsidering its decision, based on the positions taken by the parties:
1. Who is responsible for determining the place of hearing for a proceeding before a Board of Inquiry?
  2. What criteria are to be applied when making this decision?
  3. What is the appropriate location for this hearing?

The parties were given an opportunity to make written submissions respecting these issues.

### Taking a View

19. The Board determined that it would attend the Commission's offices on September 29, 2015 to take a view of the proposed hearing room. The parties were invited to attend if they wished. The Board advised that it would not receive comments or submissions from the parties at the viewing.
  
20. The Complainant and Respondent did not attend to take a view of the hearing room and surrounding offices. The Board was accompanied on the view by the Acting CEO of the Commission, Michelle Higgins.
  
21. The Board wrote to the parties on September 30, 2015 to share its observations. This was to ensure transparency respecting the information considered by the Board. The description provided by the Board is repeated here, as it is relevant to address a factual and an interpretative issue raised by the Commission's position respecting how one defines the "Commission's offices", addressed at a further point in these reasons:

*Signage on the ground floor references the Nova Scotia Human Rights Commission and the Nova Scotia Human Rights Board of Inquiry Hearing Room. Third floor signage references the Commission.*

*There is a main door off a public hallway into the office space allocated to the Commission. This door allows entrance to a waiting area where one can ring a buzzer to contact Commission staff. This area did not have a Commission staff person present at the time I attended.*

*There are two doors from the waiting area into interior areas. One door accesses the hearing room directly. The other door opens into a hallway from which two meeting rooms may be accessed....*

*There is also a door directly between the hearing room and the area in which these meeting rooms are located....*

*The area in which Commission staff presumably have offices/workstations is through a door that is located between the meeting rooms. This door is locked and is accessible only by staff with a swipe key.*

*I asked ... if the Commission would be willing to not use the two meeting rooms while the hearing is being held and was informed that this could be arranged. The Board of Inquiry can also be given its own key/swipe card to the hearing room and boardroom areas so that the Board is not dependent on Commission staff regarding access during the hearing.*

*During the hearing, Commission staff would enter/exit, as they normally do and use of the waiting room for Commission business would continue.*

#### Further Submissions of the Commission

22. The Commission offered two sets of written submissions dated October 2, 2015, one from in-house counsel for the Commission and one from external counsel for the Commission.

23. In-house counsel described the hearing room as having two entrances, one directly off the waiting room area and one that is secure between the entrance to the Commission offices and the waiting area. Counsel submits that at no time would any party have to enter the Commission offices to attend a hearing. In-house counsel for the Commission submitted that the Board of Inquiry hearing room was designed in contemplation of the legal principles of natural justice and procedural fairness and that this is why it is separate from the Commission's offices.

24. In-house counsel wrote:

*It is not procedurally unfair to any party to utilize the space the government designed specifically for this purpose. The connection to the Commission is the fact that the Commission maintains the space. The venue is properly equipped, there is space available for privacy should a party wish to speak with their counsel. The space is separate from the Commission offices and is secure.*

25. In-house counsel for the Commission further took the position that, by providing for use of the hearing room, the Commission was not attempting to take authority away from the Board. Counsel described the provision of a hearing room as an administrative function of the Commission, analogous to setting up transcription or translation services for a hearing.

26. As indicated, external counsel for the Commission filed submissions as well. With respect to the issue of who is responsible for determining the place of hearing for a proceeding before a Board of Inquiry, counsel advised that the Commission accepts that the authority to decide where the hearing should be held ultimately rests with the Board. However, counsel submitted that the Board must weigh the competing interests of all of the parties in making procedural decisions. Counsel submitted that those interests weighed in favour of the hearing taking place in the proposed room.
27. Counsel for the Commission submitted that the criteria to be applied in selecting a hearing room include convenience, cost, timeliness, and fairness. Counsel submitted that the high cost and inconvenience to the Commission and the Respondent outweighed any perceived unfairness to the Complainant. Counsel submitted that objectively there is no reasonable apprehension of bias flowing from the use of the hearing room in question, as the Board would have access to the hearing room without dependence on Commission staff and the Commission would not have any access to the hearing room that the other parties would not have.
28. Commission counsel further submitted that, while it had taken an adverse position to the Complainant on other preliminary issues that had arisen in these proceedings, these issues were procedural. Counsel submitted that the Commission's role as a party before the Board



is only for the purpose of protecting the public interest in the enforcement of human rights. Counsel submits, therefore, that the Commission's position is not adversarial to the Complainant's with regard to the merits of her complaint. In effect, counsel submits that the Commission and the Complainant are not truly in an adversarial relationship or will not be when the hearing on the merits proceeds.

29. Commission counsel agreed that hearing room "set up" is a relevant criterion to be considered in hearing room selection. Counsel submitted that this includes whether the space facilitates or frustrates the opportunity for an informed and effective presentation of a party's case to the tribunal involved. The Commission relied upon MacAulay and Sprague, "Practice and Procedure Before Administrative Tribunals" (Toronto: Thompson Canada Limited, 2004) (loose-leaf revised 2014, release 6) in this respect.
  
30. The authors indicate, at ch. 12, p.68, that hearing rooms at the agency's offices are preferable to hearing rooms elsewhere, as the members and public can draw upon the agency's staff for assistance and have access to phones, photocopiers, faxes, etc. Counsel submitted that, while the Board does not have its own space, and that, while the "agency" in this case, the Board of Inquiry, is not the Commission, Boards of Inquiry are appointed as a result of the Commission's processes. Counsel submitted that use of a space provided by the Commission has the same advantages, as a facility for hearings, as those identified by MacAulay and Sprague.

31. The Commission submitted that available resources must be weighed in considering the competing interests of the parties. The Commission relied upon *Clipperton-Boyer v RedFlagDeals.com, a division of the Yellow Pages Group Inc.*, 2014 HRTO 1392 (CanLII) ("*Clipperton-Boyer*") in this regard. There, the Ontario Human Rights Tribunal changed the venue of a human rights hearing from the Tribunal's Hearing Centre in downtown Toronto to a hearing room at the Toronto East Detention Centre, where one of the parties was incarcerated, as that party was unable to be transported to the tribunal's hearing room. The opposing party objected on the basis of suspected inadequate resources related to the alternate hearing room, inconvenience and cost.
32. The tribunal determined that the need to ensure the ability of the incarcerated party to attend the hearing outweighed considerations respecting where the hearing room was located, noting that there was marginal additional expense to the respondent. This additional cost arose only in relation to the respondent having to travel to a different location in the Toronto area.
33. While the issue of cost was not a determining factor in *Clipperton-Boyer*, the Commission submitted that the case provides authority for the proposition that resources and costs related to a particular hearing site are relevant considerations. Counsel submitted that, in

comparison, the cost to the Commission and the Respondent in this case, related to acquiring a private hearing room, was much more substantial.

34. The Commission submitted that costs were the main factor considered in *Estate ABC v. Respondent 1 and the Superintendent of Pensions*, 2015 NBFCST 3 (“*Estate ABC*”). In *Estate ABC*, the tribunal had a hearing room and staff in St. John, New Brunswick and normally held hearings at its offices. The applicant requested that the venue be changed from Saint John to Edmundston, New Brunswick for reasons that included the fact that the parties were in Edmundston, as were most of the witnesses. The tribunal allowed the application for a change of venue and, at para. 21, referred only to the cost and convenience for the parties and witnesses as relevant factors in its decision. The Commission submitted that, while the *Estate ABC* case concerned an application for a change in venue from one city to another, the case, nonetheless, supports the Commission’s position that cost and convenience are substantive factors to be considered in deciding where a hearing should be held.

35. The Commission agreed that fairness is also a relevant criterion in the selection of a hearing room. The Commission relied upon *United Enterprises Ltd. v Saskatchewan (Liquor & Gaming Licensing Commission)*, 1996 CarswellSask 799 (Sask QB) (“*United Enterprises*”), where a finding of a reasonable apprehension of bias arose due largely in part to the set up of the hearing room, and *Bailey v. Registered Nurses’ Assn. (Saskatchewan)*, 1998

CarswellSask 346 (Sack QB) ("*Bailey*"), where a proceeding was found to be unfair as the hearing rooms were inadequate. The Commission submitted that these cases stand for the principle that hearing rooms must be set up to allow each party to present its case without providing any party with an advantage. The Commission submitted that none of the advantages that existed for one party (and not the others) in those cases exist on these facts, as the hearing room in question is self-contained and is equipped for Board of Inquiry hearings.

#### Further Submissions of the Respondent

36. The Respondent did not provide any additional submissions.

#### Further Submissions of the Complainant

37. Counsel for the Complainant subsequently advised on November 2, 2015 that the Complainant withdrew any objection to the hearing being conducted at the hearing room which the Commission offered to provide. At the request of the Board, the Complainant further clarified by letter dated November 4, 2015 that, by withdrawing this objection, rather than taking no position, the Complainant consented to the use of the hearing room offered by the Commission. The Complainant took the position that the hearing room description

provided seemed to indicate that the hearing room is sufficiently detached from the Commission's premises to avoid unfavourable appearances.

38. The Board was also advised that the Complainant had determined not to consent to the hearing being held on Peninsula Halifax, for unrelated reasons. This further basis for objection is not addressed in these reasons, as the parties have requested an extended period to attempt to resolve this separate issue. If required, this issue will be determined by the Board in a separate decision. In part, this is why the Board is issuing an interim decision respecting place of hearing.

### Analysis

*1. Who is responsible for determining the place of hearing?*

39. This issue should be determined on the basis of whether the selection of a place of hearing is an administrative function or is a relevant component of procedural fairness.
40. In my view, the issue under consideration is not one of a purely administrative nature. A decision respecting where a hearing is to be held is to be distinguished from the administrative arrangements for that to occur.

41. The Board has the responsibility to ensure that a human rights inquiry held pursuant to the *Act* is conducted in a manner that is equally fair to all parties. This is confirmed by numerous legal authorities, including the case law relied upon by the Commission. In my view, both the location of the hearing and the available facilities at that location are relevant to issues of procedural fairness
42. The decision of Grotsky, J. in *Bailey* is a case on point. The Respondent, the Registered Nurses' Association, used a board room at the College of Physicians and Surgeons' offices and a hotel room for a professional discipline case. Because of the manner in which the tables and seating were configured in both board rooms, one party (the accused) was unable to see both the witness testifying and the discipline committee. That party was not able to sit at a table with their counsel. There was no space within the Colleges' offices and hallways for that party to consult privately with their counsel (they were interrupted by a steady flow of people walking through the area).
43. Grotsky, J. compared the set up of a court of law to the hearing room at the College's offices. He found, at para. 154:

*In my view, it was incumbent upon the discipline committee to conduct the hearings in a proper facility. It is not sufficient for counsel for the [Registered Nurses Association] to submit that the facilities in which they were conducted were adequate. They must in fact have been (more than) adequate so as to have allowed the appellants to see, and hear*

*the discipline committee, all counsel, the witnesses called to testify against them, and particularly, to consult with their counsel when necessary. (emphasis added)*

44. Grotsky, J. held, at para. 153, that:

*...fairness does not extend merely to the right to be tried by an impartial judge, or, as in this case, by an impartial discipline committee. It extends to all of the circumstances surrounding a fair hearing and includes the arrangement of a hearing room.*

45. The Board agrees with the conclusions of Grotsky, J. It is procedurally unfair and contrary to the principles of natural justice for one party to be disadvantaged in the preparation (which continues during the course of a hearing) or presentation of their case by reason of the inadequacy of the hearing room, including its related facilities.

46. The Board finds, as was held by Grotsky, J. and ultimately acknowledged by the Commission, that decisions respecting the place of hearing, including the selection of hearing room and related facilities, fall within the authority of the Board. This is because of the Board's role as a neutral decision-maker pursuant to the *Act* respecting, not only the merits of human rights complaints, but issues of procedure and fairness arising in proceedings before it. The Board's responsibility to ensure procedural fairness extends to the selection of hearing room facilities, as fairness extends to all of the circumstances surrounding the hearing.

*2. What criteria are to be applied in selecting a hearing room that is fair to all parties?*

a) Neutrality of location

47. The established practice is that hearings before Boards of Inquiry are normally held at a neutral location. Neither the Commission nor the Respondent offered legal authority to suggest otherwise.

48. The hearing room proposed by the Commission is associated with its new premises. The Board uses the word “associated”, as the Commission’s position is that the hearing room is not part of the Commission offices. This raises a factual and interpretative issue that is required to be determined before proceeding further with this analysis.

i) Is the proposed hearing room part of the Commission’s offices?

49. Signage in the public hallway on the third floor of Park Lane Terrace indicates that the Commission’s offices are accessed through one door. There is no separate signage or separate entrance to the hearing room from this hallway.



50. One enters a reception area through the Commission's entrance. The reception area appears to be part of the Commission's offices, as visitors are informed by signage how to contact Commission staff if none are present.
51. Those attending the Commission's offices to meet with Commission staff for restorative justice conferences or investigations convene in meeting rooms located directly off of the reception area. As the meeting rooms are for use by Commission staff, they appear to be part of the Commission's offices.
52. The Commission's submissions do not explain or provide a basis upon which the Board is able to conclude that the Commission's offices do not begin at the external door from the public hallway to the reception area, nor do they explain how the reception area, the meeting rooms or the hearing room are not part of the Commission's offices.
53. The Commission's position is, by logical inference, based upon an interpretation of the word "offices" whereby the Commission's offices begin at the secured door that is located in the internal hallway between the meeting rooms. That locked door separates what will be referenced as the areas of shared use by Commission staff, namely the hallway, meeting rooms, reception area and the hearing room, from what the Board presumes is the "personal use" office space of the Commission. The Board did not take a view of this latter area.

54. The Commission did not provide a factual basis or legal authority to support its position that the Commission's offices begin at the secure internal door in question. In the absence of evidence or legal submission to support a different interpretation, the Board applies an "ordinary language" or commonly understood definition of "offices". The Board concludes that the word "offices" includes all space related to and secured for one's business premises by way of ownership of the property or lease. By this definition, the reception area, the hallway, the meeting rooms and the hearing room are all part of the Commission's offices, along with the personal use space. No evidence was offered to demonstrate otherwise.
55. If, on the other hand, one defines "offices" as being based upon regular use, the reception area and meeting rooms are ordinarily used by the Commission for its purposes. Commission staff will regularly pass through the reception area through the hallway and into the "personal use" office space of Commission. Commission staff also normally access the meeting rooms. By this alternate definition, the Commission's offices include the reception area, the hallway and the meeting rooms.
56. The Board was not advised whether the Commission uses the hearing room for meetings or other purposes. Let us assume for the moment that the hearing room is not used by the Commission, as the Commission has decided that this portion of the office space within its control will be for the use of the Board only. Such a decision by the Commission would underlie the Commission's perception that the hearing room is not part of its offices.

However, the Commission's perception may, quite reasonably, not be shared by others, given the physical lay-out of the offices. The Board is required to view the matter objectively, from the eyes of that "reasonably informed bystander" upon which the legal test for reasonable apprehension of bias relies.

ii) Finding

57. The Board finds that the Commission's offices begin at the entrance to the Commission offices from the public hallway on the third floor and that the reception area, meeting rooms, related hallway and hearing room are part of the Commission's offices. In the alternative, in the event this finding is incorrect and the hearing room itself is not part of the Commission's offices, both entrances to the hearing room are via the Commission's offices, one from the reception area and one from the meeting room/hallway area. The parties at a hearing are, therefore, required to enter the Commission's offices to attend the hearing in the hearing room.

58. The Board finds that, in either case, on the facts, the hearing room lies within the Commission's offices. For these reasons, the Board concludes that the hearing room is not at a neutral location.

59. The alternate hearing room, originally selected by the Board, is at a neutral location, as the location is not associated with any party.

b) Neutrality of Advantages

i) What are the relevant features of the facility offered by the Commission?

60. Leaving the above finding aside for the moment, the hearing room itself is large and is well set up for presentation of the parties' cases in terms of the manner in which the furniture is configured. The reception area can be used as a waiting area by witnesses. The accommodations have the advantage of having two meeting rooms that the Commission has confirmed can be used by the parties and counsel so that they have a place to consult privately with one another as the evidence unfolds. This accommodation by the Commission addresses the issue raised in the *Bailey* decision respecting the inadequacy of the hearing facilities based upon the lack of privacy for the appellants to consult with their counsel.

61. However, as confirmed in both *Bailey* and *United Enterprises*, issues of unfairness are broader than these considerations alone. Unfairness can arise wherever the choice of hearing facilities gives one party an advantage over another.

62. The Commission submitted that the Commission would not have any access to the hearing room that the other parties do not have. The Board does not agree, as on the facts, the

Commission has direct access to its own premises and, therefore, the hearing room, as the occupier of the premises. One party having access to the hearing room was a significant contributing factor to the finding of procedural unfairness in the *United Enterprises* case.

63. In this case, one party, the Commission, has access to its own offices, to its own administrative support, to its phones, photocopiers, faxes and secure on-site file storage.

64. The Board concludes that these circumstances give the Commission an administrative advantage and the potential to have a procedural advantage during the hearing that the Complainant and the Respondent do not have.

ii) What are the relevant features of the alternate facility for the hearing?

65. As the alternate hearing room is at a hotel, no parties have access to an office. The parties are equally inconvenienced in this regard. All parties and the Board have access to the hearing room and to a large lobby area with various seating areas that facilitate an equal lack of privacy for all participants. However, there is sufficient space in seating areas within the lobby that the parties and the Board can find an area to themselves that is not subject to frequent foot traffic.

66. If a party or the Board requires copies or other administrative support, those services are available on an equal basis to all parties through the hotel's business centre. As there is no

on-site storage, all parties are required to transfer their file materials to a secure location at the end of each day of hearing. [In this case, the transfer of file materials to and from the hearing room for the parties and the Board is a factor, as the Board has been advised that documentation at the hearing will be extensive.]

iii) Finding

67. On balance, while arguably less convenient due to the lack of meeting rooms, the alternate hearing room offers neutrality of administrative advantage.

c) The Type of Hearing and Available Resources

68. The Board agrees with the broad conclusions referenced in “MacAulay and Sprague” that the type of hearing to be held and the resources available are relevant considerations in selecting hearing location and facilities. However, the authors’ comments respecting access to administrative supports are based on the assumption that the tribunal has its own hearing room, staff and phone, copiers and faxes, at a separate location, one that is not affiliated with one of the parties (at para. 68). The legal authorities provided by the Commission confirm that the consideration of “resources related to the effectiveness of the hearing room” occurs in the context of the tribunal ensuring procedural fairness to the parties. Fairness is the first priority. It is in this context that the Board finds that the type of hearing and the available resources are relevant considerations.

d) Convenience

69. The Board does not accept the Commission's submission that, as the Board does not have its own hearing space, the Board should select a hearing space offered by the Commission on the basis of convenience, nor does it agree that the fact that Boards of Inquiry are appointed as a result of the Commission's processes is a relevant consideration. In the Board's view, when a tribunal is appointed by a party by reason of the statutory requirement that this occur, the tribunal should be careful to ensure that, in all other respects, the tribunal strictly maintains its independence and impartially in relation to all parties. Convenience in the context of selecting a particular hearing room only becomes relevant once fairness is assured. Fairness is founded upon neutrality.

e) Costs

70. The Commission and the Respondent submit that it is proper for the Board to consider not only available resources, but costs, in determining the place of hearing. They submit that they will incur unnecessary hearing room costs if the alternate hearing room is chosen.
71. The case law provided to the Board demonstrates that cost has been identified as a relevant criterion in the context of disputes concerning venue. Venue cases concern choice of geographic location for a hearing, where the parties reside or work in different cities or

regions. In those cases, a tribunal should consider the cost and convenience to the parties in attending the hearing and make a determination based on the balance of convenience and fairness. These costs relate to travel and accommodation for the parties and witnesses, as opposed to the cost of the hearing room.

72. To illustrate, in *Estate ABC* the issue was one of venue in terms of choice of geographic centre for the hearing to be held. The costs to the parties in presenting their case (travel and accommodation for themselves and a number of witnesses) were relevant considerations, even though the tribunal had its own hearing place and staff in St. John, New Brunswick. In that case, available resources, namely the tribunal's hearing room, were not used for the hearing in the interests of the cost, convenience and fairness to the parties, presumably at additional cost to the tribunal.

73. This is not a "venue" case. The hearing of this matter will be held in the Halifax Regional Municipality.

74. The Commission also relied upon *Clipperton-Boyer*, to support its position that cost is a factor. In that case, there were two hearing room choices within the municipality of Toronto, Ontario. In my view, cost was identified in the reasons for decision because the respondent raised the issue. That cost related to travel cost. The tribunal did not find that cost was a



true factor because the increase in travel costs for the respondent within the Toronto area was marginal.

75. *Clipperton-Boyer* does not stand as authority for the principle that costs related to the actual selection of a hearing room should be a determining factor. Hearing room costs were simply not in issue. If anything, the case suggests that hearing room costs should not be a factor considered by the tribunal. On the facts, one of the choices for hearing location was the Tribunal Hearing Centre. From a cost perspective, this would have been the least expensive option for the tribunal, yet the tribunal moved itself to the location that enabled all parties to participate in the hearing on an equal footing. The tribunal placed priority on fairness over cost, as one party would have had to participate by telephone, had the place of hearing not changed.

76. The Board was not referred by the Commission or the Respondent to any legal authority to support the position that hearing room cost outweighs the need to ensure procedural fairness. To the opposite effect, in *Bailey*, Grotsky, J. held that it was incumbent upon the discipline committee to conduct the hearing in a proper facility. There was no reference to the issue of cost justifying the hearing being held at the College's premises when the College's facilities were not sufficiently adequate to allow a fair hearing to be held.

77. In my view, cost may be a relevant factor in selecting a hearing room, but only where issues of procedural fairness do not arise. If two rooms meet the “fairness” criteria, cost can and should be a factor and the least expensive option should be selected.

78. By placing cost in the context of ensuring procedural fairness, the Board does not mean to suggest that each hearing room must meet standards of perfection as a hearing facility. Hearings outside of the courts are often held in hotels, conference centres and other locations that are not ideal. However, they are equally not ideal for all participants. Reduced cost or the lack of cost of a particular hearing room cannot be used as a justification to proceed with a hearing that is procedurally unfair to one party in comparison to another.

f) Conclusion Respecting Relevant Criteria

79. Based on a consideration of the above issues, in my view, the criteria to be applied by the Board in selecting a hearing room may be summarized as follows.

80. The Board should:

1. Ensure that procedural fairness to the parties is the foremost priority and, in doing so, consider the type of hearing that is required.
2. Where venue is an issue, consider the cost and convenience to the parties in attending the hearing, including the attendance of witnesses.

3. Consider the resources available, in terms of both hearing location and related facilities.
4. Where more than one available hearing room will meet the criteria necessary to ensure procedural fairness, consider the cost of the hearing room.

81. From the perspective of the Board's obligation to ensure procedural fairness, the following considerations are relevant:

1. Is the hearing at a neutral location?
2. Do the proposed facilities ensure equal opportunity for effective participation in the hearing for all parties? (Does the arrangement of the hearing room allow all parties to see and hear the Board, all counsel, and the witnesses called to testify against them? Do the facilities allow the parties sufficient accommodation to consult with their counsel privately?)
3. Do the proposed facilities provide all parties with equal access to administrative supports?

82. To this list of considerations I would add that it is also relevant to assess the facilities from the perspective of suitability for the Board's role. This includes, a) whether the layout provides the Board with adequate furniture and space to take confidential notes, maintain exhibits and the Board's file; and b) whether it accommodates the Board's need to consider

issues or review materials in private, such as an office, meeting room or private area for use by the Board. Preferably, the facilities should also include secure storage space for exhibits for the Board and witnesses and Board copies of file materials.

*3. What is the appropriate location for this hearing?*

83. To be clear, the Commission acknowledges that the set up of a hearing room and its related facilities can contribute to the unfairness of proceedings. The Commission accepts that hearing room facilities had this effect in *United Enterprises* because the facilities provided an environment which enabled a reasonable apprehension of bias to arise by reason of the inadvertent conduct of the tribunal members and of one of the counsel. However, the Commission's position is that high cost and inconvenience can outweigh any "perceived" unfairness to the Complainant in this case. The Commission submits that there is no bias in holding the hearing at the place designed for it, on these facts.

84. In *United Enterprises*, the tribunal had its own premises and staff. The difficulties arose from the tribunal's decision to allow the Authority's counsel to have the use of one of its offices during hearings, as Authority counsel frequently appeared before the tribunal. This counsel had the use of an adjacent office that had its own access to the hearing room, while the other parties had to wait in the reception area until the hearing room opened. This influenced the manner in which the members of the tribunal conducted themselves in their interactions with counsel. Counsel for the Authority was entering and exiting the hearing

room with the tribunal and regularly engaged in friendly chatter with the tribunal, while the other parties were excluded or had no similar experience. All of this created the objective impression that counsel had a special relationship with the tribunal.

85. Justice Baynton held at para. 32:

*[32] ...The members of the Commissions conducted themselves (albeit inadvertently) in a manner that suggested they had some connection with counsel for the Authority or that he had a special relationship or preferred status with them. Each time they entered the premises the Authority's counsel walked in with them. When the hearing commenced, and each time it resumed, he was in the room with them before the main doors were opened to the applicant.... (emphasis added)*

86. Justice Baynton noted in the course of his reasons that the Authority's counsel was in the process of moving his office to a more distant location.

87. In the Board's view, *United Enterprises* demonstrates the difficulties that can arise if a hearing is held at the premises of a party. The combination of shared premises, the additional private access by one party to the tribunal outside of times the hearing was convened and the on-going relationship between that party and the tribunal (as that party regularly appeared before the tribunal), led to inadvertent behavior by the tribunal, resulting in the tribunal's decision being quashed.

88. However, as indicated, the Commission submits that there is no bias in holding the hearing at the place designed for it, on these facts. The Commission submits that, 1) the hearing room was designed with natural justice in mind specifically for Board of Inquiry hearings; and 2) that the Complainant and Commission are not truly adverse in interest.
89. With respect to submission 1) concerning the design of the hearing room, the Board agrees that if one considers the interior of the room in isolation, in terms of its size and furniture, the room itself is a well-appointed facility to hold a hearing. However, the issue that arose is not whether the interior of the room is suitable but rather whether the location of this room at the business premises of a party is or is not problematic from the perspective of natural justice. As noted at the outset, the Board was not provided with any legal authority by the Commission or the Respondent to support the position that it is procedurally fair to hold a hearing at one party's premises.
90. In my view, parties who are adverse in interest may perceive the selection of a hearing room at one of the party's premises as a demonstration of favouritism by the Board, thereby compromising the neutrality and fairness of the proceedings. Alternatively, they may oppose being required to attend a hearing at another parties' business premises due to their relationship or lack thereof with the other party or for other reasons.

91. Selecting a hearing room offered by a party that is not consented to by all parties also places the Board at risk of being seen as accepting administrative favours or courtesies from one party that the other parties are not in a position to offer. On these facts, there is no separate office for the Board of Inquiry to await the hearing that is not part of the Commission's offices. There is potential for the Board to be seen as using the Commission's offices and being accessible to staff of the Commission in a way that the other parties are not.
92. Further, absent special arrangements, the other parties do not have similar favourable administrative arrangements as the Commission. The Commission has greater administrative and access advantages than what was provided by the tribunal to counsel for the Authority in *United Enterprises*.
93. In the circumstances, it cannot be concluded that the hearing room and its related facilities were designed in their totality in accordance with the principles of natural justice.
94. With respect to submission 2), the Commission asserts that the Commission and Complainant are not truly adverse in interest or will not be when the hearing proceeds on the merits. The hearing is anticipated to require a month to be heard. In my view, as the hearing will involve a number of issues, the Board would be ill-advised to assume at this early stage that the Complainant and Commission will see eye to eye on every issue. The

Complainant has not responded to the Commission's submission that they will not be adverse in interest, as the Complainant instead consented to the place of hearing without addressing this point. Accordingly, the Board does not have the benefit of both perspectives on this issue.

95. What is clear is that, thus far, the Complainant and the Commission have taken significantly divergent positions respecting the nature and extent of the complaint itself. It is reasonable for the Complainant to have concluded that the Complainant and Commission have been adverse in interest. The Board is not prepared to presume in advance of the hearing that no issues or differences will arise between these parties following the Court of Appeal's decision or otherwise during the course of the hearing.

96. For these reasons, absent the consent of the Complainant, the Board would have been disinclined to find that it is procedurally fair to hold the hearing in the room offered by the Commission. However, the Complainant is of the view that the hearing room is sufficiently detached from the Commission's offices. The Complainant is prepared to consent to the use of the Commission's hearing room. The Complainant appears to accept the distinction made by the Commission respecting the separation of its personal use office area. Given the Complainant's consent, it is, therefore, not necessary for the Board to make a determination respecting whether the hearing room meets the requirements of procedural fairness, including whether there is a reasonable apprehension of bias in holding the hearing at the



Commission's offices. However, the Board requires that its decision to use the Commission's hearing room be subject to certain conditions, notwithstanding the Complainant's consent.

#### Interim Decision and Conditions

97. Accordingly, on the basis that the Complainant and the Respondent are consenting to the use of the space offered by the Commission, and, subject to certain conditions, the hearing will proceed in the hearing room provided by the Commission. Requirements are being imposed by the Board, in part, for the purpose of minimizing the difference in advantage between the Commission and the other parties, notwithstanding their consent to the use of the facilities. The stipulations are also intended to preserve the appearance of the Board's neutrality during the course of what will be a month-long hearing and to mitigate the risk that an unanticipated issue may arise. The Board will require that the parties abide by the following protocols, as prescribed in the following procedural Order:

1. The Board is to be provided with a swipe key or other means to gain access to the hearing room, reception area and meeting rooms. This is to enable the Board to enter the main entrance to the Commission's offices and to access the hearing room and permit the parties to access the meeting rooms on an independent basis, without having to request admittance to the hearing room from Commission staff.

2. The Board will not use any of the Commission's offices within its personal use work space or enter that area unless all parties consent or attend as well, nor will the Board avail itself of copies or faxes or other administrative support from Commission staff.
3. As the Board does not have access to a private area outside of the Commission's offices, the Board may require private use of the hearing room from time to time to consider objections or during short adjournments.
4. The two meeting rooms off of the reception area are to be reserved and be available for the use of the Complainant and the Respondent during the hearing. Commission counsel can make arrangements to have access to an office within the Commission's personal use work area.
5. Given the length of the hearing and the amount of documentation anticipated, it is possible that the Board and/or the parties may wish to leave shared documents or exhibits for the witnesses overnight in the hearing room. In that event, these documents will, nonetheless, need to be treated as confidential documents. The Commission is to ensure that the hearing room remains locked and secure after hours, with the exception of cleaning staff, and Commission staff are to be informed that they are not to enter/use the hearing room after hours.
6. Recognizing that technology may impose limitations respecting the ability to preserve confidentiality, the Commission is to determine whether it is possible to provide copies

and faxes to the other parties using the Commission's equipment, if requested, in a manner which preserves confidentiality for these parties and at a reasonable cost.

7. As this hearing will be held over an extended period of time, should unforeseen circumstances arise, or should the remaining and unrelated issue respecting place of hearing not be resolved by the parties, the Board reserves its jurisdiction so as to amend this interim decision to provide further directions or to issue a final decision respecting hearing room selection requiring that the hearing be completed elsewhere.

Dated at Halifax Regional Municipality this 27<sup>th</sup> day of November, 2015.

A handwritten signature in cursive script, reading "Kathryn Raymond". The signature is written in black ink and is positioned above a horizontal line.

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Kathryn A. Raymond

Nova Scotia Human Rights Board of Inquiry Chair