IN THE MATTER OF: **THE NOVA SCOTIA *HUMAN RIGHTS ACT* (the "*Act*")**

and

IN THE MATTER OF: **Board File No. 51000-30-H19-1740**

BETWEEN:

Stacey Gerard (on behalf of her children, Rhys and Ryan Gerrard)

Complainant

- and –

Cole Harbour Bel Ayr Minor Hockey Association and/or Hockey Nova Scotia

Respondents

- and –

Nova Scotia Human Rights Commission

DECISION

Chair: **Dennis James, Q.C.**

Hearing Date: **November 26, 2020**

Location: **Virtual Hearing**

Counsel: **Stacey Gerrard, on behalf of her children, Rhys and Ryan Gerrard, Complainant**
Ian Pickard, Counsel for the Respondents Cole Harbour Bel Ayr Minor Hockey Association and/or Hockey Nova Scotia
Ian Joyce, Counsel for the Nova Scotia Human Rights Commission

By a complaint form filed with the Nova Scotia Human Rights Commission ("Commission") on September 26, 2019, the Complainant, Stacey Gerrard, on behalf of her sons, Rhys and Ryan, alleges that they were discriminated against by the Respondents on the basis of family status, contrary to Section 5 (1) (a) and (r) of the *Human Rights Act*, RSNS 1989, c. 214 as amended ("Act"). Specifically, the complaint is described by her as:

> I, Stacey Gerrard, complain against the Cole Harbour Bel Ayr Minor Hockey Association and/or Hockey Nova Scotia on behalf of my children Rhys and Ryan Gerrard that from May of 2018 until July 2019, the Respondents discriminated against me with respect to the provision of or access to services or facilities because of my children's family status.

The Respondents contest the claim and say that it was filed out of time and must be dismissed. The Commission also contends that the claim is out of time. A hearing on this preliminary issue was conducted virtually on November 26, 2020.

Prior to addressing the preliminary motion on Section 29 (2), three preliminary issues should be addressed. First, there was a matter of concern raised by the Complainant concerning counsel for the Commission. Second, the Complainant objected to a portion of the Commission's brief as not being founded on the evidence and not relevant to the preliminary hearing. Finally, the Complainant alleges that the Respondents were obligated to file a judicial review of the Commission's referral of this matter to a Board of Inquiry and should not now be allowed to raise the preliminary motion pursuant to Section 29 (2).

On the first matter, at the outset of the hearing counsel were canvassed as to whether there were any matters to be addressed before proceeding to oral submissions. None were raised. However, at the outset of the Complaint's oral submission, she did raise a concern over the involvement of Commission's counsel due to an ongoing unrelated criminal file that she and the Commission's counsel share. The Complainant raised the matter of concern, but did not object to completing the preliminary motion which was two-thirds complete at the time the issue was raised. It was left that the Complainant might raise her objection should this complaint proceed to a full hearing. The Board did not hear details that were being relied on by the Complainant to advance her objection and was satisfied with the Complainant's acknowledgement there was no objection to the hearing of the preliminary motion being completed.

Second, the Complainant justifiably objected to paragraph 13 of the Commission's pre-hearing brief. The paragraph contains strong allegations of behaviour on the part of the Complainant and her spouse. There was no evidence filed to support the allegations (none was expected at this stage) and they are not germane to the preliminary motion advanced by the Respondents. The Board agrees that this portion of the Commission's brief is disappointing and unhelpful, but places no weight on any of the allegations. It views

paragraph 13 as a misdirected sojourn into hyper-zealous rhetoric in an otherwise helpful written submission.

Finally, the suggestion by the Complainant that the Respondents were obligated to seek judicial review of the Commission's referral to a Board of Inquiry is not sustainable at law. In *Halifax (Regional Municipality) v Nova Scotia Human Rights Commission)* 2012 SCC 10, 2012 SCC 10, Justice Cromwell offered the following:

> [19] I respectfully agree with the Court of Appeal. The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the *Act*. Rather, within the scheme of the *Act*, the Commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.
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> [20] The *Act* sets up a complete regime for the resolution of human rights complaints. Within this regime, the Commission performs a number of functions related to the enforcement and promotion of human rights. With regard to complaints, it acts as a kind of gatekeeper and administrator. Under s. 29 as it read at the relevant time, the Commission was required to "instruct the Director [of Human Rights] or some other officer to inquire into and endeavour to effect a settlement" of a complaint, provided that the complaint is in writing in the prescribed form or that the Commission "has reasonable grounds for believing that a complaint exists".
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> [21] Where a complaint is not settled or otherwise determined, the Commission may appoint a board of inquiry to inquire into it (s. 32A (1). The Commission has a broad discretion as to whether or not to take this step. The Commission may do so if it "is satisfied that, having regard to all circumstances of the complaint, an inquiry there into is warranted" (Boards of Inquiry Regulations, N.S. Reg 221/91, s.1. There is no legislative requirement that the Commission determine that the matter is within its jurisdiction or that it passes some merit threshold before appointing a board of inquiry; the Commission must simply be "satisfied" having regard to all the circumstances of the complaint that an inquiry is warranted.
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> [22] Once appointed, a board of inquiry conducts a public hearing into the complaint and decides the matter. The

> board of inquiry has the authority to determine any question of fact or law required to make a determination on whether there has been a contravention of the *Act* and has the power to remedy such contravention (ss. 34 (1), (7) and (8). There is an appeal to the Court of Appeal from a decision of the board of inquiry on questions of law (s. 36).
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> [23] What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the *Act*. Those determinations may be made by the board of inquiry. In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication. (Emphasis added)

It follows that the referral of this matter to a Board of Inquiry is not a determination as to whether the complaint is founded or even within the purview of the *Act*. The Respondents can advance the preliminary motion that is now before the Board.

Summary of Facts

On May 26, 2018, the Cole Harbour Bel Ayr Minor Hockey Association ("CHBA") communicated to the Complainant and her spouse that their family was being removed from its membership. Arrangements had been made for the transfer of Rhys and Ryan to one of the neighbouring minor hockey associations, however, they ended up playing out of Halifax for subsequent seasons. The decision to terminate membership had been made at a meeting of April 21, 2018 and there was some issue of whether it was communicated prior to May 26, 2018. For the purpose of the preliminary motion, CHBA and the other respondent, Hockey Nova Scotia ("HNS"), accepted May 26, 2018 as the date of communication of the decision.

The Complainant appealed CHBA's decision to HNS. A HNS decision dated July 16, 2018, rejected the appeal.

In responding to the Respondents' motion to dismiss, the Complainant refers to some additional facts, which are not contested by the Respondents as to their occurrence; there is contest by them as to the implication. The Complainant relies on the following as new occurrences or fresh steps:

> i. An email sent by Ryan Gerrard to CHBA dated August 21, 2018 in which they request CHBA reverse its' decision to terminate the family's membership;
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> ii. The fact that Rhys and Ryan were not allowed to play in CHBA for the 2018-19 and 2019-20 seasons.

iii. An email exchange during the period November 6, 7 and 8, 2018 between the Complainant and the new Executive Director of HNS in which the Complainant objected that CHBA and HNS did not follow their own procedures in handling the complaints against the Gerrards; and,

iv. An approach by the Complainant to HNS in July 2019 which she claims was prompted once she learned from a third party of a previous settlement between the Commission and HNS in 2014 arising from a separate human rights complaint. The settlement, which was made without admission of liability by HNS, established a Dispute Resolution protocol. The Complainant says she was not aware of the protocol until July 2019 and asserts the protocol was not followed by CHBA and HNS in handling the removal of her family from the CHBA membership.

Law

Section 29 (2) of the *Act* provides:

> (2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

The Nova Scotia Court of Appeal has provided clear direction on the meaning of Section 29 (2). In assessing the Respondents' motion the Board is directed that "(t)he limitation clearly tolls from the events described in s. 29(2)." See *Smith v. Nova Scotia (Board of Inquiry)* 2017 NSCA 27 ("*Smith"*); *Izaak Walton Killam v. Nova Scotia (Human Rights Commission)* 2014 NSCA 81 (*"IWK"*)

The Complainant urges that the Board consider that the conduct of discrimination was ongoing through November 2018, and as late as July 2019. These dates are important because, if accepted as ongoing conduct, the claim is in time. If not accepted, the complaint was not brought within twelve months of the alleged discriminatory action or conduct.

Again, the Nova Scotia Court of Appeal has provided guidance on what constitutes ongoing conduct. In *Nova Scotia Liquor Corp. v. Nova Scotia (Board of Inquiry)* 2016 NSCA 28, the Court provided the following:

> G. Did the Board err in law by treating statute barred conduct that was not discriminatory under the Act as evidence of ongoing misconduct by the Corporation?
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> 97 Ms. Kelly complained that she was prohibited from working at a wine fair in November 2004 because she was pregnant, although she did end up working at the event in a different

capacity. Before the Board the NSLC challenged the veracity of Ms. Kelly's account, but also argued that the complaint would be statute barred in any event. It submitted that s. 29(2) of the Act prohibited a finding of discrimination in the circumstances. That section provides:

> 29(2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

98 The NSLC submits that the Board appeared to accept its argument with respect to the wine incident being statute barred, but then proceeded in its reasons to throw the practical effect of that finding in doubt. The Board's reasoning and conclusion help underscore the source of the concern.

…

106 The Board quotes from *O'Hara v. British Columbia (Human Rights Commission)*, 2002 BCSC 559 in relation to what constitutes continuing conduct for the purpose of s. 29(2). That decision adopts the earlier reasoning of the Manitoba Court of Appeal in *Manitoba v. Manitoba (Human Rights Commission)*, [1983] M.J. No. 223, which described a "continuing violation" under that province's legislation as follows:

> 19 What emerges from all of the decisions is that a continuing violation (or a continuing grievance, discrimination, offence or cause of action) is one that arises from a succession (or repetition) of separate violations (or separate acts, omissions, discriminations, offences or actions) of the same character (or of the same kind). That reasoning, in my view, should apply to the notion of the "continuing contravention" under the Act. To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.

> 107 I am satisfied that neither case supports the proposition that conduct found to not be a stand alone act of discrimination and statute-barred "is evidence to prove ongoing misconduct". The Board then cites the recent decision of this Court in *Izaak Walton Killam Centre v. Nova Scotia (Human Rights Commission)*, supra. Clearly that decision does not support the proposition that s. 29(2) can, or should, be interpreted as permitting statute barred conduct to be used as "evidence to prove ongoing misconduct".

In its brief, the Commission referred the Board to three additional authorities, *Munro v. I.M.P Aerospace Components* [2014] N.S.H.R.B.I.D. No. 9 ("*Munro*"); *Whitwell v. U.S. Steel Canada Inc*. [2011] O.H.R.T.D. No. 694 ("*Whitwell*"), and, *Juan v. Lakehead University* [2014] O.H.R.T.D. No. 572 ("*Juan*"), that set out the following helpful points:

> i. There must be successor or repetition or separate acts of discrimination of the same character; *Munro, supra*
>
> ii. There must be present acts of discrimination which could be considered a separate contravention of the *Act,* and not of merely one act of discrimination which may have continuing effects or consequences. *Whitwell, supra*
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> iii. The focus of the inquiry should be on whether the incidents in question involve fresh steps taken by the parties each step giving rise to a separate alleged breach of the *Act Juan, supra*
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> iv. The fact that a respondent maintains a decision it has already taken does not involve a fresh step nor does it give rise to a separate breach of the Act. *Juan, supra*

Time Period as it Related to CHBA

The Board is mindful that the two Respondents are separate legal entities. For that reason it is important to consider the limitation issue individually.

As it relates to CHBA, the alleged acts of discrimination or continued acts of discrimination are the May 26, 2018 communication of the decision to terminate membership and the response to the communication from Ryan Gerrard on August 21, 2018. I find that CHBA's response to the further communication by Ryan in August 2018 does not constitute a new act of discrimination, but simply the CHBA maintaining its position.

The Complainant also relies on the fact that her sons have now had to play two seasons outside of CHBA as ongoing conduct of discrimination. The Board finds the following excerpt from *Whitwell*, *supra,* to be persuasive on this argument:

> 10 In my view, the continuing effect of the applicant's inability to become qualified as a 3rd Class Operating Engineer is not a part of a series of incidents of discrimination within the meaning of section 34(1). The continuing effect does not extend the time limit for filing an application under the Code. If it did, then there would effectively be no time limit on filing an application, since most actions of any significance will have long term effect. (Emphasis added)

I find that the inability of Rhys and Ryan to play hockey in CHBA for the 2018-19 and 2019-20 seasons is not a part of series of incidents of discrimination within Section 29 (2) of the *Act*. Rather, these are examples of the continuing effect of the May 2018 decision.

The Complainant alleges that the communication in July 2019 with counsel for HNS following her discovery of the 2014 Dispute Resolution protocol is a new act of discrimination by CHBA. The Board rejects this as a possible fresh step that shows new conduct in violation of *Act*. At best, this allegation, if true, may raise a procedural fairness issue which is not a focus of the present inquiry.

This leaves the decision by CHBA as communicated on May 26, 2018 as the only possible act of discrimination. This is not a finding that it was, simply if there was an act of discrimination it was on May 26, 2018.

Time Period as it Relates to HNS

As it relates to HNS, the alleged acts of discrimination or continued acts of discrimination are the July 16, 2018 decision on the appeal of the CHBA decision and the communication with Ms. Walsh, the new Executive Director of HNS between November 6 and 8, 2018. I find that that the communication between November 6 and 8, 2018 could not constitute a decision, let alone a fresh act of discrimination. As counsel for the Respondents contended, it was a mere exchange of information.

Again, the Complainant alleges that the communication in July 2019 with counsel for HNS following her discovery of the 2014 Dispute Resolution protocol is a new act of discrimination by HNS. The Board rejects this as a possible fresh step that shows new conduct in violation of *Act*. At best, this allegation, if true, may raise a procedural fairness issue which is not a focus of the present inquiry.

This leaves the decision by HNS of July 16, 2018 as the only possible act of discrimination. This is not a finding that it was, simply if there was an act of discrimination it was on July 16, 2018.

Board's Jurisdiction to Extend

The Complainant requested that if the Board found the complaint to be out of time, that the Board extend the limitation period as set out in Section 29 (3) of the *Act*. Section 29 (3) provides:

> (3) Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable. (Emphasis added)

On the plain reading of Section 29 (3), it is clear that it is the Director that has the authority to extend the period for filing a complaint. There was no evidence that the Director extended the limitation period for the Complainant, nor was a request made of the Director. There is no comparable language in the *Act* that empowers a Board of Inquiry to provide the relief that the Complainant seeks. The Board's conclusion is that it has no authority to extend the limitation period set out under Section 29 (2).

Conclusion

Based on the contents of the complaint form and relevant evidence provided to the Board, the complaint against each of the Respondents as filed by the Complainant is outside the time period set out in Section 29 (2) of the *Act*. Taking the filing date of September 26, 2019, it follows that the alleged offending act or ongoing conduct had to occur no earlier than September 26, 2018. Based on the findings as set out, and applying the principles described, there are no such alleged acts of discrimination or continued acts of discrimination by either Respondent within the twelve month period preceding the complaint. Accordingly, the complaint of September 26, 2019 filed by the Complainant is dismissed as against CHBA and HNS.

DATED at Truro, Nova Scotia this 30th day of November, 2020

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Dennis James, Q.C.
Board