NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114

Date: 20151222
Docket: CA 429284
Registry: Halifax

Between:

Nova Scotia Department of the Environment

Appellant
Respondent on Cross-Appeal

v.

Sandra Wakeham and Kathryn Raymond, in her capacity as Nova Scotia Human Rights Board of Inquiry Chair, and The Nova Scotia Human Rights Commission and the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondents
Appellants on Cross-Appeal

Judges: MacDonald, C.J.N.S.; Farrar and Bourgeois, JJ.A.

Appeal Heard: September 22, 2015, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Bourgeois, JJ.A. concurring.

Counsel: Andrew D. Taillon, for the appellant
Bruce W. Evans, for the respondent, Sandra Wakeham
Anne E. Smith, Q.C. and Keith Lehwald (Articled Clerk), for the respondent Nova Scotia Human Rights Commission
Respondent, Kathryn Raymond not participating
Edward A. Gores, Q.C., for the respondent, Attorney General of Nova Scotia not participating

Reasons for judgment:

Background

[1] This appeal arises out of a human rights complaint Ms. Wakeham filed with the Human Rights Commission against her employer, the Nova Scotia Department of the Environment (DOE) on May 10, 2012. In that complaint she alleged she had been discriminated against by DOE on the basis of physical disability since February 21, 2012.

[2] The complaint proceeded through the investigation and referral process mandated by the *Human Rights Act*, R.S.N.S. 1989, c. 214 and was referred to Kathryn Raymond to sit as a Board of Inquiry by the Human Rights Commission.

[3] In November 2013, Ms. Wakeham sought to add a second ground of discrimination (mental disability) and to change the date of the alleged discrimination from February 21, 2012, to February 14, 1999.

[4] A motion to amend was heard by the Board of Inquiry on December 5 and 6, 2013.

[5] On June 13, 2014, in a lengthy decision (reported as [2014] N.S.H.R.B.I.D. No. 5), the Board of Inquiry allowed the amendment. She concluded that the ground of mental disability could be included in the complaint and it was not limited in time to events commencing on February 21, 2012. The Board of Inquiry allowed the complaint to be backdated to February 14, 1999, the date when Ms. Wakeham was involved in a motor vehicle accident.

[6] The DOE appealed that decision to this Court which resulted in three separate appearances before us.

[7] The first appearance was in Chambers when Ms. Wakeham moved to dismiss the appeal on the basis that it was premature. She also argued, in the alternative, that if the appeal were not dismissed, she be granted an extension in time to file a Cross-appeal and Notice of Contention. Those matters were referred to a panel of the Court and heard on January 23, 2015. In an oral decision announced at the end of a hearing, the motion to dismiss the appeal was denied with reasons to follow and be included within the reasons on the appeal proper.

Ms. Wakeham's motion to extend the time for filing a Cross-appeal and a Notice of Contention was allowed.

[8] The matter then proceeded to an appeal on its merits on September 22, 2015. At the conclusion of oral argument the decision of the Court was reserved.

[9] For the reasons that follow I would allow the appeal and dismiss the Cross-appeal and the Notice of Contention without costs to any party.

Issues

[10] The parties have identified the following issues in the Notice of Appeal, Cross-Appeal and Notice of Contention:

> **Notice of Appeal**
>
> 1. The Board of Inquiry erred in law when it found that the human rights complaint ("the complaint") filed by the Respondent Sandra Wakeham was ambiguous.
>
> 2. The Board of Inquiry erred in law when it found s.5 (1)(o) of the *Nova Scotia Human Rights Act* to be ambiguous.
>
> 3. The Board of Inquiry erred in law when it found that an amendment to include mental disability was not adding a new ground to the complaint
>
> 4. The Board of Inquiry erred in law when it found that the mention of the term "chronic pain" in the complaint was sufficient to allow the addition of the new ground of disability.
>
> 5. The Board of Inquiry erred in law when it effectively amended the complaint to include allegations of discrimination dating back to 1999, thereby violating section 29(2) of the *Nova Scotia Human Rights Act*, R.S., c. 214, s. 1.
>
> 6. The Board of Inquiry violated the Respondent's right to procedural fairness and natural justice when it effectively amended the complaint to include allegations back to 1999 without evidence that any discrimination was "ongoing", contrary to section 34(3) of the *Nova Scotia Human Rights Act*, R.S., c. 214, s. 1.
>
> **Notice of Contention**

> 1. Did the NSHRC violate the statutory right of Ms. Wakeham under s. 29(1)(a) of the *Human Rights Act* to make a complaint in writing on a form prescribed by the Director of Human Rights?
>
> 2. Alternatively, did the NSHRC violate its statutory or other duty to Ms. Wakeham by failing to amend the complaint of May 10, 2012, in accordance with its investigation of such complaint?
>
> **Notice of Cross -Appeal**:
>
> 3. Did the BOI unreasonably err in law in holding that the Affidavit of Sandra Wakeham sworn December 16, 2013 is not relevant to determining the substance of her complaint of May 10, 2012?

[11] Despite the multitude of issues raised by the parties, this matter is not that complicated. I would reduce the issues to two. They are as follows:

1. Did the Board of Inquiry err in allowing the amendment to Ms. Wakeham's complaint?
2. Did the Human Rights Commission violate the rights of Ms. Wakeham by not permitting her to make a complaint in the manner of her choosing?

[12] In light of my conclusions on these two issues it is not necessary to address any other issue raised by the parties.

[13] After addressing these two issues, I will also provide reasons for our earlier decision that the appeal was not premature.

Analysis

Issue #1 Did the Board of Inquiry err in allowing the amendment to Ms. Wakeham's complaint?

[14] All parties are in agreement that this issue attracts a reasonableness standard of review. This was recently confirmed in *Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 2. In that case, this Court noted a line of authority to that effect (¶11-14) and concluded by citing *IWK v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18 (*IWK*), as follows:

> [14] Reasonableness is "… concerned mostly with the existence of jurisdiction, transparency and intelligibility within the decision making process.

> But it is also concerned with whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, ¶47). The reviewing court should not conduct two separate analyses — one for reasons and another for result. Rather the exercise is "organic"; the "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes, (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, ¶14).

[15] I will apply the reasonableness standard when considering this issue.

[16] The Board of Inquiry found that there were ambiguities in the complaint of Ms. Wakeham regarding both the grounds and the dates of discrimination. As a result, she allowed amendments to include mental disability (in addition to physical disability) and allowed amendments taking the alleged discrimination back to as early as February 14, 1999. On the latter, the Board of Inquiry reserved the right to make decisions regarding limitation periods at the Board of Inquiry hearing proper.

[17] The original complaint alleged that the DOE discriminated against Ms. Wakeham "with respect to employment because of (her) physical disability". Likewise, the complaint alleged discrimination "from February 21, 2012 and continuing" and further states that "(t)he discrimination began on February 21, 2012". In my view the existence of an ambiguity, if any, does not open the door for a Board of Inquiry to make substantive amendments to a complaint (See ¶28 and ¶48 *infra*). Further, a review of the complaint in this case does not reveal any ambiguity. I will address the alleged ambiguities in more detail later in these reasons.

[18] This is not a situation of resolving ambiguities or attempting to particularize elements of an existing complaint. Rather, it is allowing an additional complaint with a new ground – mental disability – in a far elongated scope of time - back to 1999 - rather than February 2012.

[19] The effect of the amendments is to have a complaint which circumvents all of the procedures under the human rights regime, including intake, investigation, attempts at resolution, consideration for referral, and ultimately referral or dismissal by the Commissioners. As I will explain, this is inconsistent both with the *Human Rights Act* and settled jurisprudence. While a Board of Inquiry has significant powers, it is ultimately a statutory tribunal governed and limited by the provisions of the parent legislation – in this case the *Human Rights Act*. The

Human Rights Act simply does not allow a Board of Inquiry to approve substantive amendments.

[20] The authority to appoint a Board of Inquiry is found at s. 32A (1) of the *Act*:

> Board of inquiry
>
> 32A (1) The Commission may, at any stage after the filing of a complaint, appoint a board of inquiry to inquire into the complaint.

[21] Section 34(1) of the *Act* gives equivalent powers and privileges to a Board of Inquiry as a commissioner under the *Public Inquiries Act*:

> Public hearing
>
> 34 (1) A board of inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the *Public Inquiries Act*.

[22] Likewise, the *Act* gives a Board of Inquiry broad remedial powers as set out at 34(8) of the *Act*.

> 34 (8) A board of inquiry may order any party who has contravened this *Act* to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

[23] As a statutory tribunal, a Board of Inquiry's source of powers and privileges flow out of express provisions of the *Act.* The *Act* does not give a Board of Inquiry the power to amend complaints.

[24] The respective roles of the Commission and a Board of Inquiry under the *Human Rights Act* were discussed in *IWK*. In that case it was made clear that it is the Commission which completely controls the complaint process:

> [5] It is a curiosity of the *Human Rights Act* process that the filing of a complaint is completely controlled by the Commission. One cannot contact the Commission and obtain a "complaint form" and file a "complaint". Potential complainants are given "intake forms" which they complete. These are then reviewed by Commission staff and, if considered appropriate, the potential complainant is then provided with a complaint form for filing. …

[25] Likewise, in *IMP Group Ltd. v. Dillman* (1995), 143 N.S.R. (2d) 169, this Court described the powers of the Commission:

> 34. When a complaint is made under the Act, the Commission has power to instruct the Director of Human Rights or some other officer to inquire into the complaint. The Act gives the Commission through its investigators broad powers to require information, and to enter into the premises to which a complaint refers. The Commission has power to obtain an order from the Supreme Court to permit entry into premises. The Act provides for settlement of a complaint, as well as the inquiry process respecting a complaint.

[26] In *Halifax v. Nova Scotia Human Rights Commission,* 2012 SCC 10 (*Comeau*), the Supreme Court of Canada specifically dealt with the role of the Commission in deciding to refer a complaint to a Board of Inquiry. It noted that the *Human Rights Act* is a "complete regime for the resolution of human rights complaints":

> [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".
>
> [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 thereinto 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.
>
> [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).

> [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.
>
> [24] The nature of this role has been recognized in the Nova Scotia case law and in the case law which has developed in relation to the similarly worded provisions of the *Canadian Human Rights Act, R.S.C.* 1985, c. H-6: . . . While there is some limited assessment of the merits inherent in this screening and administrative role, the Commission is not making any final determination about the complaint's ultimate success or failure: . . .
>
> [25] Moreover, the Commission's referral decision is a discretionary one. . .

(Emphasis added)

[27] To allow the complainant or a board of Inquiry to control the complaint process would usurp the role of the Commission in determining which cases would be referred to a board of inquiry. The Commission is the sole gatekeeper; that is – and has been – the process in Nova Scotia under the *Human Rights Act*.

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

[29] In *Harnish v. Halifax (Regional Municipality)***,** [2007] N.S.H.R.B.I.D. No. 7, the complainant alleged that she was discriminated against on the basis of race and colour, providing two specific examples of the alleged discrimination in her complaint. At the hearing before the Board of Inquiry, Ms. Harnish sought to prove discrimination by leading evidence about several other instances that she had not outlined in her complaint.

[30] The Board of Inquiry ruled that Ms. Harnish was allowed to lead evidence about particulars of the grounds of discrimination set forth in her complaint, stating:

> 41. The Board agrees with Ms. Ross that the nature of new allegations do not have the troubling and confusing effect of leading evidence on an unrelated matter (e.g., sexual discrimination). It is not as if the Commission has investigated a

> complaint of racial discrimination up to this point, and now has to change course and launch an investigation into sexual harassment. The fact that certain issues were not investigated by the Commission does not necessarily lead to the conclusion that those issues fall outside the scope of the complaint if those issues reasonably fall within its scope…the additional allegations simply seek to provide additional examples by reference to separate incidences of the type of discrimination allegedly suffered by Ms. Harnish. Such additional allegations arise out of the same basic set of facts on which the original complaint is rooted...

(Emphasis added)

[31] In that case the evidence which Ms. Harnish wished to put forward was under the same ground of discrimination and within the same period of time. It was an evidentiary issue, not one of amending the complaint.

[32] An appeal from the decision of the Board of Inquiry was dismissed by this Court as being premature (*Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 108).

[33] In *IMP Group Ltd.*, a board of inquiry appointed pursuant to the Nova Scotia *Human Rights Act* allowed an amendment to a complaint during the course of a board of inquiry hearing in circumstances where the corporate respondent chose not to attend the hearing.

[34] The amendment to the complaint alleged the complainant had not been the successful applicant for a position with the respondent as a result of gender discrimination. The initial complaint alleged only that the complainant had been subjected to continuous sexual harassment by a co-worker for an approximate two year period.

[35] The Board of Inquiry determined that the complainant had been sexually harassed and concluded that she had been subjected to gender discrimination by the respondent in the job competition.

[36] On appeal, this Court considered whether the board of inquiry erred in granting the amendment to the complaint.

[37] Justice Chipman reviewed the process whereby complaints of discrimination are put before a board of inquiry appointed to inquire into a complaint of discrimination pursuant to the *Human Rights Act* and concluded that to raise a new complaint at the hearing stage would circumvent the legislative process:

> [35] . . . Mr. Wood was nominated as a Board of Inquiry by the Chief Judge of the Provincial Court pursuant to regulations under the *Act* with a mandate:
>
> > …to inquire into the complaint of Michelle Dillman, dated 18th day of December, 1992, against I.M.P. Group Limited, being the complaint to which the request relates.
>
> [36] The letter from the Commission to Mr. Wood dated February 4, 1994 advising him of his appointment enclosed a copy of the complaint dated December 18, 1992. This was the only complaint from Dillman against the Company pursuant to the *Act*, the only complaint the Commission referred to a hearing and the only complaint referred to Mr. Wood. It related to sexual discrimination between June 14, 1989 and May 3, 1991 and named Pettipas as the "main offender".
>
> [37] The amendment granted by the Board added a new and separate complaint. It now alleged the Company's failure to give Dillman an opportunity to obtain a job as an air frame mechanic because of sexual discrimination. This took place in the summer of 1992. It bore no relation to the harassment caused by Pettipas, but related to different circumstances which raised a new and different issue. <u>As counsel for the Company says, it was not merely an extension, elaboration or clarification of the sexual harassment complaint already before the Board. To raise a new complaint at the hearing stage would circumvent the whole legislative process that is designed to provide for attempts at conciliation and settlement. This matter did not go through the preliminary stages of investigation, conciliation and referral by the Commission to an inquiry pursuant to S. 32A of the Act. The Board dealt with a matter which had never been referred to it</u>.

(Emphasis added)

[38] This Court went on to determine that the Board of Inquiry's error in allowing the amendment to the complaint did not taint his decision on the initial complaint.

[39] On the facts before the Board of Inquiry in Ms. Wakeham's complaint, the proposed amendments were not simply further and better particulars of the allegation of discrimination on the basis of disability. The amendments proposed constituted a substantive change to the original complaint.

[40] A similar situation arose in *Tran v. Canada (Revenue Agency),* 2010 CHRT 31. In that case, the complainant filed a complaint alleging discrimination on the part of her employer, the respondent CRA, on the basis of family status. She also alleged retaliation for having filed a previous human rights complaint against her employer.

[41] Approximately 18 months after filing the initial complaint, the complainant sought to amend her complaint to include allegations of discrimination on the basis of sex, national or ethnic origin, race and colour. The proposed amendments were subsequently withdrawn by the complainant. The Canadian Human Rights Commission referred the original complaint to a tribunal for an inquiry.

[42] The complainant then brought a motion before the tribunal to allow her to amend the complaint in the manner she previously proposed to add new grounds of prohibited discrimination.

[43] The respondent opposed the proposed amendments on the basis that the Tribunal's jurisdiction did not permit it to consider new complaints, that the amendment fundamentally altered the allegations and constituted a "new complaint" and that allowing the amendment would prejudice the respondent.

[44] The Tribunal did not permit the proposed amendments to the complaint, stating as follows:

> 17. . . . It is not possible, in my view, to derive any logical connection or nexus from these facts to the allegations of the additional prohibited grounds of discrimination and the additional discriminatory practice proposed by the Complainant to be added by this motion, as described in the Amended Complaint in paragraph 10 herein and the Notice of Motion in paragraph 14 herein. Without such a connection or nexus, there is no statutory authority for the referral to occur under paragraph 44(3)(a) of the *CHRA* with respect to the proposed amendment, since that is how the Tribunal obtains jurisdiction for the inquiry. Where a proposed new ground is no "mere amendment" but in fact is a substantially new Complaint, as in my view is the case here, the Commission cannot be said to have requested the inquiry and the Tribunal has no jurisdiction to proceed. *Canada (Attorney General) v. Canada (Human Rights Commission)*, [1991] F.C.J. No. 334, 43 F.T.R. 47 (Fed. T.D.)
>
> For this reason, the Tribunal has correctly established the following limitation on amendments:
>
> > The Commission must have considered the essential situation that forms the subject-matter of the inquiry, when it referred the Complaint to the Tribunal. This places certain limits on amendments, which must have their pedigree in the circumstances that were put before the Commission.
> >
> > *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1
>
> 18. A Complaint will be considered "new" were it bears no factual, logical or other connection with the original Complaint as is the case here with respect to

> the proposed amendment. As the proposed amendment introduces a new Complaint that was neither considered by the Commission nor referred to the Tribunal it exceeds the Tribunal's jurisdiction and must be denied.
>
> 19. For these reasons, the motion to amend is dismissed.

(Emphasis added)

[45] Similarly, in this case, the amendments introduced a new complaint over a longer period of time and should not have been allowed by the Board of Inquiry.

[46] The Board of Inquiry was obviously concerned about her ability to amend the complaint but felt she could if the complaint were deemed ambiguous. She reasoned:

> 38 The Commission and Respondent submitted that the Board of Inquiry did not have jurisdiction to look at evidence of what occurred prior to the referral of the complaint to the Board of Inquiry. They relied upon the decision of the Nova Scotia Court of Appeal in *IMP Group Ltd. v. Dillman* (1995), 143 N.S.R. (2d) (N.S.C.A.) ("*IMP*"), where the Court reviewed the amendment of a complaint granted by a Board of Inquiry. The Court of Appeal held that complaints must pass through the investigation and referral stage and be referred for inquiry by the Commission. The Commission and the Respondent submitted that this Board has no jurisdiction to look at pre-referral evidence concerning the complaint and must consider the complaint, as filed, to determine whether it can be amended. However, in my view, IMP did not address the issue of the jurisdiction of this Board to consider evidence or the admissibility or relevance of evidence arising during the complaint process in the context of the requested amendment of a potentially ambiguous complaint. As this evidentiary issue arose during the course of the hearing, the parties were provided with an opportunity to offer additional authorities on this point.

[Emphasis added]

[47] With respect, the Board of Inquiry confuses the distinction between what constitutes evidence on an existing complaint which has been referred to her and what constitutes the very nature of the complaint. This confusion can be seen in her decision where she says:

> 73. In my view, Boards of Inquiry have the jurisdiction to grant amendments to complaints post-referral. Boards may do so where the amendment falls within the "substance" of the complaint and where there will not be significant prejudice to the Respondent: *Welch v. Eggloff (No. 2)* (1998), 34 C.H.R.R. D/438 (B.C.H.R.T.) referenced in *Harnish v. Halifax (Regional Municipality)*, 2007

> NSHRC 6 (CanLII) ("*Harnish*") and *Toneguzzzo v. Kimberley-Clark Inc.* 2005 HRTO 45 (CanLII)("*Toneguzzo*").

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

[49] Compounding this error is the Board of Inquiry's comment regarding the "nature of human rights cases":

> 48. This Board is under a statutory responsibility to conduct an inquiry into the complaint to determine whether discrimination occurred. This includes determining the substance of the complaint. This proceeding is not civil litigation where it is left to the parties to determine the issues that they wish to have determined and the evidence they wish to lead; rather, a hearing under the *Act* is a quasi-judicial inquiry into whether discrimination occurred. …

[50] And further:

> 68. In my view, these considerations have implications for how the substance of the complaint is to be interpreted. I conclude that the referral process of the Commission and s. 34 of the *Act* require a Board of Inquiry to take a broad and liberal interpretation of the complaint in determining substance of the complaint. In this regard:
>
> 1. The referral letter states that, in relation to the complaint which is attached, the Board of Inquiry's jurisdiction is to "determine if discrimination occurred". Such language is to be read broadly to give effect to the *Act* and its purposes.
> 2. It is to be presumed that the Board of Inquiry is to take the complaint as a starting point, as the Commission did at the investigation stage, in determining if discrimination occurred, while respecting identifiable parameters of the complaint; and
> 3. In determining the substance of the complaint, any ambiguity or inconsistency within the wording of the complaint form is to be resolved in favour of an interpretation of the complaint that provides the Complainant with an opportunity to have her case presented fully.

[51] With respect, this reasoning is similar to the errors committed by the Boards of Inquiry in *IWK, supra,* and *Tri-County Regional School Board*. As noted in *IWK*, the difference between civil litigation and the human rights complaints

process has no relevance to matters of interpretation where the language is clear (¶34). Similarly, in *Tri-County*, the Board of Inquiry in that case erred when it appropriated similar powers to those the Board of Inquiry here ascribed to herself. As noted by this Court:

> [33] The Board then appropriates an unfettered authority, beyond the competency of any court:
>
> > [33] …My decision follows the *Potash* decision establishing the Pension Plan to be bona fide and further interpreting *Potash* and extending such analysis of the legitimacy of the Pension Plan in application. As Board of Inquiry Chair, although *stare decisis* is a consideration, I have a broader application of the law to apply to effect the principles of natural justice applied to effect a personal remedy and move the law in the direction of non-tolerance of discriminatory conduct pursuant to the *Human Rights Act*, such being clearly in the public interest. It is clear that the public interest is moving toward eliminating/narrowing exceptions to Mandatory Retirement as witnessed by the *Act Respecting the Elimination of Mandatory Retirement…*
>
> No explanation is offered for "the principles of natural justice…to effect a personal remedy" or why the Board considers itself the voice of a hitherto undeclared "public interest". The Board has no authority to implement "…what it considered to be a beneficial policy outcome rather than engage in an interpretive process taking account of the text, context and purpose of the provisions in issue." (*Canada (Canadian Human Rights Commission) and v. Canada (Attorney General)*, 2011 SCC 53, ¶64)

[52] Again, with respect to the Board of Inquiry, she could not appropriate to herself a power which was not given to her by the *Act*. As noted earlier, to do so is to circumvent the legislated referral process mandated by the *Human Rights Act* and amends the complaint beyond that which was referred to the Board of Inquiry

[53] Her analysis and conclusions do not fall within a range of possible outcomes. It is unreasonable and must be set aside.

[54] This conclusion is sufficient to dispose of this ground of appeal. However, as I noted earlier, I will address the alleged ambiguities.

[55] The decision of the Board of Inquiry identifies two broad areas which she characterized as ambiguities:

- The start date(s) of discrimination; and
- Whether the complaint includes "mental disability" (along with "physical disability")

[56] A review of the complaint satisfies me that any finding of ambiguity surrounding the start date of discrimination cannot be supported on any reading of settled interpretive principles. The first statement of the complaint is the following:

> I, Sandra Wakeham, complain against the Department of Environment that from February 21, 2012 and continuing, the Respondent discriminated against me with respect to employment because of my physical disability

[57] Even clearer is the second question on the complaint and the resulting answer:

> 2. When did the alleged discrimination begin?
>
> Answer: The discrimination began on February 21, 2012.

[58] It is equally clear that the reference to 1999 in the complaint involves the origin of Ms. Wakeham's alleged physical disability:

> Question: What is your protected characteristic(s)? Please explain.
>
> Answer: I was involved in a car accident in 1999 and that caused herniated discs in my neck. I was in another car accident in 2005 which has caused me Chronic Pain, but there has been no diagnosis from my doctors so I am being treated by an Osteopath.

[59] It simply cannot be reasonable to interpret those responses as creating an ambiguity with regard to the start date of the alleged discrimination.

[60] The second basis for a finding an ambiguity is s. 5(1)(o) of the *Human Rights Act* which provides:

> 5(1) No person shall in respect of …. discriminate against an individual or class of individuals on account of …
>
> (o) physical disability or mental disability

[61] The Board of Inquiry painstakingly goes through the submissions of the parties as to the meaning of this section of the *Human Rights Act*. Her obvious concern was that she recognized that the ground of mental disability was a potentially new ground under the complaint and it would be outside her authority to allow it. She concluded:

> 139. In my view, paragraph (o) is intended to refer to disability in all its contexts such that the word "or" must mean "and/or". This interpretation permits the most inclusive approach to the protection of human rights. I am not persuaded that the definition of physical and mental disability in section 3 provides a basis to alter this conclusion. I also note that there is nothing in the *Act* which requires a complainant to make a selection within each protected characteristic.

[62] Respectfully, the Board of Inquiry is clearly wrong in her approach to statutory interpretation. The proper and long-settled approach is that described by Driedger as exemplified in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. This is discussed in the context of the Nova Scotia *Human Rights Act* in the *IWK* case, beginning at ¶ 21:

> [21] Although Human Rights legislation enjoys a special status in Canadian law, such legislation is not exempt from the normal principles of statutory interpretation. As the Supreme Court of Canada said in *Potash*:
>
> > [19] I accept that human rights legislation must be interpreted in accordance with its quasi-constitutional status. This means that ***ambiguous language*** must be interpreted in a way that best reflects the remedial goals of the statute. ***It does not, however, permit interpretations which are inconsistent with the wording of the legislation***. I agree with L'Heureux-Dubé J.'s observation that "where legislation provides tribunals with a specific test for discriminatory justifications, the tribunals should apply that test" (Dickason, at p. 1157).
>
> [Emphasis added]
>
> [22] How this Court should approach a "reasonableness" review of a tribunal's interpretation of human rights legislation is described by the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII):
>
> > [33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC),

> [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500***. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.***

[Emphasis added]

> [23] In *McLean*, the Supreme Court of Canada said that "ordinary meaning" means the "natural meaning which appears when the provision is simply read through", quoting from *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn*., [1993] 3 S.C.R. 724 at p. 735.

[63] The Board of Inquiry referenced the *IWK* case as follows at paragraph 136 of the Decision:

> … *IWK* may be distinguished on the basis that, in that case, there was no ambiguity in the relevant provision of the *Act*. …

[64] The Board of Inquiry then went on to find that because of the "ambiguity" in the *Act* that the word "or" should be interpreted as "and/or."

[65] With respect, this is the same error that was committed by the Boards of Inquiry in *IWK, supra*, and in *Tri-County, supra*. The wording of the statute is clear. The word used is "or", which is obviously disjunctive. As per *Black's Law Dictionary*, 5th ed., "or" is a "disjunctive particle used to express an alternative or to give a choice of one among two or more things" and "and" is a "conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first."

[66] As noted in *IWK* at ¶ 24, the Board of Inquiry must "begin with the words the Legislature has used." The Legislature has clearly used the word "or" and not the words "and/or".

[67] As a result of its unreasonable interpretation, the Board of Inquiry concluded at ¶ 142 that "An amendment to include mental disability, therefore, does not add a new ground to the complaint."

[68] The interpretation and conclusion above was unreasonable. It cannot sustain the addition of an entirely new ground of discrimination to the complaint.

[69] In conclusion on this point, I would allow this ground of appeal and set aside the decision of the Board of Inquiry amending the complaint.

Issue #2 Did the Human Rights Commission violate the rights of Ms. Wakeham by not permitting her to make a complaint in the manner of her choosing?

[70] There is no standard of review for this issue as it was not decided by the Board of Inquiry.

[71] The Notice of Contention alleges that the Human Rights Commission violated the *Human Rights Act* by its traditional investigation and referral process with regard to her complaint.

[72] Ms. Wakeham argues that she had the right to pursue the complaint in the manner in which she chose and that the Human Rights Commission somehow violated her rights in failing to allow her to do so.

[73] The thrust of her argument is that the process behind the creation of the referred complaint is a violation of s. 29(1)(a) of the *Act*. A summary of her argument can be seen in her factum:

> 43. It is submitted that the NSHRC violated the statutory right of Ms. Wakeham under s. 29(1)(a) of the *Human Rights Act* to make a complaint in writing on the form prescribed by the Director of Human Rights by:
>
> (a) failing to give Ms. Wakeham free access to the complaint form prescribed by the Director;
>
> (b) failing to allow Ms. Wakeham to determine the substance of her complaint by filling in the prescribed form;
>
> (c) failing to allow Ms. Wakeham to file the complaint form with the NSHRC after she had filled it in;
>
> (d) failing to allow Ms. Wakeham to determine, and fill in the prescribed form regarding, when the discrimination began; whether the discrimination was ongoing and when the last instance of discrimination occurred.

[74] Ms. Wakeham is effectively arguing that the Human Rights Commission should not be allowed to control the investigation and referral of human rights complaints. Her position is completely contrary to the law that exists in Nova Scotia. Two recent cases on this issue, to which I have already referred in detail, show that the design and function of the *Human Rights Act* is to protect the public interest. The Human Rights Commission is charged with doing so through the screening and referral of complaints.

[75] The Supreme Court of Canada in *Comeau* dealt squarely with the role of the Human Rights Commission with regard to the filing and referral of complaints. For ease of reference, I will repeat what the Supreme Court of Canada said when describing the role of the Human Rights Commission:

> [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. …
>
> [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 thereinto 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.

[76] And at ¶23:

> [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.

[77] The Court goes on to note that:

> [24] The nature of this role has been recognized in the Nova Scotia case law and in the case law which has developed in relation to the similarly worded provisions of the *Canadian Human Rights Act,* …

[78] In *Comeau*, the Supreme Court explains how the Commission's decision to refer a complaint to a board of inquiry should be judicially reviewed. It is clear that the context for this ruling was the "gatekeeper and administrator" role in which the Commission makes its determination. If the wording of the complaint were to be controlled by the complainant, as Ms. Wakeham says the *Act* requires, the important legislated role of the Commission would be nullified, and there would be nothing available to be judicially reviewed. It would be akin to the judicial review of a statement of pleadings.

[79] This is further reinforced by this Court's decision in *IWK*. Again, I repeat what was quoted earlier for ease of reference:

> [5] It is a curiosity of the *Human Rights Act* process that the filing of a complaint is completely controlled by the Commission. One cannot contact the Commission and obtain a "complaint form" and file a "complaint". Potential complainants are given "intake forms" which they complete. These are then reviewed by Commission staff and, if considered appropriate, the potential complainant is then provided with a complaint form for filing.

[80] This process is similar to other jurisdictions which also have human rights commissions that carry out a gatekeeper function, such as Newfoundland and Labrador and Saskatchewan. By contrast, in Ontario, the Ontario Human Rights Commission does not play a role in the filing of complaints. Rather, complaints are filed directly with the Ontario Human Rights Tribunal in a manner more similar to the filing of pleadings in a civil suit. See, for example, sections 29, 34 and 35 of the *Ontario Human Rights Code*, R.S.O. 1990, Chapter H.19, which clearly delineates these roles, and states that individuals must apply directly to the Tribunal, not the Commission.

[81] It appears it is this type of system Ms. Wakeham has in mind when she says she has been wronged by the Human Rights Commission. However, that is not the system in Nova Scotia.

[82] If Ms. Wakeham disagreed with the way in which the Commission handled her complaint, she should have sought judicial review of the decision. She did not. Her argument amounts to a request for this Court, in the first instance, to judicially review the complaint process. That is not our role. Her submission is without merit.

[83] I would dismiss this ground of appeal.

[84] I will now turn to Ms. Wakeham's Motion to Dismiss which was dismissed by Order dated January 28, 2015.

Motion to Dismiss

[85] Ms. Wakeham moved under Rule 90.40(3) of the *Civil Procedure Rules* to dismiss the DOE's appeal. Rule 90.40(3) reads as follows:

> **Setting aside or dismissing an appeal summarily**
>
> (3) On a motion for which seven days notice has been given to the appellant, a judge of the Court of Appeal may dismiss an appeal if it is demonstrated that no appeal lies to the Court of Appeal.

[86] Appeals from boards of inquiry appointed under the Nova Scotia *Human Rights Act* are governed by s. 36 of the *Act*, which reads as follows:

> **Appeal**
>
> 36 (1) Any party to a hearing before a board of inquiry may appeal from the decision or order of the board to the Nova Scotia Court of Appeal on a question of law in accordance with the rules of court.
>
> (2) Where notice of an appeal is served pursuant to this Section,the Commission shall forthwith file with the Nova Scotia Court of Appeal the record of the proceedings in which the decision or order appealed from was made and that record shall constitute the record on the appeal.
>
> (3) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal pursuant to this Section.
>
> (4) The Nova Scotia Court of Appeal shall hear and determine an appeal based upon the record on the appeal.

[87] Ms. Wakeham asks us to interpret the *Human Rights Act* to only allow for an appeal to this Court of a "final" decision of a Board of Inquiry. Accordingly, there could be no appeal of a preliminary decision.

[88] Normally, Rule 90.40(3) is used where an appeal has been filed without appropriate jurisdiction. For example, in *CIBC Mortgage Corporation v. Ofume*, 2004 NSCA 112, Fichaud, J.A., discussed Rule 62.11(e) (the precursor to Rule 90.40(3)) as follows:

> [8] This ruling does not invade this power of the "court" under *Rule* 62.18(1). The ruling that no appeal lies to this Court under *Rule* 62.11(e) is not an assessment of the merits of the Ofumes' claim against HRPS, ie. whether the

> claim is arguable, frivolous or vexatious. Whatever degree of strength the Ofumes' claim may or may not have, there simply is no decision by the Supreme Court on that matter, and therefore nothing to appeal.

[89] By contrast, there are two relatively recent decisions of this Court involving decisions of boards of inquiry made during the course of hearings: *Harnish* and *IWK*.

[90] In *Harnish*, the Court found that the appeal was premature after hearing arguments on the merits of the appeal, not under Rule 90.40(3). In particular, *Harnish* stands for the proposition that the adding of further particulars to a human rights complaint is an **evidentiary matter** and not an amendment. As the claim had not been amended, there was no issue of the Board of Inquiry's authority to amend complaints.

[91] Further, this Court in *Harnish* found that the appeal should not go ahead because "it [the interlocutory decision] does not impact the merits of the final decision to be made." (¶10).

[92] In *IWK*, the IWK appealed the dismissal of its preliminary motion that the human rights complaint filed was outside the 12 month time period set out in s. 29(2) of the *Human Rights Act*. This Court heard the appeal and overturned the decision of the Board of Inquiry finding that its interpretation of the *Act* was unreasonable.

[93] In this case, the interlocutory decision of the Board of Inquiry significantly affects the final decision. The Board of Inquiry has added a second (new) ground of discrimination to the complaint, and broadened the scope of potential liability in the complaint from alleged discrimination beginning in February 2012 back to Ms. Wakeham's original car accident in 1999. The case has been transformed into a complaint involving alleged discrimination based on both mental and physical disability over a period of approximately 13 years. The merits of the final decision will be impacted as the DOE is now facing potential liability over a greater period of time and with regard to different grounds.

[94] In refusing Ms. Wakeham's motion to dismiss, the authority of the Board of Inquiry to grant the requested amendments was clearly in issue. If we had determined that the appeal was premature, a significant amount of time and effort would have been spent in addressing the complaints over the 13 year time period between 1999 and 2013.

[95] In *Szczecka v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 934 (F.C.A.), Létourneau, J.A. held:

> [4] …unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgement. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several Court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses, which interfere with the sound administration of justice and ultimately bring it into disrepute.

See also *People First of Ontario v. Porter, Regional Coroner Niagara*(1992), 6 O.R.(3d) 289 (C.A.), at p. 292:

> We entirely agree with the Divisional Court that it is undesirable to interrupt inquests with applications for judicial review. Whenever possible, it is best to let the inquest proceed to its resolution and then perhaps, if circumstances dictate, to take judicial proceedings….

[96] These cases were cited with approval in *Harnish*.

[97] This is one of those cases where special circumstances exist such that an interim decision of a Board of Inquiry should be the subject of an appeal. I would summarize the special circumstances as follows:

1. The Board of Inquiry's preliminary decision had a significant impact on the length and complexity of the hearing. It would have forced the parties to address 13 years of evidence and a ground of discrimination which had never been subject to the legislative process.
2. The subject-matter of the complaint was something different than that which had been referred to the Board of Inquiry and had never been scrutinized by the Commission.
3. The key objective of human rights legislation is to be remedial. The process of inquiring into and exposing acts of discrimination must be expeditious in order to effect this result (see *Nova Scotia Construction Safety Association v. Nova Scotia (Human Rights Commission)*, 2006 NSCA 63). The process of amending the complaint at the Board of Inquiry level, if inappropriate, would have the effect of undermining that process.

[98] For these reasons we determined it was appropriate to hear the appeal of the preliminary decision of the Board of Inquiry to amend the complaint.

Conclusion

[99] For these reasons, the appeal is allowed, the decision of the Board of Inquiry amending the complaint is set aside. The Notice of Contention and Notice of Cross-Appeal are dismissed, all without costs to any party.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bourgeois, J.A.