NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality)*, 2010 NSCA 8

Date: 20100211
Docket: CA 307568
Registry: Halifax

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

IN THE MATTER OF : The Complaint of Lucien Comeau dated June 26, 2003, filed pursuant to the provisions of the *Human Rights Act*.

IN THE MATTER OF: An application by the Halifax Regional Municipality in the nature of *certiorari* and prohibition to review the decision of the Nova Scotia Human Rights Commission to appoint Lynn Connors as the Board of Inquiry in the Comeau complaint and to prohibit Lynn Connors as the Board of Inquiry from proceeding to convene a hearing into the Comeau complaint.

Between: Nova Scotia Human Rights Commission and Lucien Comeau

Appellants

v.

The Halifax Regional Municipality, a body corporate duly incorporated pursuant to the law of Nova Scotia, and Lynn Connors and Her Majesty The Queen in Right of the Province of Nova Scotia

Respondents

Judges: MacDonald, C.J.N.S.; Oland and Hamilton, JJ.A.

Appeal Heard: December 10, 2009, in Halifax, Nova Scotia

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

Counsel: John P. Merrick, Q.C., for the appellant NSHRC
Lucien Comeau, the appellant in person
Randolphe Kinghorne and Stephan Jedynak, for the respondent HRM
Alicia Arana, for the respondent AGNS

Reasons for judgment:

OVERVIEW

[1] Boudreau, J. of the Supreme Court of Nova Scotia prohibited the Nova Scotia Human Rights Commission from advancing its inquiry into complaints of discrimination. This appeal explores the circumstances that would justify such an extraordinary remedy.

BACKGROUND

The Complaints

[2] In June 2003 and July of 2004, the appellant, Mr. Lucien Comeau, filed two complaints with the Nova Scotia Human Rights Commission, one against the respondent Halifax Regional Municipality ("HRM") and the other against the Province of Nova Scotia (Department of Education). They both alleged discrimination against him as a person of Acadian descent. Essentially his issue involved the fact that he paid extra taxes to finance special projects for schools in his area, while the French schools that his children attended received no such benefit. Let me elaborate.

[3] Since the HRM was created back in 1996, it has collected supplemental realty taxes from all homeowners living within the former cities of Halifax and Dartmouth. This was done in order to continue the pre-amalgamation tradition of funding special projects for schools within these former municipalities, now falling under the umbrella of the Halifax Regional School Board.

[4] Moving to this area in 1998, Mr. Comeau began paying this added tax but his children received no such benefit. This is because they attended one of HRM's designated French language schools which were funded directly by the Province through a separate board, the Conseil Scolaire Acadien Provincial ("CSAP"). These schools received no funding for special projects. Thus in his complaint, Mr. Comeau asserted:

> [1] I am Acadian and have lived in the Halifax Regional Municipality (HRM) since 1998. I have two children who attend Ecole Bois-Joli, a public school in Dartmouth, Nova Scotia, which is administered by the Conseil Scolaire Acadien Provincial (CSAP).

[2] The CSAP administers three French schools in the HRM; Ecole du Carrefour which opened in 1991, and Ecole Bois-Joli and Ecole Beaubassin which opened in 1999 and 2000 respectively. These schools provide publicly funded education by way of a French-first language program to children of Acadian origin and to other children of entitled parents in order to satisfy Nova Scotia's obligations under the *Canadian Charter of Rights and Freedoms.*

[3] All other public schools in HRM are administered by the Halifax Regional School Board (HRSB).

[4] The general funding of all public schools is provided by the Department of Education through a formula applicable to all schools. Municipalities, through a mandatory education tax, cover a portion of costs associated with the administration and delivery of public education. Over and above the amount required for mandatory education there is a "supplementary" education tax. The supplementary tax is levied by HRM and paid only to HRSB. As a taxpayer I pay both taxes.

[5] The cities of Halifax and Dartmouth provided supplementary funding prior to amalgamation. Upon amalgamation HRM was required to continue to provide supplementary funding and continues to do so pursuant to the provisions of the *Municipal Government Act*. The funding is raised by an area rate on the assessed value of taxable property and business occupancy assessments levied within the boundaries of the former cities of Halifax and Dartmouth. The CSAP schools located in HRM do not receive any of these supplementary funds. However, as a resident of HRM, I am required to pay the supplementary tax which is then provided to the HRSB.

[6] Pursuant to section 530 of the *Municipal Government Act* HRM pays the amount of taxes raised for supplementary funding to HRSB. HRM does not, and has not, paid anything by way of supplementary funding to CSAP. Accordingly, the schools administered by CSAP are disadvantaged financially when compared to the school administered by the HRSB.

[7] The Respondent has been made aware of this problem over the past few years by representations made by individual parents and/or groups of parents but to date has failed to address the issue.

[8] I refer to the foregoing paragraphs and allege that the Respondent has treated, and continue to treat, me and my children differentially on account of our ethnic origin (Acadian) by levying the supplementary tax on me and by not providing any of the funds generated by the supplementary tax to the CSAP. This differential treatment has negatively impacted myself and my children.

> [9] I allege that the Respondent has discriminated against me and my children in violation of section 5(1)(a)(q) of the *Human Rights Act*. I also allege that the Respondents have violated our equality rights under section 15 of the *Canadian Charter of Rights and Freedoms.*

[5] The Commission took a serious look at Mr. Comeau's two complaints. Investigation Officer Michael Lambert filed his report on the HRM complaint on April 8. 2005. He recommended the appointment of a Board of Inquiry. Rightly or wrongly, he felt that the HRM could have provided the CSAP with additional funding:

> Summary
>
> 57. Pursuant to the provisions of the *Education Act* and *Regulations* made under that *Act*:
>
> . HRSB receives funding from HRM and from the Department of Education for the English schools within its jurisdiction.
>
> . CSAP receives funding from the Department of Education for the French-first-language schools within its jurisdiction. Included in the amount paid by the Department of Education to CSAP is an amount that would otherwise be contributed to for CSAP by HRM and/or any other municipalities with a CSAP school in their district.
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> 58. Pursuant to Section 530 of the *Municipal Government Act*, HRM pays to HRSB an additional amount of funding which, as noted above, "... is in addition to funding provided pursuant to the Education Act."
>
> 59. It appears from the legal opinion of Wayne Anstey that HRM could have provided CSAP with additional funds but they did not do so. (See paragraph 30 of this Report).
>
> 60. It would appear to follow that by not paying supplementary/additional funding to CSAP schools within HRM, CSAP is not able to offer services or facilities to those schools which it would be able to do if it received supplementary funding. *This would appear to establish a prima facie case of discrimination.*
>
> I. Recommendation
>
> 61. *In accordance with the foregoing I recommend that a Board of Inquiry be appointed*.

[Emphasis added.]

[6] Around this same time, several other parents with the same grievance took a different tack. They directly challenged the provincial legislation that enabled this scheme. Specifically, they asked the Supreme Court of Nova Scotia to correct this legislation pursuant to the minority language provisions of Canada's *Charter of Rights and Freedoms*. These parents eventually succeeded in having the legislation amended so that HRM's French schools now receive the same benefits. Their court application was therefore dismissed by consent. As I will discuss later, their success ultimately motivated Boudreau, J. to grant the order under appeal.

[7] In any event, the Commission followed Mr. Lambert's recommendation and arranged to appoint the respondent Lynn Connors as a one-person Board of Inquiry. This prompted the HRM to apply to the Supreme Court to quash the appointment and to prohibit Ms. Connors from conducting her inquiry. It attacked the Commission's decision on several fronts with the main thrust being that it could not possibly be guilty of discrimination because it simply complied with the provincial statute mandating this taxation scheme. Furthermore, because the offending statute was rectified as a result of the *Charter* application, the complaints should have evaporated. Boudreau, J. agreed and granted the relief sought. Let me now turn to this decision.

The Decision Under Appeal

[8] In analyzing the matter, Boudreau, J. concentrated on what he viewed as the motivation for the complaint. He reasoned that its sole purpose was to secure the same relief that had already been achieved by the Supreme Court *Charter* application. This would ultimately lead him to confirm that such relief was outside the Commission's jurisdiction and in any event rendered redundant and moot by the ensuing legislative reform.

[9] Regarding the motivation behind the complaints, he reasoned:

> ¶ 35 The complainant, Mr. Comeau, alleges discrimination by HRM and the Province in "the provision of or access to services or facilities" on account of "ethnic ... origin", contrary to s. 5(1)(a) and (g) of the ***HRA***. He also asserts a violation of his equality rights under s. 15 of the ***Charter*** (See complaint at para. 9). The alleged discrimination arises from the historical provision of "supplementary" education funding to certain schools within the Cities of Halifax

> and Dartmouth, and the continuation of that funding by HRM as mandated and required by ***s.* 530** of the ***MGA***, after the amalgamation of HRM. The CSAP, which by 2003 and 2004, operated French-first language schools in the former Cities of Halifax and Dartmouth, was not included in this supplementary funding scheme. In fact, no other schools or school boards in the rest of the Province had entered into supplementary funding agreements. The situation was unique to the schools in the former cities of Halifax and Dartmouth and the status quo was simply maintained for those schools by HRM post amalgamation, as was required by the ***MGA***.
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> ¶ 36 It seems indisputable that the aim of Mr. Comeau's complaints was to bring about an amendment to the ***MGA*** whereby the CSAP schools in HRM would be included in the supplementary funding scheme maintained by **s. 530** or, in the alternative, to have the Commission declare **s. 530** of no force and effect. This was clearly the aim of the constitutional challenge initiated in this Court by the five representative parents with children in each of the CSAP schools in HRM. Mr. Comeau indicated in his complaints that the complaints were being filed with the Commission because he feared that the constitutional challenge could be delayed in the court process if it ended up with appeals all the way to the Supreme Court of Canada. *This is not how Mr. Comeau or the Commission would now wish the matter to be characterized, but that would have been the principal and overriding purpose of the complaint*.
>
> [Emphasis added.]

[10] Yet both Mr. Comeau and the Commission denied that legislative reform was the principal and overriding purpose of the complaint. Indeed, as evidenced in the above passage, the judge acknowledged as much but felt that the pursuit of other remedies would be impractical. He added:

> ¶ 37 The position of the Commission appears to be that the aim of the complaints is also to remedy a breach of the ***HRA*** by obtaining damages for funding that was not provided prior to the 2006 retroactive amendments to the ***MGA***. It is by no means apparent that the purpose of the complaints is to effect such a remedy and it must be remembered that the CSAP is not a party to these complaints. Furthermore, the practical hurdles to proving such damages on the part of the Comeau family or other families in his position who are not parties to these complaints (i.e. a lesser quality of education and causally connected adverse effects on the families) certainly taxes the imagination. This is particularly so considering the agreed upon fact that the CSAP and its schools received their total funding from sources entirely different than the English school boards in the Province and that the per student funding of CSAP school boards was consistently higher than that received by the other school boards in the Province. Obviously, these would be matters requiring a factual basis for determination at what would

> obviously be a significant if not monumental expense of time and resources for all parties, including non-parties such as CSAP and HRSB. The practicality of pursuing such an exercise is, in my opinion, seriously in doubt for the reasons I have just previously mentioned. In any event, these are matters going to the question of possible damages and not to the issues of jurisdiction, mootness, *res judicata* and reasonableness.

[11] In the end, the judge quashed the Commission's decision to appoint the Board and prohibited Ms. Connors from proceeding. In doing so, he acknowledged that the HRM's concerns could also have been addressed by the Board, and even by way of preliminary motion if deemed appropriate:

> ¶ 38 The Commission contends that matters of jurisdiction, and even issues of mootness or *res judicata*, should be left to the Board of Inquiry, even if argued as preliminary motions. It is argued that the Board will have the benefit of a complete factual basis on which to decide such preliminary questions. I am not convinced that an expanded factual basis is required to decide these issues in this case, especially when the complete factual basis implied by the Commission's submissions would obviously come at great expense of human, time and financial resources for parties and non-parties alike. The facts on which the questions in this proceeding are to be decided are already before the Court and they are not contested. The facts which the Commission implied should be ascertained relate primarily to questions surrounding possible damages and not to the issues of jurisdiction, mootness, *res judicata* or reasonableness.
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> ¶ 39 There can be little doubt that a Board of Inquiry can adjudicate on issues of law such as jurisdiction, etc. That view is supported by s. 34(7) of the ***HRA***:
>
> > (7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision. [Emphasis Added]
>
> . . .
>
> ¶ 48 In the previously cited case of *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, both this Court and our Court of Appeal considered the question of jurisdiction as a preliminary issue; albeit in the context of an argument over production of information. In my opinion, it is appropriate for superior courts to adjudicate on the question of the Commission's jurisdiction in certain circumstances. In the case at bar, counsel for the Commission argues that a full hearing is required to provide a factual basis for deciding the issue of the Commission and its appointed Board's jurisdiction. There are serious ramifications, as I mentioned previously, with proceeding in such a manner and I

> do not find that that is necessary in this case. In my opinion, this is a proper case for this Court to consider the question of the Commission's jurisdiction in the matter of the two complaints of Mr. Comeau. I am not persuaded that a fuller or expanded factual background is necessary in order to adjudicate and decide the application and issues raised by HRM and the Province in these proceedings. I am satisfied that the relevant information is found in the complaint itself, and in the record produced by the Commission. I will therefore proceed to address the issues outlined in Questions 4(a-c).

ANALYSIS

[12] In my analysis of this matter, I will first consider the standard upon which we should review the judge's decision. Then I will review a superior court's authority to intervene with the work of administrative boards such as this. This, in turn, will involve a closer look at this Commission's mandate. I will conclude by explaining why I feel the judge erred in his general approach to this matter and why I therefore feel it necessary to reverse his decision.

Standard of Review

[13] I begin with this basic proposition. Superior courts have the jurisdiction to prohibit the work of administrative boards of inquiry in appropriate circumstances. The decision to do so therefore involves an exercise of discretion to which the judge is entitled to deference where the decision is made the subject of appellate review. In other words, we will intervene only if there exists an error in law, a palpable and overriding error of fact, or if the decision results in an injustice. See: **Central Halifax Community Association v. Halifax (Regional Municipality)**, 2007 NSCA 39, at para. 17.

[14] At the same time, it must be noted that Boudreau, J. was himself reviewing a discretionary decision, namely the Commission's decision to advance its investigation to a Board of Inquiry; the type of decision that falls squarely within the Commission's mandate. As such, the judge owed deference to the Commission. In turn, his duty to pay the Commission deference comes to us as a matter of law, attracting no deference. In other words, it would be an error in law for the judge to deny the Commission appropriate deference. See **Halifax (Regional Municipality) v. United Gulf Developments Ltd.**, 2009 NSCA 78 at para. 41.

A Superior Court's Authority to Intervene

[15] Now, let me consider in more detail a superior court's authority to intervene in the workings of an administrative tribunal. As this court noted in **Central Halifax**, *supra*, the authority to act in appropriate circumstances is clear:

> ¶ 1 The Supreme Court of Nova Scotia, like other superior courts in Canada, has a limited supervisory role over public decision-makers and in appropriate circumstances can quash their decisions.

[16] However, the issue before this court is not the existence of the courts' supervisory jurisdiction. Instead, we are concerned solely with its use to stifle a Board of Inquiry even before it begins.

[17] The respondent relies on the decision of the Supreme Court of Canada in **Bell v. Ontario Human Rights Com'n**, [1971] S.C.R. 756 to support such a pre-emptive strike. There, the Ontario High Court of Justice used its supervisory authority to halt proceedings before a Board of Inquiry appointed under the *Ontario Human Rights Code*, S.O. 1961-62, c. 93. A five-judge panel of the Ontario Court of Appeal reversed this decision. Then in the Supreme Court of Canada, Martland, J., for the majority, confirmed the first instance judgment, stating at page 775:

> In my opinion the appellant was not compelled to await the decision of the board on that issue before seeking to have it determined in a court of law by an application for prohibition, and the Court had jurisdiction to deal with the matter.

[18] However, **Bell** represents somewhat of a high watermark when it comes to pre-emptively curtailing administrative decisions. In fact, within a few years of the now four decade old decision, the Saskatchewan Court of Appeal had stressed that the decision should not be given an overly broad application. There in **CIP Paper Products Ltd. v. Saskatchewan (Human Rights Commission)** (1978), 87 D.L.R. (3d) 609 (C.A.), [1978] S.J. No. 211 (QL), Culliton, C.J.S. emphasized the importance of the tribunal proceedings:

> ¶ 12 Care must be taken not to give to the decision in Bell v. Ontario Human Rights Commission, supra, too wide an application. That case simply decided that, where there is a clear point of law not depending upon particular facts upon the determination of which the jurisdiction of the tribunal depends, that determination may be made in an application for prohibition. That judgment did not decide that prohibition lies on the contention that the complaint is one which cannot be sustained within the provisions of the Act in respect to which the complaint is made. The decision as to whether the complaint is one which is

> contemplated by the pertinent legislation, and, if so, whether discrimination is, or is not, established, are matters for The Human Rights Commission. Such statutory rights and duties of the Commission cannot be usurped by the Court under the guise of prohibition proceedings in which is sought, in effect, a determination of the complaint on its merits.

[19] This caution was emphasized more recently by Evans, J. (as he then was) in ***Zündel v. Canada (Attorney General)***, [1999] 4 F.C. 289; 175 D.L.R. (4th) 512; 22 Admin. L.R. (3d) 170; 67 C.R.R. (2d) 59; 35 C.H.R.R. 363; 170 F.T.R. 194 aff'd 195 D.L.R. (4th) 394. There, in a case very similar to ours, Mr. Zündel had applied to the Federal Court for review of the decision of the Canadian Human Rights Commission to request the appointment of a human rights tribunal. Indeed, one of the arguments raised by Mr. Zündel, like the HRM, was that the complaint was outside the jurisdiction conferred by the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. In his thorough judgment, Evans, J. (as he then was) summarized the significant changes in administrative law since **Bell**:

> ¶ 43 Counsel for the applicant submitted, however, that considerations of prematurity do not justify a similar judicial reluctance to intervene when the issue in dispute is a legal question involving the interpretation of a provision in the enabling statute that defines the "jurisdiction" of the Tribunal. He relied on *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 for the proposition that a court may prohibit a tribunal from proceeding, before it has even started the hearing, when the issue raised is a "short and perfectly simple question of law".
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> ¶ 44 I do not find this argument persuasive. First, the authoritativeness of *Bell* has been severely eroded, if not totally destroyed, by the revolution in the law of judicial review of administrative action that started with the decision of the Supreme Court of Canada in Canadian *Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227.
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> ¶ 45 Courts no longer regard the interpretation of statutory provisions defining the regulated conduct as ipso facto "jurisdictional" in nature. Even if the Tribunal's interpretation of the words "communicated telephonically" are ultimately reviewed on a standard of correctness, the reviewing court will want the benefit of the Tribunal's considered decision, will be reluctant to encourage piecemeal challenges to administrative proceedings and will defer to any findings of fact that inform the Tribunal's legal conclusions.
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> ¶ 46 Furthermore, the Commission's power to refer a complaint to a Human Rights Tribunal has a significant subjective element. A reference may be made under paragraph 44(3)(a) [as am. by S.C. 1998, c. 9, s. 24] or subsection 49(1) when the Commission "is satisfied" that in all the circumstances of the complaint

> an inquiry is warranted. This signals that the Commission's decisions are normally reviewable only on a standard of rationality, not correctness.
>
> ¶ 47 Second, the interpretation of the disputed words of subsection 13(1) is not a "pure question of law" because it will be informed by evidence on the way in which information is communicated through the Internet and, in particular, the part played by the telephone system in accessing and transmitting it. On the modern or functional approach to the interpretation of legislation, questions of law, fact and policy can no longer be regarded as wholly discrete.
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> ¶ 48 Third, when *Bell v. Ontario Human Rights Commission*, supra, was decided it was not clear to the Court (at pages 769-770) that, if the applicant were prevented from seeking judicial review prior to the hearing of the complaint by the board of inquiry, he would have a remedy after the board had rendered its decision and made a recommendation on the appropriate disposition of the matter. Even though there is no right of appeal from the Canadian Human Rights Tribunal its decisions are fully subject to review in this Court on the grounds contained in subsection 18.1(4) of the *Federal Court Act* [R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5)].
>
> ¶ 49 Accordingly, I should only quash the Commission's decision and prohibit the Tribunal from continuing to inquire into the complaints against Mr. Zündel if I am satisfied that there is no rational basis in law or on the evidence to support the Commission's decision that an inquiry by a Tribunal is warranted in all the circumstances of the complaints. Any more searching examination of the questions of statutory interpretation or application raised by Mr. Zündel should, in my opinion, be deferred until the Tribunal has completed the hearing and rendered a reasoned decision.
>
> ¶ 50 The issues raised by Mr. Zündel challenge the legal authority of the Commission and the Tribunal to regulate material available on the Internet, which is fast becoming one of the most powerful media of mass communication. The benefits to be obtained from awaiting the Tribunal's considered determination of questions of this complexity, novelty and importance clearly outweigh the costs to Mr. Zündel, and to the public purse, of permitting the administrative process to run its course before the matter is fully reviewed by the Court.

[20] This court has also confirmed the need for restraint when it comes to prohibiting the important work of administrative tribunals. For example, in **Psychologist "Y" v. Nova Scotia Board of Examiners in Psychology**, 2005 NSCA 116; 236 N.S.R. (2d) 273, the applicant psychologist sought to prohibit a disciplinary proceeding from continuing, arguing that the Board had no jurisdiction. Yet Cromwell, J.A. (as he then was) cautioned:

> ¶ 21 Prohibition is a drastic remedy. It is to be used only when a tribunal has no authority to undertake (or to continue with) the matter before it. Unless a lack of jurisdiction or a denial of natural justice is clear on the record, prohibition is also a discretionary remedy. As Sara Blake says in her text, *Administrative Law in Canada*, 3rd ed. (Butterworths, 2001) at 200, it may be refused if the existence of jurisdiction is debatable or turns on findings of fact that have yet to be made. "It must be clear and beyond doubt," she writes, "that the tribunal lacks authority to proceed." Or as 11 Halsbury's Laws of England (3rd ed., 1955) p. 115 puts it, prohibition cannot be claimed as of right unless the defect of jurisdiction is clear. (See also **R. v. Ashby**, [1934] O.R. 421 (C.A.); **Re Lilly and Gairdner** (1973), 2 O.R. (2d) 74 (Div. Ct.).) Prohibition is not a substitute for an appeal: **R. v. Jones** (1974), 2 O.R. (2d) 741 (C.A.) application for leave to appeal dismissed (1974), 2 O.R. (2d) 741n (S.C.C.).

[21] Then in **Potter v. Nova Scotia (Securities Commission)**, 2006 NSCA 45, again, Cromwell, J.A. for the court elaborated on this need for restraint:

> ¶ 16 If *certiorari* is potentially available, we are left with the court's exercise of discretion as to whether to intervene in the investigation. Generally speaking, courts exercise that discretion with great caution and restraint while the administrative process is ongoing. This restraint is based on the concern that intervention may result in a multiplication of proceedings with the attendant costs and delay and in the failure to accord appropriate deference to the administrative decision-maker: see, e.g., *Brown and Evans*, para. 3:4100; **Psychologist "Y" v. Nova Scotia Board of Examiners in Psychology** 2005 NSCA 116, (2005), 236 N.S.R. (2d) 273; N.S.J. No. 350 (Q.L.)(C.A.) at paras. 22-25. Of course, the rights of the challenger are a critical part of the analysis and so the courts also consider whether there are other effective means of redress within the administrative scheme.

[22] Therefore, the test enunciated by Professor Blake and adopted by this court in **Psychologist "Y"**, *supra*, applies to this case. In other words, a tribunal's work should not be prohibited unless its lack of jurisdiction is "clear and beyond doubt".

[23] What then was the work of the Commission in this matter? I will address this question next.

The Role of the Nova Scotia Human Rights Commission

[24] The *HRA* gives to the Commission a broad mandate to investigate and pursue human rights complaints. Section 29(1) of the *Act* provides:

> 29 (1) The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where
>
> (a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or
>
> (b) the Commission has reasonable grounds for believing that a complaint exists.

[25] Note the mandatory language of 29(1) - "The Commission shall inquire ...". See also: **Dalhousie University v. Aylward**, [2002] N.S.J. No. 267 (C.A.) at para. 34.

[26] As well, the broad scope of this duty is confirmed by the *Boards of Inquiry Regulations*, O.I.C. 91-1222 (October 15, 1991), N.S. Reg. 221/91, s. 1 of which states:

> **1** The Nova Scotia Human Rights Commission may, at any stage after the filing of a complaint, request the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the Commission to a Human Rights Board of Inquiry to inquire into the complaint if the Commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted.

[27] This court has also emphasized the importance of our *Human Rights Act*, R.S.N.S 1989, c. 214 [*HRA*] and the role of the Commission. For example, in **Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)**, 2008 NSCA 21; 264 N.S.R. (2d) 61; 290 D.L.R. (4th) 577; 65 C.C.E.L. (3d) 92, Saunders, J.A. observed:

> ¶ 43 From this review it is obvious that the **HRA** is broad in scope. Its reach is extensive. The Act does not explicitly defer to other legislation or tribunals. The statute provides a mechanism for the investigation and enforcement of human rights. It creates and empowers the Commission to administer and enforce the Act. A board of inquiry may conduct hearings with broad authority to determine any question of fact or law when deciding alleged violations of the Act and ensuring full statutory compliance and rectification.

[28] In fact, Saunders, J.A. confirmed the quasi-constitutional matter of human rights legislation:

> ¶ 71 Additionally, the "fundamental" and "quasi-constitutional" status of human rights legislation requires that it be interpreted in a broad and purposive

> manner. **Battlefords and District Co-Operative Ltd. v. Gibbs**, [1996] 3 S.C.R. 566.

[29] Therefore, given this broad discretionary mandate, this Commission's decision to establish a Board of Inquiry is, in my view, entitled to significant deference. With this backdrop, I now turn to what I view as the judge's fundamental errors in approaching this matter.

Conclusion

[30] Respectfully, I believe that the judge committed two fundamental errors when addressing this matter. Firstly, he erred when characterizing the nature of Mr. Comeau's complaint against the HRM. Secondly, I believe that he mis-characterized the nature of the Commission's decision to strike a Board of Inquiry and as a result he failed to afford it appropriate deference. Let me now elaborate on each.

The Nature of the Complaint

[31] Here again is how the judge described the aim of Mr. Comeau's complaint:

> ¶ 36 ... This is not how Mr. Comeau or the Commission would now wish the matter to be characterized, but that would have been the principal and overriding purpose of the complaint.

[32] It is clear from this passage and from the judgment generally that the judge felt that this complaint was exclusively about legislative reform. Yet the record is clear that both Mr. Comeau and the Commission argued otherwise. For example, the Commission, in its factum, highlights other potential forms of relief:

> ¶ 89 There are, in Human Rights cases, other remedies that complainants seek.
>
> ¶ 90 One of the major, and most insidious, forms of discrimination is when those in authority turn a blind eye to discrimination because they don't see it. Often they are blinded to what is really happening by their own discriminatory attitude. One of the concerns behind the complaints was why it took so long for HRM and the Province to take remedial action.
>
> ¶ 91 As noted in the two complaints and in Mr. Lambert's reports, the issue of the failure of the CSAP to obtain a share of the supplemental funding had been

> raised many years before but nothing had been done about it. Suggestions that the CSAP be given 1% of the funds were dropped.
>
> ¶ 92 If this type of discrimination exists one of the most effective remedies is to expose it through the process of a Board of Inquiry. Exposing discrimination to the light of day is often the most effective way for individuals, and organizations, to come to the realization that indeed discrimination has occurred. In this case, the inquiry itself, was a major objective.
>
> ¶ 93 In addition, the remedy of sensitivity training is a common remedy that would be an option in this case, if discrimination were found to have existed.
>
> ¶ 94 Damages are a remedy, both to punish and to compensate. Justice Boudreau recognized the possibility of damages but discounted it as the practical hurdles to proving such damages "taxes the imagination". [See: Appeal Book Tab C, p. 43 at para. 37]

[33] Therefore, in my view, this narrow approach to the complaint respectfully represents a *palpable and overriding error of fact*. It is palpable because it is clearly contrary to the evidence. It is overriding because it prompted the judge to pre-emptively declare the Commission's lack of jurisdiction. So while the judge may have been correct to assert that legislative reform is beyond the Commission's mandate, its lack of jurisdiction is not so clear when it comes to other potential remedies which the judge respectfully seemed to have ignored.

[34] In reaching this conclusion, it is important to add this. I am not at all suggesting that the Board would have jurisdiction to entertain such other potential remedies or, if it did, whether any of them would have merit. I am simply stating that the Board's lack of jurisdiction in this regard, is not "clear and beyond doubt". In other words, with respect, the judge in these circumstances should have exercised restraint and left all these issues to the Board.

The Nature of the Commission's Decision

[35] This takes me to what I see as the judge's second fundamental error. In my view, he misapprehended the nature of the Commission's decision. The Commission simply decided to advance the complaint to the next level by establishing an independent Board of Inquiry. As noted, such decisions fall squarely within the Commission's mandate and it was entitled to deference. Yet as is evident from the following passage, the judge seems to suggest that the

Commission had already decided the jurisdictional issue and perhaps even the *res judicata* and mootness issues:

> ¶ 53 *The Commission's determination that the complaint fell under the HRA and therefore under its jurisdiction is subject to review on a correctness standard.* This proceeding also potentially raises issues of *res judicata* and mootness, matters of general law that are "of central importance to the legal system as a whole" and are outside the Commission's specialized area of expertise. These matters are likewise subject to review on a standard of correctness.
>
> [Emphasis added.]

[36] Yet the Commission made no such finding. Again, it did no more than continue the inquiry by appointing a board. Furthermore, as I have already noted, the independent Board could have easily decided these issues and, if appropriate, even by way of preliminary motion. Therefore, respectfully, this too reflects *palpable and overriding errors of fact.*

[37] Furthermore, the judge's error in mis-characterizing the nature of the Commission's decision was compounded when he failed to afford the Commission any deference. Instead, as the above passage confirms, he applied a *correctness* standard when he should have accorded the Commission deference. This represents an *error of law*.

[38] Furthermore, these errors are significant because they too had a direct impact on the outcome of the case. In other words, but for these errors, the judge likely would not have intervened.

[39] In short, I am not at all saying that the Board has jurisdiction to proceed. I am simply saying that, at this stage, its lack of jurisdiction is not "clear and beyond doubt". Therefore it was an error to prohibit the Board from proceeding before it even began.

DISPOSITION

[40] I would allow the appeal, set aside the judge's order and reinstate the Board of Inquiry. I would further direct the HRM to pay the Commission's costs on appeal in the all inclusive amount of $1,000.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.

Hamilton, J.A.