NOVA SCOTIA COURT OF APPEAL
Citation: ***Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)***, 2014 NSCA 18

Date: 20140219
Docket: CA 417434
Registry: Halifax

Between:

Izaak Walton Killam Health Centre

Appellant

v.

Nova Scotia Human Rights Commission
and Danny Patterson and Cynthia L. Chewter,
sitting as a Board of Inquiry and Attorney General of Nova Scotia

Respondents

Judges:	Saunders, Bryson and Scanlan, JJ.A.
Appeal Heard:	January 27, 2014, in Halifax, Nova Scotia
Held:	Appeal granted without costs, per reasons for judgment of Bryson, J.A.; Saunders and Scanlan, JJ.A. concurring.
Counsel:	Patrick Saulnier, for the appellant John Merrick, Q.C., for the respondent (Human Rights Commission) Danny Patterson, not present Cynthia Chewter, not present Edward Gores, Q.C., not present

Reasons for judgment:

[1] The Izaak Walton Killam Health Centre ("IWK") appeals a June 13, 2013 decision by Cynthia L. Chewter acting as a Board of Inquiry ("Board") who refused to dismiss a human rights complaint that was filed outside the 12 month limitation period contained in s. 29(2) of the *Human Rights Act*, R.S.N.S. 1989, c. 214.

Facts:

[2] Mr. Danny Patterson was employed as a casual youth care worker at the IWK assisting adolescents who were seeking treatment for substance abuse, mental health or gambling. Mr. Patterson has Type 1 diabetes and must take insulin by injection several times a day. On August 14, 2010 he took insulin in the presence of program participants. Mr. Patterson was placed on paid leave while the IWK investigated. After he was placed on leave from the IWK, Mr. Patterson contacted the Human Rights Commission. The Commission gave him an Intake Form which he completed and returned on September 17, 2010.

[3] On November 16, 2010 Mr. Patterson received a disciplinary letter from the IWK which included a requirement that he participate in a three month development plan involving supervision and educational classes. The IWK had concluded that Mr. Patterson's use of insulin in the presence of adolescents participating in its program demonstrated a lack of professional judgment on Mr. Patterson's behalf.

[4] Although he agreed to take insulin privately in the future, Mr. Patterson disagreed with the discipline imposed by the IWK. He refused to participate in the development plan and has not returned to work since.

[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. The problem with this process from the limitation point of view is that the limitation period begins to run from the "last instance of the action or conduct complained of …".

[6] On June 30, 2011 the Commission advised the IWK that Mr. Patterson had approached the Commission to make a complaint and that the matter was in the "pre-complaint assessment stage". At the Commission's invitation, the IWK responded to Mr. Patterson's proposed complaint. Following an initial assessment, an intake officer at the Commission decided not to proceed further with the potential complaint. Mr. Patterson objected and filed a Request for Review on September 16, 2011 and his file was forwarded to the Commission Director for decision on whether the file should proceed. In effect, the Request for Review is an internal appeal on the question of whether the Commission will authorize a formal complaint.

[7] The IWK was unaware that an initial decision had been taken not to proceed with Mr. Patterson's request to file a complaint, nor was the IWK aware of Mr. Patterson's internal appeal of that decision. They only learned about both after making inquiries of the Commission on November 17, 2011.

[8] On December 15, 2011 the Director allowed Mr. Patterson's appeal. It was only then that the Commission gave Mr. Patterson a prescribed complaint form. He completed the complaint form and filed it with the Commission on January 20, 2012. His complaint alleged that the discipline he received from the IWK and the requirement that he participate in a development plan, constituted discrimination on the basis of physical disability.

[9] Both parties agreed that the limitation period in this case began to run on November 16, 2010, when Mr. Patterson received his disciplinary letter. So the time period for filing Mr. Patterson's complaint expired on November 16, 2011. Since his complaint was not filed until January 20, 2012, Mr. Patterson was outside the 12 months referred to in s. 29 of the *Act*, but, as the Board observed:

> [14] In this case, Commission counsel indicated that the Commission did not make the prescribed form available to Mr. Patterson until after his appeal was allowed by the Director on December 15, 2011. As such, it was impossible for Mr. Patterson to file a complaint on the prescribed form prior to that time. This is through no fault of Mr. Patterson, who appears to have co-operated with the Commission and acted with dispatch throughout the process.

[10] The Board noted that the Commission had a specific policy entitled "Policy on Legislative Time Limitation Period". One of the objectives of this policy was "to establish a process which gives complainants a fair chance of meeting the limitation period stipulated in s. 29(2)". Again, the Board commented that:

> [15] … The first general principle of the policy is that "the policies and procedures of the NSHRC governing the intake and assessment of new Inquiries need to ensure that the Complainant's ability to make a complaint within the 12 month limitation period is not hindered." To this end, the policy requires that "During the initial assessment of a matter, Officers with the Intake Team are required to pay close attention to the 12 month limitation period," and "Notwithstanding where in the process a matter may be, it will be referred for formal investigation no later than 6 weeks before the expiry of the 12 month limitation period." It is clear from this policy that the Commission took steps to adapt to the introduction of the limitation period.

[11] The Board also noted that nothing in the policy addresses the limitation period in the context of internal appeals. The internal appeal process is not mentioned in the *Act* and is entirely a matter of Commission policy. During the hearing before the Board, Commission counsel agreed that the Commission has "an unwritten policy of calculating the limitation period by excluding time elapsed during an internal appeal". Relying on that exclusion, this would add three months to the period for calculating the limitation period in this case — in other words, the limitation period would not expire for Mr. Patterson until February 15, 2012. The Board effectively accepted this interpretation of when the limitation period expired.

Standard of Review:

[12] In this case the Commission was interpreting its home statute. Rulings of the Supreme Court of Canada and this Court have held that a tribunal's interpretation of its home statute will be reviewed for reasonableness: *Robinson v. Nova Scotia Power Inc*., 2012 NSCA 93, ¶21 to 24; *McIntyre v. Nova Scotia (Community Services)*, 2012 NSCA 106, ¶22 to 24; *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2, ¶14; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, ¶167 to 168 and *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[13] Most recently the Supreme Court of Canada has affirmed the reasonableness standard of review where the British Columbia Securities Commission had to interpret a limitation period in connection with a public interest order against a securities sales person. In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, the Supreme Court reiterated the reasonableness standard in such cases:

> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* — not the courts — to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

[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] If application of principles of statutory interpretation yield only one reasonable interpretation, an administrative decision maker must adopt it. As *McLean* emphasized:

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. ***Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable*** — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.
>
> [Emphasis added]

Limitation Period:

[16] In this case, the Board had to interpret Section 29 of the *Human Rights Act*:

> **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.
>
> **(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.***
>
> **(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]

[17] The limitation period in Section 29 of the *Act* is relatively new. It has only been in force since July 1, 2008. Prior to that there was no time limit for making a complaint under the *Act.*

Board's Decision:

[18] The Commission argued that calculation of the 12 month period should be suspended during the internal review period. In deciding to adopt the position of the Commission, the Board said:

> [37] After giving the matter a great deal of consideration, I am unable to accept the respondent's argument that the limitation period runs without break until it expires, as to do so would require that I completely disregard not only the Commission's policies and practices – the way it performs its work – but also the manner in which the human rights process differs from civil litigation.
>
> [38] While the plain meaning of the section accords easily with the interpretation the respondent urges, the Commission's interpretation better accords with the purposes and context of the *Human Rights Act* and its administration. As Duff, C.J. wrote in *McBratney v. McBratney*, [1919] 59 S.C.R. 550 at 561 nearly a century ago:
>
> > Of course where you have rival constructions of which the language of the statute is capable, you must resort to the object or principle of the statute…; and if one find there is some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment, runs counter to the principle and spirit of it.
>
> [39] Professor Ruth Sullivan summed up the principle this way: "If the ordinary meaning is clear, but an alternate interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of

> the legislation should be adopted." Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (Markham: Lexis Nexis, 2008) at p. 281.

[19] The IWK protests that the Board misstated the law and accordingly rendered an unreasonable decision, relying on *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45:

> [31] … I return to McLachlin J.'s admonition in *Meiorin* that "in the absence of a constitutional challenge, this Court must interpret [human rights statutes] according to their terms" (para. 43). …

[20] The Board acknowledged that the IWK's interpretation of s. 29, "accords easily" with the plain meaning of s. 29, but found that "the Commission's interpretation better accords with the purposes and context of the *Human Rights Act* and its administration". The Board then referred to Chief Justice Duff's comments in *McBratney*, and Professor Sullivan's book, both quoted in the foregoing excerpts from the Board's decision, (¶18 above).

[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:

> [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] 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.

[24] So we begin with the words the Legislature has used. To repeat, these are:

> **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.

Those words seem clear. One hardly needs a dictionary to interpret "within", which clearly assumes a beginning and end inside of which the time should run. Resort to standard texts bears this out. For example, *The Concise Oxford Dictionary*, 8th ed. uses such words as "inside"; "enclosed" or "contained by"; "not beyond or exceeding" to describe "within". More pertinently, *Stroud's Judicial Dictionary*, 5th ed., vol. 5, p. 2876 cites examples of judicial interpretation of "within" as "inside which certain events may happen"; "within four months" means any date within that period: "within three years" means not later than three years. But the Board found that "within twelve months" did not mean within consecutive months. Rather, it meant within 12 months excluding any period during which the Commission was conducting an internal review. So the limitation period could be 15 months, 20 months or whatever period by which the internal review delayed the tolling of the months. The Board provided no linguistic or "ordinary meaning" defence of this eccentric interpretation.

[25] As authority for rejecting an interpretation which the Board conceded "accords easily" with the plain meaning of s. 29(2) of the *Act*, the Board resorted to *McBratney* and *Sullivan*, quoted above, (¶18). *Sullivan* goes on to elaborate on *McBratney*:

> In this passage Duff C.J. asserts two principles that govern judicial reliance on purpose in interpretation.

> (1) If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted.
>
> (2) If the ordinary meaning is clear, but an alternative interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted.
>
> These principles are often expressed in a negative form: an interpretation that would tend to frustrate or defeat the legislature's purpose should be rejected if there is a plausible alternative.

Professor Sullivan notes that a purposive analysis is most often relied upon, *inter alia* to "resolve ambiguity", (*ibid* p. 282).

[26] In *McLean*, the Supreme Court was satisfied that the plain meaning of the statutory words were consonant with the British Columbia Security Commission's interpretation. But the court went on to say:

> [43] However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of their work of interpretation. That is so because
>
> > [w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.
>
> (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)

[27] In *McLean*, the Supreme Court examined the legislative history of the *British Columbia Securities Act* as well as the statutory context of the limitation provision. These additional approaches also sustained that Commission's interpretation. Finally, the Supreme Court noted the Legislature's clear intention of improving interprovincial cooperation with respect to Securities regulation:

> [59] In the end, the Commission's interpretation is a reasonable one because it furthers the legislature's manifest goal of improving interprovincial cooperation. The appellant's interpretation, by contrast, fits uneasily with the broader indicators of legislative intent available to us. In reducing s. 161(6) to a belts-and-suspenders codification of what is already common practice, her

> interpretation does little to improve interprovincial cooperation. I do not say that the appellant's interpretation is inconsistent with such efforts — only that it does not further them to the same extent as the Commission's interpretation.

[28] But the court did not end its consideration there. It was not prepared to allow a "secondary" legislative purpose of interprovincial cooperation to overwhelm its analysis. After reviewing the purposes of limitation periods generally, the court concluded:

> [69] The Commission's interpretation strikes a reasonable balance between facilitation of interprovincial cooperation and the underlying purposes of limitation periods. Thus, notwithstanding the appellant's reasonable concerns, I am unable to conclude that the Commission's interpretation is rendered unreasonable in light of the purpose of limitation periods.

[29] In this case, the Board does not explain how suspending the tolling of the 12 month period is either contextually plausible or better accords with the *Act*'s purposes. Those purposes are:

> **Purpose of Act**
>
> **2** The purpose of this Act is to
>
> (a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;
>
> (b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;
>
> (c) recognize that human rights must be protected by the rule of law;
>
> (d) affirm the principle that every person is free and equal in dignity and rights;
>
> (e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and
>
> (f) extend the statute law relating to human rights and provide for its effective administration.

These purposes are unimpaired by the tolling of the 12 month limitation period. In this case, the Board's interpretation better assists Mr. Patterson because he will get a hearing. But a better outcome in a particular case cannot be a measure of

whether *interpretation of the statute* better accords with its purposes. Put another way, any alleged frustration of the statute's purposes in this case could just as easily be ascribed to the Commission's delay in considering Mr. Patterson's case. The statute should not be interpreted solely to accommodate that delay. There is no evidence that assessment of the complaint — including any internal review — could not have occurred within the twelve month limitation period.

[30] The only real explanation for its departure from the ordinary meaning of the words in s. 29(2) of the *Act* is contained in ¶37 of the Board's decision where it said that it could not accept the IWK's interpretation because "… to do so would require that I completely disregard not only the Commission's policies and practices — the way it performed its work — but also the manner in which the human rights process differs from civil litigation." Respectfully, neither reason is persuasive.

Commission Policy:

[31] The Commission's practices and policies do not have the force of law. Even if they did, they could not amend an Act of the Legislature. As Justice Fichaud said in *Jivalian*:

> [31] I agree with Mr. Calderhead's submissions respecting the legal effect of Policies 5.7.1 and 5.7.2. Section 21 of the *Act* authorizes the Governor in Council to enact Regulations. But nothing in the *Act* enables Departmental employees to create Policies that have the effect of law. There is no enabling provision such as, for instance, s. 183 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, that expressly authorizes "policies", apart from regulations, and provides that those policies shall have legal effect. ***It may be administratively convenient that the Department of Community Services operate with consistent standards, termed "policies". But those Policies are not legislative instruments, and have no legal effect, either before the Board or in court. The legal issues on this appeal should be determined based on the interpretation of the Act and Regulations, not the Policies.*** [Emphasis added]

[32] By interpreting s. 29(2) of the *Act* to facilitate Commission policy, the Board effectively allows the Commission to amend the *Act*. Even if the Commission's policy had the force of law — which it does not — it would have to be consistent with the *Act* which the Commission has to apply. The Commission's policies and practices must accord with the *Act*. It is not the other way around.

Civil Litigation:

[33] While the outcome in this case is unfortunate for Mr. Patterson, it is the inevitable result of the Legislature's clearly expressed intention that a 12 month limitation should run from the conduct complained of, and the failure of the Commission to address the complaint within that limitation period. Moreover, the Legislature provided an alternative. Section 29(3) of the *Act* permits the Director to extend the limitation period in "exceptional circumstances" as more fully described in that subsection. If there were no "exceptional circumstances" in this case, one wonders why the complaint was not addressed in a timely way.

[34] Furthermore, it is not clear how "the Human Rights process differs from civil litigation" has any relevance to the interpretative task with which the Board was faced in this case. The Board's reference to *West End Construction Ltd. v. Ontario (Ministry of Labour)*, [1989] O.J. No. 1444 (Ont. CA) and *Allcott v. Walker* (1997), 160 N.S.R. (2d) 1 (NSCA) is of no assistance. In both of those cases, the court was commenting on the inapplicability of a *Limitation of Actions Act* to specific statutory proceedings. In this case, the relevant limitation period is not contained in a general *Limitation of Actions Act* but is specifically set in the *Human Rights Act* and is clearly designed to apply to complaints under the *Act*.

[35] Then the Board refers to the general proposition that the law favours a potential claimant who cannot comply with legislation by extending or suspending limitation periods in special circumstances. The Board noted a similar policy with respect to the discoverability principle when interpreting limitation provisions. It is certainly true that limitation periods in Limitation of Actions legislation contain exceptions for minors and those under disability and are often interpreted using a "discoverability" principle that indulges a potential claimant who may not know that he has a claim. But the discoverability principle is not universal and cannot vanquish plain statutory language that would exclude it. Limitation periods which begin and end at specific times cannot be extended by the discoverability principle. For example, the discoverability principle does not apply to a limitation period which runs from a specific date such as the termination of professional services (*Smith v. McGillivary*, 2001 NSSC 17, per MacDonald, A.C.J., as he then was).

Conclusion:

[36] The Board's interpretation of s. 29(2) of the *Act* is not reasonable. The limitation period clearly tolls from the events described in s. 29(2). The language

is not ambiguous and is undisturbed by the policy considerations on which the Board relied. To précis an earlier quotation from *McLean*:

> [38] … Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; …

[37] So it is here. I would allow the appeal and dismiss the complaint as out of time. In the circumstances, I would make no order as to costs.

Bryson, J.A.

Concurred in:

Saunders, J.A.

Scanlan, J.A.