SUPREME COURT OF NOVA SCOTIA

Citation: Cape Breton (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2013 NSSC 193

Date: 20130625
Docket: Syd. No. 407500
Registry: Sydney

Between:

Cape Breton Regional Municipality

Applicant

v.

Nova Scotia Human Rights Commission, Canadian Union of Public Employees, Canadian Union of Public Employees Local 759, Canadian Union of Public Employees, Local 933, Canadian Union of Public Employees Local 761, John Hynes, Douglas Foster, Judy Wadden, Mary Coffin, and the Attorney General of Nova Scotia

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: February 26 and 27, 2013, in Sydney, Nova Scotia

Final Written Submissions: June 20, 2013

Written Decision: June 25, 2013

Counsel: Eric Durnford, Q.C., for the Applicant
Lisa Teryl for the Respondent Commission
Blair Mitchell for the Respondent Douglas Foster
Susan Coen for the Canadian Union of Public Employees, and locals,
John Hynes, Judy Wadden, and Mary Coffin, unrepresented
The Attorney General of Nova Scotia not appearing

By the Court:

INTRODUCTION

[1] The Cape Breton Regional Municipality ("CBRM") has brought an application for judicial review of a decision of the Nova Scotia Human Rights Commission (the "Commission") to refer a number of complaints to a Board of Inquiry ("BOI"). All of the complainants alleged that the CBRM had discriminated against them as employees contrary to the *Human Rights Act*, R.S.N.S. 1989, c. 214 (the "*Act*"), by virtue of imposing retirement upon attaining the age of 65.

[2] This application is supported by the Canadian Union of Public Employees and several of its locals (collectively referred to herein as "CUPE"). It is opposed by the Respondent employees, most notably Mr. Foster. The Commission participated in the application as it relates to its jurisdiction.

BACKGROUND

[3] Between January 26, 2010 and March 9, 2012, six former employees of the CBRM filed complaints with the Commission, alleging that they had been forced to retire at age 65, and such constituted discrimination contrary to s. 5(d)(h) of the *Act*.

[4] The CBRM has two pension plans, a "Defined Benefits" plan and a "Defined Contribution" plan. Both plans contain terms which require that its members retire at age 65.

[5] Most, but not all of the CBRM's employees are members of one, or both pension plans.

[6] On June 28, 2012 the Commission decided to refer the six complaints to a single BOI pursuant to Section 32A(1) of the *Act* to determine whether discrimination had occurred.

[7] On September 28, 2012 the CBRM filed a Notice of Judicial Review in which it challenged the referral decision, on the following grounds:

> 1. The Commission is improperly attempting to re-litigate an issue that already has been fully and finally determined by another Board of Inquiry appointed by the Commission in *Talbot v. Cape Breton (Municipality)*, 2009 NSHRC 1 ("Talbot"). The Commission played an active role in the *Talbot* inquiry and did not appeal the Board of Inquiry's decision. The Commission's attempt to re-litigate the same issue against the same respondent is an abuse of process;
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> 2. There is no reasonable basis in law or on the evidence for the Commission's conclusion that an appointment of a Board of Inquiry is warranted in the circumstances. In *Talbot*, the Board of Inquiry found that CBRM's pension plan was *bona fides* and met the test of legitimacy set out in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45; therefore the Board of Inquiry found that CBRM's mandatory requirement that employees retire upon reaching the age 65 was within the age discrimination exception in s. 6(g) of the *Human Rights Act*.
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> 3. The decision of the Commission to appoint a Board of Inquiry was made in violation of its duties of due process, natural justice and procedural fairness to CBRM, and otherwise was a decision taken without jurisdiction, or in excess of jurisdiction, by:
>
> > i) Resolving to appoint a Board of Inquiry without first notifying CBRM, or providing it with copies, of the complaints or the resolution to appoint a Board;
> >
> > ii) Not following its own policies requiring that all parties be given an opportunity to provide written comments on whether a Board of Inquiry should be appointed;
> >
> > iii) Establishing policies and/or procedures in the handling of complaints under the *Act* that are inconsistent with the Commission's authority under the *Act*.

[8] The CBRM further brought a motion seeking a stay of the referral decision, which was heard on November 14, 2012. The stay pending judicial review was granted, with reasons reported at 2013 NSSC 41.

LEGISLATIVE FRAMEWORK

[9] There are several legislative provisions which are relevant to the matter before the Court. It may be helpful at this juncture to set the stage for the issues to follow, by noting those of greatest significance.

[10] The *Act* provides a meaning of the term "discrimination" in section 4. It provides:

> 4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[11] Section 5 of the *Act* outlines the prohibited means and grounds of discrimination. Clearly, a person cannot be discriminated against in relation to their employment based upon their age.

[12] The legislation provides for recognized exceptions, which serve to permit certain conduct which would otherwise be prohibited by Section 5(1). Section 6(g) is particularly relevant. It presently reads:

> 6. Subsection (1) of Section 5 does not apply
>
> (g) to prevent, on account of age, the operation of a bona fide pension plan or the terms or conditions of a bona fide group or employees insurance plan;

[13] As was brought to the Court's attention by several parties, this particular section has undergone fairly recent amendment. In *"An Act Respecting the Elimination of Mandatory Retirement*", S.N.S. 2007, c. 11, section 6(g) was amended to strike out "retirement" plans from the permitted exemptions. Further, an entire exemption (the former section 6(h)) pertaining to *bona fide* mandatory retirement schemes was removed from the *Act*. This amending legislation received Royal Assent on April 13, 2007, but contained a provision that it would "not come into force before July 1, 2009".

[14] The procedure to be followed upon receipt of a complaint is addressed in the *Act*. For the purposes of considering the matter before the Court, two provisions, section 29 and section 32A are particularly relevant.

[15] Section 29(1) and (4) provide:

> 29(1) The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where
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> > (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.
>
> (4) The Commission or the Director may dismiss a complaint at any time if
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> > (a) the best interests of the individual or class of individuals on whose behalf the complaint was made will not be served by continuing with the complaint;
> >
> > (b) the complaint is without merit;
> >
> > (c) the complaint raises no significant issues of discrimination;
> >
> > (d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;
> >
> > (e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;
> >
> > (f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or
> >
> > (g) the complaint arises out of circumstances for which an exemption order has been made pursuant to Section 9.

[16] Section 32A(1) provides:

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

[17] Once a BOI is appointed, its function is delineated in section 34, which contains along with others, the following provisions:

> 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*.
>
> (3) A board of inquiry shall give full opportunity to all parties to present evidence and make representations.
>
> (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.

[18] Following upon section 34(1) above, the *Public Inquiries Act*, R.S.N.S. 1989, c. 372 provides:

> 4. The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing, or on solemn affirmation if they are entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matter into which he or they are appointed to inquire.

[19] Section 36(1) of the *Act* provides that an appeal from a decision of a BOI on a question of law, is made to the Nova Scotia Court of Appeal.

[20] The above provisions will be discussed in further detail below.

POSITION OF THE PARTIES

CBRM

[21] In its pre-hearing submissions, the CBRM succinctly summarizes its position as follows:

> CBRM has asserted two main grounds for review. First, that the Commission's referral decision is an abuse of process given a Board of Inquiry's previous consideration of the same issue in *Talbot v. Cape Breton (Municipality)*, 2009 NSHRC 1 ("Talbot"). Second, that the Commission's referral decision was procedurally flawed in that the Commission, prior to making its referral decision, failed to (a) observe the statutory requirements set out in s. 29 of the *Human Rights Act*; and (b) accord CBRM procedural fairness when it failed to inform CBRM that the complaints existed and failed to provide CBRM the opportunity to be heard.

[22] On the first argument, the CBRM argues that the legitimacy of the CBRM's pension plans have already been conclusively determined in **Talbot, supra**. It is asserted that in that instance it was determined that the CBRM pension plan was "*bona fides*" and fell within the age discrimination exemption provided in section 6(g) of the *Act*. It is asserted that to permit a BOI to again reconsider these very same issues would constitute an abuse of process. The CBRM argues that the standard of review for abuse of process is correctness.

[23] On the procedural issue, the CBRM argues the Commission failed to properly follow the process mandated by the *Act* when it decided to forego an

investigation as required by section 29(1), and erred by interpreting section 32A as allowing a direct referral to a BOI. The CBRM characterizes this as an error going to the Commission's jurisdiction. It is further submitted that the Commission breached its duty of fairness to the CBRM by not advising of the complaints, nor providing an opportunity to make submissions prior to making the referral decision.

[24] The CBRM further submits that the underlying report of Mr. Hashey was defective, and as such, the Commission's decision relying upon same is similarly flawed. Based on the above, the CBRM seeks an order quashing the referral decision, and further seeks an order prohibiting the Commission from proceeding further with the four remaining complaints.

The CUPE Respondents

[25] CUPE, with a few variances, generally supports the position advanced by the CBRM and argues for the same remedy. In her written submissions Counsel provides a helpful overview of CUPE's position as follows:

> 2. CUPE agrees with CBRM that the Commission's referral decision ought to be quashed because it is:
>
> (1) an abuse of process;

(2) procedurally flawed due to the Commission's:

a. failure to adhere to statutory pre-requisites; and

b. failure to accord procedural fairness to the respondent(s) to the complaints.

3. While CUPE agrees with CBRM's end result, CUPE arrives there taking a slightly different path. In CUPE's view, the referral decision should be quashed outright, based upon the Commission's failure to adhere to statutory pre-requisite in s. 29(1). One need go no further. The Commission didn't even get out of the starting gate.

4. Had the Commission adhered to the statutory pre-requisite (and a fair process), it would have quickly encountered the issue of abuse of process. It then could have, would have, and should have, decided not to refer the complaints to a BOI due to abuse of process. It would have invoked s. 29(4) to dismiss the complaints.

5. Even had the Commission nonetheless referred the complaints to a BOI, in CUPE's view the BOI could have dealt with the issues of the statutory prerequisites, procedural fairness, and abuse of process. This is where CUPE's and CBRM's views depart. However, CUPE agrees that it is appropriate for this Honourable Court to dispose of these issues, even if a BOI could have.

[26] While agreeing with the CBRM that the standard of review for abuse of process is correctness, CUPE does not agree that the same standard applies to the Commission's interpretation of the Act, and in particular, the interplay between sections 29(1) and 32A. CUPE asserts this is subject to a reasonableness standard.

The Respondent Foster

[27] Relying on recent authority from the Supreme Court of Canada, most notably **Halifax (Regional Municipality) v. Nova Scotia (Human Rights**

Commission), 2012 SCC 10, Mr. Foster asserts this Court should take a "hands off" approach and leave the BOI to undertake the task assigned to it. The issues of concern to the CBRM and CUPE can be fully addressed by the BOI.

[28] Mr. Foster argues that a direct referral to a BOI is permitted under the *Act*, submitting:

> 11. Section 32A does not restrict the Commission to the choice of only referring a Complaint to a Board of Inquiry following investigation and attempt to settle under Section 29(1). Rather, in addition to this option, this Section also authorizes a referral directly to a Board of Inquiry without investigation or attempt to settle.

[29] He further submits:

> 13. The separation between the two means of referral under s. 32A is significant to this Motion: contrary to the submissions made by the Applicant in this case, with respect, the Commission's authority to refer a Complaint to the Board does not require that it investigate or attempt to settle a complaint before doing so.
>
> 14. This direct referral to a Board, which is what occurred in this case, is not frequently exercised, but is available to the Commission in cases which it deems appropriate.

[30] Following on the above, Mr. Foster asserts that the Commission's procedural fairness responsibilities change depending on whether it chooses to act under section 29 or section 32A of the *Act*. It is further asserted that all parties will have the opportunity to be fully heard before the BOI, which has the authority

to hear arguments relating to the alleged abuse of process, as well as all other legal issues.

[31] If this Court is inclined to consider the abuse of process argument, Mr. Foster submits that the Applicant's reliance on the **Talbot, supra**, decision as determinative of his complaint is flawed.

The Respondents Coffin, Hynes and Wadden

[32] On behalf of herself, Ms. Wadden and Mr. Hynes, Ms. Coffin made oral submissions which opposed the CBRM's application. These parties generally endorse the position advanced by Mr. Foster. They want to have their complaints heard, not short circuited due to the case involving Mr. Talbot, in which they had no involvement.

The Commission

[33] The Commission provided general submissions as to its jurisdiction and statutory interpretation of the *Act*.

NATURE OF THE DECISION UNDER REVIEW

[34] The CBRM is challenging the Commission's decision to refer a number of complaints, originally six and now four, to a BOI. That seems simple enough. However, in my view, given that the nature of the decision impacts on the assessment of procedural fairness, as well as the abuse of process arguments, it is prudent to look at the determination under review more closely.

[35] The nature of a referral decision under the Act has been recently addressed by the Supreme Court of Canada in **Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), supra**. Writing for the Court, Justice Cromwell characterizes such a decision as being discretionary, and serving a screening function. He writes:

> [19] I respectfully agree with the Court of Appeal. The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the *Act*. Rather, within the scheme of the *Act*, the commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.

And further:

> [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. (citations omitted)

[36] In the present case, in making the decision to refer to a BOI, the Commission reviewed and ultimately accepted the recommendation of Mr. Gerald Hashey, Manager of Dispute Resolution. In a Memorandum dated June 25, 2012, Mr. Hashey writes:

> I am writing to recommend that the above files be placed before the Commissioners with a request that they consider exercising their authority under section 32A(1) of the Human Rights Act to appoint a single Board of Inquiry to inquire into the complaints. I further request that this be done without related investigations being carried out or investigation reports being prepared.

[37] Mr. Hashey was cognizant of the possibility that proceeding to make a referral decision under section 32A of the *Act* without an initial investigation, may result in a legal challenge to the appropriateness of that approach.

[38] In his memorandum, Mr. Hashey outlined the rationale for the recommendation to a Board of Inquiry without investigation, as follows:

1. Efficiency

All five matters share a common fact situation. As a result, it would be an efficient use of resources to have these matters dealt with in a single Board of Inquiry.

2. Interpretation of Law

There is no apparent disagreement over the fact situation. Final disposition of these five cases relies exclusively on an interpretation of the Human Rights Act within the context of recent case law. Investigating these four files will add no value.

3. Public Interest

There is a significant public interest in achieving adjudication of these issues. The resulting decision will help employers understand their responsibilities under the Human Rights Act with respect to mandatory retirement.

4. Consistency of Outcome

In light of the fact that all five cases share identical fact situations, achieving consistent outcomes for these cases is more likely if they are heard before a single Board of Inquiry.

[39] As noted from the above, Mr. Hashey opined that the relevant facts in all complaints were identical, and the law pertaining to interpretation of the *Act* may be uncertain. An accompanying "Mandatory Retirement Fact Sheet" discloses Mr. Hashey was concerned about the applicability of several earlier case authorities in light of the July 1, 2009 amendments to the *Act*, and what was characterized by him as "the current unsettled status of the law".

[40] Undoubtedly the Commission reviewed and relied upon the assertions made by Mr. Hashey in the materials prepared by him. What is important to appreciate however, is that this Court's function is not to review Mr. Hashey's conclusions either for correctness or reasonableness. Even if this Court would be inclined to disagree with some of Mr. Hashey's assertions, such would be irrelevant in my view to the matter before the Court. Mr. Hashey made no binding determinations as to the outcome of the complaints, nor the status of the law, he merely identified issues which would be before, or potentially before a BOI for its consideration.

[41] In proceeding with the referral to a BOI the Commission did implicitly make a decision pertaining to its ability to make a "direct" referral without first undertaking an investigation. This approach necessarily included the Commission interpreting the procedural provisions contained in sections 29 and 32A of the *Act* - a topic of great debate at the review hearing. The interpretation of these provisions by the Commission, will by necessity impact on the content of the procedural fairness owed to CBRM and CUPE.

[42] The Applicant has forcefully argued that to proceed with the remaining four complaints before a BOI would constitute an abuse of process. It is clear that in

making the referral decision, the Commission made no determination whatsoever as to whether having any or all of the complaints considered by a BOI would, or would not, constitute an abuse of process.

ISSUES

[43] Based upon the materials before me and the submissions received, the issues for determination can be stated as follows:

a) Was the Commission's decision to make a direct referral to a BOI without a preceding investigation permissible within the terms of the *Act*?

b) Was the CBRM, CUPE or both, denied procedural fairness in the manner in which the complaints were handled by the Commission, and if so, what is an appropriate remedy? Was the referral to a BOI otherwise unjustified?

c) Does the referral to a BOI constitute an abuse of process?

d) If the referral decision is found to be unjustified, what is an appropriate remedy?

ANALYSIS

a) Was the Commission's decision to make a direct referral to a BOI without a preceding investigation permissible within the terms of the Act?

[44] This inquiry goes directly to the interplay between sections 29 and 32A of the *Act*, and in particular the interpretation adopted by the Commission. This Court must initially determine what standard of review to apply when considering the Commission's interpretation of these statutory provisions.

[45] Two recent decisions of the Supreme Court of Canada have addressed the standard of review analysis in circumstances where the decision maker is interpreting its home statute. Deference will be afforded unless the circumstances are shown to be exceptional, thus warranting a correctness standard (see **Canada (Canadian Human Rights Commission) v. Canada (Attorney General)**, 2011 SCC 53 and **Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association**, 2011 SCC 61).

[46] This approach was explained by Rothstein, J. in **Alberta (Information and Privacy Commissioner), supra**, as follows:

> 30 The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) PIPA, a provision of the Commissioner's home statute. There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, per Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to [page674] which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or vires" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, per LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

[47] Is the interpretation of section 29 and section 32A permitting a direct referral to a BOI a circumstance falling within any of the "categories of questions to which the correctness standard continues to apply?" Clearly, it is not a constitutional question, nor a question of jurisdiction between competing tribunals. It is not a question of central importance to the legal system as a whole, but rather is one that is specific to the administrative regime for the protection of

human rights and prevention of discrimination. Finally, does it constitute a true question of jurisdiction or *vires*?

[48] In **Alberta (Information and Privacy Commissioner), supra**, Rothstein, J. re-iterates that questions of true jurisdiction are uncommon:

> 33 ...As this Court explained in *Canada (Canadian Human Rights Commission), "Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Smith v. Alliance Pipeline Ltd.*, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).
>
> 34 The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has [page676] come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[49] I cannot conclude the interpretation of these sections is a true question of jurisdiction or *vires*. Accordingly, based on the above, the appropriate standard of review regarding the Commission's interpretation of its home statute is one of reasonableness.

[50] In applying the reasonableness standard to the Commission's interpretation of sections 29 and 32A of the *Act*, I have found particularly helpful the comments of Justices LeBel and Cromwell in **Canada (Canadian Human Rights commission) v. Canada (Attorney General), supra**, who describe "reasonableness" as follows:

> 29 Reasonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise. The concept of deference is fundamental in the context of judicial review, as this Court held in the seminal case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.,* [1979] 2 S.C.R. 227. Deference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (*Macklin*, at p. 205).
>
> 30 The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R. E. Hawkins, *"Whither Judicial Review?*" (2010), 88 Can. Bar Rev. 603).

[51] The above decision involved circumstances where the Canadian Human Rights Tribunal interpreted certain provisions of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, in such a fashion as to permit an award of costs to a complainant. Justices LeBel and Cromwell succinctly set out the principles of statutory interpretation in the context of human rights legislation as follows:

> 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., [page491] *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.

[52] Considering the provisions in question liberally and purposively, in my view the Commission's interpretation falls within a range of reasonable outcomes. I will explain.

[53] The CBRM and CUPE submit that a referral under section 32A to a BOI is permissible only after the preconditions in section 29(1) have been met - namely, a complaint has been inquired into and attempts at settlement have been undertaken.

These parties equate “inquire into” as meaning “investigate”. In the present case, clearly there was no investigation, nor attempts at settlement, and as such, it is submitted the Commission was unable to make a referral under section 32A.

[54] There are a number of considerations which support the Commission’s interpretation as a reasonable one. It is not inconsistent with the legislation to interpret section 32A as permitting a referral to a BOI without first attempting to investigate or settle the complaint. Arguably, not even section 29 requires these steps as mandatory pre-conditions when considering an outright dismissal. Section 29(4)(f) permits the Commission to dismiss “a complaint at any time” if “there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this *Act*”.

[55] It thus appears that a dismissal, without an investigation, is specifically contemplated by section 29(4)(f). If the legislature intended such a streamlined approach to be available for the dismissal of a complaint, it is not unreasonable to interpret the relevant provisions to permit the Commission to move a complaint to the BOI stage, also without investigation. In my view, the contents of section 29(4) supports the Commission’s interpretation that section 29(1) does not create

mandatory pre-conditions in the handling of all complaints, and specifically those where a direct referral to a BOI is felt to be warranted by the Commission.

[56] There is also support from the Court in terms of the reasonableness of the Commission's interpretation of sections 29 and 32A. Hallett, J.A. in **Aylward v. Nova Scotia (Human Rights Commission)**, 2002 NSCA 76, writes:

> 45 Section 29 of the *Act* is clear. The Commission shall instruct the Director or some other officer to inquire into and endeavour to effect a settlement of any complaint of an alleged violation of the *Act*. This is a mandatory direction to the Commission as to what it is to do when a person aggrieved makes a complaint in writing or if the Commission has reasonable grounds for believing that a discrimination complaint exists. I tend to think that under the circumstances of this case that the Commission had reasonable grounds for believing that a complaint by Professor Aylward against Dalhousie existed. The Commission can **either** cause the complaint to be inquired into and an attempt made to have the parties settle **or** the Commission could appoint a board of inquiry once the complaint is filed (s. 32A). (Emphasis added)

[57] The "reasonableness" of the Commission's interpretation is further supported in my view by the "Board of Inquiry Regulations", N.S. Reg. 221/91 which provide:

> 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.

[58] The purpose of the *Act* is to promote of course, human rights and the dignity of all persons. A stated purpose is also to "extend the statute law relating to human rights and provide for its effective administration"- section 2(f). The "direct referral" process envisioned within the Commission's interpretation of sections 29 and 32A, would prevent some complaints, not suitable for settlement attempts, to proceed directly to a BOI without "going through the motions" of steps which the Applicant argues are mandatory. This, in my view, aligns with the stated purpose of administrative effectiveness.

b) Was the CBRM, CUPE or both, denied procedural fairness in the manner in which the complaints were handled by the Commission, and if so, what is an appropriate remedy? Was the referral to a BOI otherwise justified?

[59] As noted earlier herein, CBRM and CUPE submit they were denied procedural fairness by virtue of the Commission failing to adhere to the statutory pre-requisites under section 29. Given the conclusion reached regarding the reasonableness of the Commission's interpretation that section 32A permits a direct referral to a BOI, the Court need not consider that particular aspect of the procedural fairness argument.

[60] There are, however, other assertions of a breach of the duty of fairness by the Commission. As was apparent from the "Amended Record" before the Court, the Commission had received six complaints against the CBRM alleging age discrimination, the filing dates ranging from January 26, 2010 to March 9, 2012. In some of the complaints, CUPE, or one of its locals, was also named as a Respondent. Neither of the respondents were notified by the Commission of receipt of the complaints until receipt of correspondence from Commission Chair Harker, dated July 20, 2012, advising that a referral had been made to a BOI pursuant to section 32A of the *Act*, based upon a motion adopted June 27, 2012.

[61] Both CBRM and CUPE submit the failure to advise of the complaints and seek input from the named respondents constitute a breach of procedural fairness, and is contrary to the Commission's own policies noted as follows by the CBRM:

> Policy 2.4 states that the Commission's mandate is to investigate and try to resolve complaints.
>
> Policy 5.4 states: "Commission staff will recommend complaint file outcomes, either dismissal or referral to a Board of Inquiry for unresolved disputes. Parties will have an opportunity to provide comments on these recommendations before the decision is made."

> Policy 5.5.8 states: "Commission staff may recommend in writing that Commissioners refer a complaint to a Board of Inquiry under s. 32A of the *Act* to determine if discrimination has occurred. Parties will have an opportunity to comment on the recommendation. This recommendation will be made within 14 days of a completed Resolution Conference."
>
> Policy 7.4 states: "The parties to a complaint have a right to comment in writing on a recommendation to close or refer a file to a Board of Inquiry."
>
> Policy 7.5.1 states: "Parties will have 21 calendar days to provide their written comments on a recommendation.

[62] There is no standard of review analysis to be conducted in considering issues of procedural fairness. Deference is not to be afforded in such circumstances. In approaching the procedural fairness analysis, I have found instructive the comments of Fichaud, J.A. in **Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.**, 2010 NSCA 19, who writes:

> [30] The judge gave no deference to the arbitrator in the judge's assessment of procedural fairness. With that, I agree. I note parenthetically that deference is not withheld because of any standard of review analysis. The judge is not reviewing the tribunal's ultimate decision, to which a "standard of review" is accorded. Rather, the judge assesses the tribunal's process, a topic outside the typical standard of review analysis. In *Nova Scotia (Provincial Dental Board) v. Creager*, 2005 NSCA 9, this court said:
>
> > [24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Berube v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Basterache, J. dissenting. As stated by Justice Binnie in *C.U.P.E.*, at para. 102:

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dube (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

[25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

To the same effect: *Moreau-Berube v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74; *Nova Scotia v. N.N.M.*, para 39; *Allstate Insurance Company v. Nova Scotia (Insurance Review Board)*, 2009 NSCA 75, para 11.

[31] From the same perspective, in *Kelly*, Justice Cromwell described the two step approach to procedural fairness analysis:

> [19] The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness - in other words, that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: *C.U.P.E*. at para. 102.
>
> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first

> addresses the content of the Board's duty of fairness and the second whether the Board breached that duty.
>
> [32] Though the reviewing judge does not conduct "standard of review" analysis for procedural fairness, the judge must still determine the content of the duty of fairness. That duty does not just replicate the courtroom model. The duty's content is context specific and depends on various factors, including the tribunal's delegated room to manoeuver that is contemplated by its governing statute, the nature of the tribunal's decision and the decision's importance to the parties: *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, at para 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, at para 31-32; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para 79; *Moreau-Berube,* para 74-75; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 21-28; *Kelly*, para 21-33; *Creager*, para 25, 100-107; *Nova Scotia v. N.N.M.*, para 40-98 and authorities there cited.

[63] In the present instance, the real issue before the Court is not whether a duty of fairness was owed to the CBRM and CUPE by the Commission, but the content of that duty. As the authorities cited above by Fichaud, J.A. disclose, the concept of what constitutes "procedural fairness" is one of great flexibility, varying based upon the context of each case.

[64] In **Baker v. Canada (Minister of Citizenship and Immigration), supra,** Justice L'Heureux-Dubé identified a non-exhaustive list of factors which are of assistance in determining the content of procedural fairness owed in any particular situation. These are: (1) the nature of the decision; (2) the nature of the statutory scheme; (3) the importance of the decision to the individuals affected; (4) the

legitimate expectations of the person challenging the decision; and (5) the procedural choices of the decision-maker.

[65] Ultimately, the determination will be driven by fairness to the parties, as noted by Justice L'Heureux-Dubé as follows:

> [22] ... I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[66] I now turn to consider the **Baker** factors in the present context. In terms of the first factor, Justice L'Heureux-Dubé directs " The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."

[67] As noted earlier herein, the function of the Commission in making a referral decision is an administrative one, screening complaints with little inquiry into the ultimate merits of the complaint. As noted by Cromwell, J. in **Halifax (Regional**

Municipality), supra, the Commission does not make any final determination about a complaint's "ultimate success or failure"; that is left to a Board of Inquiry. Given the Commission's decision is not adjudicative in nature, this factor points to a lower level of procedural fairness.

[68] On the second factor, which considers the statutory scheme, Justice L'Heureux-Dubé explains in **Baker, supra**:

> [24] ... The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at pp. 7-66 to 7-67.

[69] Here, the referral decision is obviously not determinative of the complaints made against the CBRM and CUPE. The legislative provisions outlined above establish that a BOI, once constituted will be charged with determining the complaint and such legal issues which may be posed relating thereto. This process will afford the CBRM and CUPE the ability to fully challenge the merits of the complaints, including a statutory right of appeal to the Nova Scotia Court of Appeal. This factor, therefore, also points to a lower level of procedural fairness.

[70] The third factor asks the Court to consider the importance of the referral decision to the lives of those affected. As submitted by the CBRM, to have a human rights complaint referred to a BOI is a significant occurrence. The obligation to respond is an undertaking of considerable effort, utilizing valuable resources. I agree. However, this factor also requires a consideration of the importance to other parties, namely the complainants who also view the referral decision as one of great significance. Given the importance to both parties, I am unable to conclude that a higher level of procedural fairness should be afforded in these circumstances.

[71] The fourth factor, the legitimate expectations of the parties considers, amongst other things, how a decision maker has acted in the past. Justice L'Heureux-Dubé writes:

> [26] ... This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[72] Here, the CBRM and CUPE were surprised by the Commission's choice of a direct referral without investigation, settlement attempts or notification. The Commission acknowledges the direct referral mechanism, although utilized before, is not typical. Past and usual practices, both those specified in policy and otherwise may have lead the CBRM and CUPE to expect the Commission to approach the referral decision differently. This factor points to a higher degree of procedural fairness to be afforded.

[73] The last factor is described by Justice L'Heureux-Dubé as follows:

> 27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, per Gonthier J.

[74] This factor points to deference being afforded to the Commission in terms of the procedures it choses to implement. In totality, the above factors lead to a low level of required procedural fairness.

[75] I turn now to consider the Commission policies relating to referrals. Policy 2.0 - "File Evaluation" provides that "Commission staff will decide the process used to resolve a complaint, taking into consideration the circumstances and the parties involved." There are various options for resolving complaints including "Resolution Conference, External Mediation, and Alternative Investigation Methods."

[76] A review of Policy 3.0 - "Resolution Conferences" establishes that such would not be applicable to a direct referral under section 32A. That process appears to be contemplated in Policy 4.0 - "Alternative Investigation Methods". For the purposes of the procedural fairness consideration, Policy directives 4.5.1 and 4.5.2 are particularly relevant. They provide:

> 4.5 Policy Directives
>
> 4.5.1 Alternative Investigation Methods include, but are not limited to an Administrative Investigation, forming an investigation team, or recommending a direct referral to a Board of Inquiry without an investigation.
>
> 4.4.2 Commission staff will notify parties of the Alternative Investigation Method that will be used to investigate the complaint.

[77] It would appear Policy 5.0 - “Recommendations” also has applicability. The Policy Statement contained in 5.4 provides:

> 5.4 Policy Statement
>
> Commission staff will recommend complaint file outcomes, either dismissal or referral to a Board of Inquiry for unresolved disputes. Parties will have an opportunity to provide comments on these recommendations before the decision is made.

[78] Further, Policy 5.5.8 reads:

> 5.5.8 Commission staff may recommend in writing that Commissioners refer a complaint to a Board of Inquiry under s. 32A of the *Act* to determine if discrimination has occurred. Parties will have an opportunity to comment on the recommendation. This recommendation will be made within 14 days of a completed Resolution Conference.

[79] Finally, in Policy 7.0 - “Submissions to Recommendations”, “the parties to a complaint have a right to comment in writing on a recommendation to close or refer a file to a Board of Inquiry” (7.4) and that a copy of such submitted comments are to “accompany the recommendation when it is placed before the Director / Commissioners” (7.5.3).

[80] The CBRM argues that none of the above policies were adhered to in the present case. Of greatest significance however, is that CBRM was not advised of

the recommendation to refer, and did not accordingly have the opportunity to place before the Commission its written response prior to them reaching their referral decision.

[81] The CBRM argues that because of this error, the Commissioners had only Mr. Hashey's inaccurate characterization of the status of the law. If CBRM had been given an opportunity to respond, the Commissioners would have understood that based on the authority of **Talbot, supra**, proceeding with the new complaints would be an abuse of process. As such, the CBRM (and CUPE) was denied the opportunity to have the complaints dismissed prior to a BOI being appointed.

[82] In order to determine whether procedural fairness has been denied to the CBRM and CUPE, the broader context must be considered. Notwithstanding a lack of notification regarding Mr. Hashey's planned recommendation for a direct referral without investigation, it would appear as if the CBRM and CUPE had some indication that the Commission may be considering referring a complaint, identified as Mr. Foster's, to a BOI. The Amended Record includes correspondence from both Mr. Durnford on behalf of the CBRM and Ms. Coen on behalf of CUPE. Although these letters were written without the benefit of

knowing the number of complaints and particular details, Mr. Durnford's letter of June 19, 2012, in particular, clearly articulates why the CBRM views **Talbot, supra** as determinative of the complaints of age discrimination in light of the legislative provisions and Supreme Court of Canada jurisprudence.

[83] These letters, placed before the Commission would have provided a clear indication that the basis for Mr. Hashey's recommendations, at least on the application of case authorities would be vehemently opposed. It must be remembered that the Commission's function in making a referral decision was not to assess whether Mr. Hashey's view of the facts and status of the law was correct, but whether, in all the circumstances, including the letters received from the CBRM and CUPE, a referral was warranted. As Cromwell, J. noted in **Halifax (Regional Municipality), supra**, it is "only where there is no reasonable basis in law or on the evidence to support the Commission's decision that an inquiry by a board of inquiry is warranted in all the circumstances would it be appropriate to overcome judicial reluctance to intervene" (paragraph 51).

[84] The Commission had, although not in strict compliance with policy, an understanding of the CBRM and CUPE's position regarding the need and

appropriateness for a referral to a BOI. Mr. Durnford's letter in particular could reasonably be interpreted as a strong indicator that settlement attempts would be futile. Given the complexity of the issues being raised, including arguments of abuse of process centred upon legislative provisions which had been amended, the Commission had, in my view, a reasonable basis for asking a BOI to address these contentious issues.

[85] I cannot conclude that in the circumstances of this case, even with some procedural irregularities noted, the CBRM or CUPE were deprived of fairness. In so deciding, I have found particularly helpful the recent comments of Coughlan, J. in **Brant v. Nova Scotia (Human Rights Commission)**, 2013 NSSC 56, where the Court found that a procedural error did not create "manifest unfairness". He writes:

> 21 ... Mr. Brant was not given a copy of the submission. Procedural fairness requires a complainant receive copies of any submission filed by the party which is the subject of a complaint so that the complainant has the ability to respond.
>
> 22 Does this error by the Commission require Mr. Brant's complaint be referred back to the Commission for reconsideration? The issue of procedural errors was addressed in Administrative Law in Canada, Fourth Edition by Sara Blake where the author stated at page 23:
>
> > "To determine whether fair procedure has been followed, one must examine the entire proceeding. Although procedural irregularities at one stage may appear to have prejudiced a party's rights, they may diminish in

> significance if the party has been accorded a full and fair hearing at a later stage in the proceeding. A tribunal may cure its procedural defaults. In the end, the party may be seen not to have suffered any prejudice."

and at page 214:

> "The question of procedural fairness is concerned with the manner in which the tribunal went about making the decision." ...
>
> A court will interfere with a tribunal decision because of procedural errors committed by the tribunal only if those errors resulted in manifest unfairness to the right of a party to be heard. Minor procedural lapses that do not result in unfairness to the complaining party will not persuade a court to overturn the tribunal decision." ...

[86] Although the Court has some level of discomfort with the delay in notification, and procedural irregularities noted, based on the above analysis, I cannot conclude that CBRM and CUPE were denied procedural fairness so to justify a quashing of the referral decision.

c) Does the referral to a BOI constitute an abuse of process?

[87] Having determined that the Court should not intervene relating to the Commission's interpretation of the *Act*, or on the basis of a lack of procedural fairness, I now turn to consider whether the referral to a BOI constitutes an abuse of process.

[88] As noted earlier herein, the Commission has not made a determination that to fully hear a complaint relating to whether the CBRM's pension plans fall within the exemption contained in section 6(g) of the *Act* would be an abuse of process. This Court heard extensive arguments as to why such an inquiry would be an abuse of process. Conversely, Mr. Foster put forward a compelling argument as to why the referral decision, and a further inquiry would not constitute and abuse of process. Based on the submissions received, I could render a decision on that issue; but the paramount consideration is should I?

[89] A BOI has wide powers to resolve issues before it, including whether a matter proceeding would constitute an abuse of process. The legislature intended for a BOI to undertake that type of analysis, as part of the human rights regime it created. In my view, given the absence of any other reason to interfere with the functioning of the BOI, this Court should not intervene. To do so would to overstep the boundaries so clearly articulated by Cromwell, J. in **Halifax (Regional Municipality), supra**.

[90] I decline to quash the referral decision as an abuse of process and leave it to the BOI to determine, perhaps as a preliminary matter if it deems appropriate, whether proceeding with an inquiry would be an abuse.

d) If the referral decision is found to be unjustified, what is an appropriate remedy?

[91] Given the conclusions reached above, this Court does not need to consider the remedies proposed by the CBRM, most notably the request for prohibition.

CONCLUSION

[92] The application for judicial review brought by the CBRM is hereby dismissed. The stay previously granted in relation to the complaints proceeding to a BOI is hereby lifted. Should the parties hereto be unable to agree with respect to the costs arising from this proceeding, the Court will receive and consider written submissions.

J.