SUPREME COURT OF NOVA SCOTIA

Citation: *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11

Date: 2017-01-11
Docket: Hfx No. 453841
Registry: Halifax

Between:

Deborah Wright, Bonnie Barrett, Roxanne Barton, Pamela Chandler, Michele Cox, and The North End Community Health Society ("NECHS")

Applicants

v.

The Nova Scotia Human Rights Commission, The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

Judge: The Honourable Justice James L. Chipman

Heard: December 15, 2016, in Halifax, Nova Scotia

Counsel: Vincent Calderhead, for the Applicants
Kymberly Franklin, for The Nova Scotia Human Rights Commission
Dorianne Mullin, for The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia

Orally by the Court:

Introduction

[1] By Notice for Judicial Review filed July 25, 2016, the Applicants request judicial review of what they allege to be an unreasonable decision of the Respondent, The Nova Scotia Human Rights Commission (the Commission). On July 28, the Commission filed a Notice of Participation stating their decision should be upheld. By Notice of Participation filed August 8, the other Respondent, the Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia (the Province) says the decision should not be disturbed.

Background

[2] At the relevant times, the individually named Applicants all received Employment Support and Income Assistance (ESIA) benefits. All five received the basic personal allowance amount of $275 per month. Additionally, due to their medical conditions, the five Applicants received additional amounts of funding (on top of the $275) for special diets.

[3] The Province introduced special diet allowances in 1996. Over the past 20 years, in recognition of inflation, the Province has increased the basic food allowance 11 times. Through the same period, the accommodative (additional) food allowances required by recipients (including the individual Applicants) with certain specified medical conditions have remained static.

[4] The sixth Applicant, the North End Community Health Society (NECHS), has among its goals the promotion of equality for low-income people with disabilities.

[5] On August 10, 2015, the Commission received a complaint filed by counsel on behalf of the Applicants. In his covering letter, Mr. Calderhead stated:

> The five individuals all claim to have been personally discriminated against while the NECHC (sic) is an "aggrieved person" within the terms of the *Human Rights Act*.
>
> *Summary of the Complaint*

> As will be plain from reviewing the complaint, we claim that, for the past 20 years, the Respondent's social assistance regulations and policies regarding food allowances have and continue to discriminate against people with disabilities.
>
> Specifically, we complain that while the Respondent has periodically increased the value of food allowances needed by persons without disabilities, it has completely failed to ever increase the accommodative food allowances ("Special Diet Allowances") required by persons with disabilities.

[6] By letter dated September 3, 2015, a Human Rights Officer acknowledged receipt of the complaint and stated:

> In order for the Commission to proceed with a complaint, there must be sufficient evidence, at face value, to suggest that a person has been disadvantaged in one of the protected areas covered in the *Human Rights Act* because of one of the protected characteristics listed in the Act.
>
> After careful review of the information you provided, it has been determined that we can proceed with your complaint.

[7] The author of the letter went on to note that the Applicants' information was referred to Melanie MacNaughton, a human rights officer with the Commission.

[8] On September 9, 2015, a manager with the Commission completed a "File Evaluation for an Alternative Investigation Method" form, noting the reason why the complaint was not appropriate for a resolution conference was due to "systemic discrimination issues". For an explanation of this, the manager noted:

> Complainants have already met with Officials from the PNS [the Province] to resolve issues in complaint and it was not resolved; issues are related to policy and are systemic.

[9] The recommended alternative investigation method (rather than a resolution conference) was "Administrative Investigation".

[10] Ms. MacNaughton prepared an investigation report dated March 2, 2016. Appended to her 56 para. report is the Applicants' complaint form and ESIA special diet rate schedule. The first 40 paras. of the report deal with:

- Nature of allegation
- Undisputed background information
- Parties and persons involved

- Complainants' position
- Respondent's position

[11] The author then poses this question:

> Does the evidence support a case of discrimination on account of disability alleged by the Complainants? If the evidence supports a case of discrimination on account of disability, does the Respondent have a valid, non-discriminatory defence?

[12] Ms. MacNaughton then goes over the "evidence for individual allegations and issues", citing six documents and providing background as follows:

- **ESIA Special Diet Rate Schedule** was reviewed. Provides criteria/approved monthly amounts according to various conditions requiring a special diet (attached as Appendix "B").
- **24(1)(a) of the ESIA Act and Regulations** defines "special needs" as an item of service with respect to, among things, special diet. Other items and services listed include dental care, optical care, pharmacare, transportation, child care, implementation of an employment plan and funeral arrangements.
- **Appendix "A" of the ESIA Regulations** sets out the prescribed allowance for special needs and indicates up to $150.00 for special diet.
- **ESIA Program Policy 6.2.32** provides guidance regarding special needs diets.
- **DCS Social Assistance Policy Appendix "C"** (December 5, 1997) for Halifax Region Special Diet Rates reveal similar monthly amounts as the Special Diet Rate Schedule above.
- **Can Nova Scotians afford to eat healthy? Report on 2012 Participatory Food Costing** published in partnership with the NS Department of Health and Wellness was provided by the Complainants and says "*Special diet allowances…(have not increased since 1998), making it difficult for those on Income Assistance to meet their special dietary needs. Increasing special diet allowances for individuals receiving Income Assistance in Nova Scotia is an investment in improved population health.*"

[13] The report concludes with a seven para. "Analysis" ending with this:

> Since this complaint deals with an issue affecting a number of disabled income assistance recipients and given the systemic nature of this complaint and the parties interpretations of the case law on the issues involved in this complaint, it

> seems that it would be appropriate to refer this complaint to a board of inquiry to provide a legal analysis on the parties legal interpretations.

[14] Following this para., Ms. MacNaughton ends her report with the following remarks, under the heading, "Recommendation":

> An Investigation Report does not determine whether or not there has been discrimination. It determines if there are allegations which, if proven on a balance of probabilities, would establish discrimination on the grounds alleged in the complaint. A Board of Inquiry can only be appointed by the Human Rights Commissioners, not by Commission staff. The appointment of a Board of Inquiry is the final internal step in the Commission's process and a number of factors have to be considered by the Commissioners before a Board of Inquiry is appointed, such as deciding whether or not it is in the public interest to appoint a Board of Inquiry.
>
> I recommend, based on the available information, the complaint be referred to a Board of Inquiry pursuant to Section 32A(1) of the *Human Rights Act* to determine whether discrimination has occurred on account of disability with respect to provision of or access to services.

[15] On March 22, Ms. MacNaughton prepared a memorandum for the Commission's Board of Commissioners. She provided these four documents for the Commission's "consideration and disposition":

- Copy of complaint form
- March 2, 2016 investigation report
- Respondent's March 10, 2016 submission to investigation report
- Complainants' March 22, 2016 submission to investigation report

[16] She concluded her memorandum as follows:

> The information reveals that all complainants receive the same personal allowance and increases to this rate as others on income assistance who are not disabled; however, since special diet allowances were incorporated as a special needs item, these rates have never increased. Since this complaint deals with an issue affecting a number of disabled income assistance recipients, given the systemic nature of this complaint and the party's interpretations of the case law on the issues involved, it seems appropriate to refer this complaint to a board of inquiry to provide a legal analysis on the issue.

> At the party's requests, the maximum 5 page submission was waived and each have provided submissions to the Investigation Report; however, my recommendation remains the same.
>
> I recommend, based on the available information, the complaint be referred to a Board of Inquiry pursuant to Section 32A(1) of the Human Rights Act to determine whether discrimination has occurred.

[17] The matter was presented to the Commissioners on the second day of their April 20 and 21, 2016 board meeting. The minutes disclose that there were 16 investigation reports and updates reviewed by the Commissioners and beside no. 6, the following is noted:

Item		**Discussion**	**Motion**	**Action**
6	Deborah Wright et al v. Province of Nova Scotia (Department of Community Services)	The matter was deferred for a legal opinion on several issues, including the nature of the disability, the appropriateness of North End Community Health Centre as a party to the complaint, and limitation period.		Complaint deferred to June Commission meeting.

[18] The June 16 and 17, 2016 Board Meeting minutes show this matter came up on the first day. Under item E the following is disclosed:

Item		**Discussion**	**Motion**	**Action**
E	**LEGAL INFORMATION AND ANALYSIS**			
2	Deborah Wright et al v. Province of Nova Scotia (Department of Community Services)	K. Franklin presented a legal opinion on several issues, including the nature of the disability, the appropriateness of North End Community Health Centre as a party to the complaint, and	Carried	Letters to be sent to parties notifying them of the decision

		limitation period. It was moved by K. Armour and seconded by D. Prasad that the complaint be dismissed pursuant to Section 29(4)(f) of the *Human Rights Act* because there is no likelihood that an investigation will reveal evidence of a contravention of this Act.		

[19] By letter dated June 23, 2016, the Commission Chair wrote counsel for the Applicants as follows:

> We are writing to advise you that the above-named complaint was discussed at the meeting of the Commissioners of the Nova Scotia Human Rights Commission held on June 16, 2016.
>
> After a thorough review of the matter, the Commissioners decided that based on the available information, the complaint is dismissed pursuant to Section 29(4)(f) of the *Human Rights Act* because there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act. Decisions by the Commissioners of the Nova Scotia Human Rights Commission are final.
>
> Thank you for your cooperation as the process proceeded.

[20] An identical letter dated June 23, 2016 was sent to counsel for the Province.

Positions of the Parties

Applicants

[21] The Applicants say the decision is unreasonable because the Commission dismissed their complaint under s. 24(4)(f) of the *Human Rights Act*, R.S.N.S., c. 214, s. 1 (*HRA*), notwithstanding that Ms. MacNaughton had already carried out a six-month long investigation. They point out that following the investigation, consistent with her March 2 report, Ms. MacNaughton's March 22, 2016 memorandum to Commissioners recommended the matter be referred to a Board of Inquiry.

[22] In the Notice for Judicial Review, the Applicants request an Order:

> (1) In the nature of *certiorari* setting aside the Commission decision;
> (2) A declaration that the Commission's decision is unreasonable;
> (3) An order remitting the matter back to the Commission for decision in accordance with the Court's reasons; and
> (4) Such other relief as this Court may permit.

[23] In their rebuttal brief, the Applicants submit that the interests of justice are best served by the Court, either:

> (1) Setting aside the impugned reasons for decision while also going on to determine the alternative grounds proposed by the grounds and then remitting; or
> (2) Setting aside the impugned decision, remitting the matter to the Commission in accordance with the Court's reasons which address the question of whether a *prima facie* case of discrimination has been made out.

The Commission

[24] The Commission asserts that it has a screening function and public policy role in determining whether or not to refer a complaint to a Board of Inquiry. They acknowledge that the citing of subsection 29(4)(f), "does not correspond to the fact that there clearly was an investigation of the matter and a report produced afterward." Given that s. 24(4)(f) was referenced, this Respondent goes on to suggest that there could have been an error in the recording of the minutes or in stating the motion to be passed.

[25] The Commission argues that the Court should regard the citing of s. 29(4)(f) as an error. Accordingly, this Respondent requests that the matter be returned to the Commissioners, "for a correction and that the dismissal not be overturned. An error in recording should not render a decision overturned."

The Province

[26] The Province says that it was reasonable for the Commission to review the information and to dismiss the complaint pursuant to s. 29(4)(f). Further, this Respondent says that it would have been equally reasonable for the Commission to have dismissed the complaint as it is without merit (s. 29(4)(b)) and/or on the ground that it raises no significant issues of discrimination (s. 29(4)(c)).

[27] The Province says the Court should not disturb the decision. They take the position that the Commission had sufficient information before it to reach a reasonable conclusion that the complaint must be dismissed. They point out that the Commission had the positions of the parties along with a legal opinion. In the result, the Province says that the decision is reasonable and should be left to stand with the Application for Judicial Review dismissed.

Issues Requiring Determination by the Court

1. Whether the Commission's decision was reasonable?

2. What is the proper remedy?

Discussion of Issue 1 - Whether the Commission's decision was reasonable?

[28] The parties agree that the Commission's decision to refer complaints to a Board of Inquiry or, alternatively, to dismiss them are subject to review on the standard of reasonableness (see *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 at para. 62). This standard inquires, "whether [the Commission's] decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at para. 47).

[29] For the latest word on what constitutes reasonableness, I turn to Justice Fichaud in *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90 at paras. 22-23:

> [22] In *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, Justice Moldaver, for the majority, explained reasonableness:
>
> > [20] … However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.
> >
> > …
> >
> > [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. … The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
> >
> > [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. This 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.
>
> …
>
> [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 [citations omitted]
>
> …
>
> [40] The bottom line here, then, is that the Commission holds the interpretive upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. …
>
> [Justice Moldaver's italics]

[23] Similarly, in *Egg Films Inc. v. Nova Scotia (Labour Relations Board)*, 2014 NSCA 33, leave to appeal denied September 25, 2014 (S.C.C.), the majority said:

> [26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analyzing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one, and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. [citations omitted]
>
> …
>
> [30] Reasonableness isn't the judge's quest for truth with a margin for tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan, supra*, at paras. 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras. 11-17.

[30] Reasonableness was determined to be the standard in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at paras. 25-27. In addition, Justice Cromwell held that significant deference is to be given to the Commission's decision whether to refer a matter to a Board of Inquiry. In *French v. Nova Scotia (Human Rights Commission)*, 2012 NSSC 395, Justice Muise noted that the same deference is to be accorded to decisions dismissing complaints. As he stated at para. 29, referring to *Halifax*, "that view is supported by the inclusion of the words "or not" in para. 21, and of the words "or failure" in para. 24."

[31] In *Green v. Nova Scotia (Human Rights Commission)*, 2011 NSCA 47, our Court of Appeal had cause to review a decision of the Commission. The Commission had dismissed a complaint, stating that it was "without merit". Ms. Green filed a motion for judicial review of the Commission's decision on the basis of its failure to provide reasons and, alternatively, that it was unreasonable. Bryson, J. (as he then was) rejected Ms. Green's arguments and dismissed her appeal. In dismissing the appeal from Justice Bryson's decision, Justice Oland touched on s. 29(4) of the *HRA* noting at para. 31:

> The Legislature entrusted the Commission, which has specialized expertise in the field of human rights, to screen complaints of alleged violations of such rights. It authorized it to dismiss a complaint at any time for any of the reasons set out in s. 29(4), including that it is "without merit".

[32] Further on at para. 41, she noted:

> According to the record, the Commission considered all the material, including the submissions of the parties, relating to the appellant's complaint against the University. Its dismissal of her complaint as "without merit" falls within one of the subcategories in s. 29(4) where it may exercise its discretion to dismiss. Its decision revealed not only <u>what</u> the Commission decided, namely, dismissal of the complaint, but also <u>why</u>, namely, having assessed the evidence, the Commission did not consider it sufficient to warrant referral to a board of inquiry.
>
> [Justice Oland's underlining]

[33] Later on at para. 44, Justice Oland noted that her determination that the Commission need not provide more extensive reasons for its decision did not preclude her from reviewing the decision for reasonableness. She then concluded her decision as follows at paras. 47 and 48:

> The Commission had the Investigation Report, the appellant's complaint, and the written arguments of the parties before it. It was able to consider the positions of the parties and to appropriately draw inferences from the entire body of evidence to conclude that the complaint should not be referred to a board of inquiry.
>
> Having reviewed that material and considered the arguments put forward by the appellant and the University, it is my view that the Commission's decision to dismiss the complaint falls within the range of acceptable outcomes which are defensible in respect of the facts and the law. I would dismiss this ground of appeal.

[34] The Record confirms that prior to arriving at their decision in this case, the Commission received:

- the Applicants' submissions
- the Province's submission
- Ms. MacNaughton's report, inclusive of the evidence she reviewed
- Ms. MacNaughton's memorandum
- a legal opinion provided by Commission counsel

[35] With the exception of the (privileged) legal opinion, I have reviewed all of the above material. On the basis of my review, I am of the opinion that a decision to either refer or not to refer the matter to a Board of Inquiry could constitute a reasonable decision. I would add that the Commission is not bound to follow the investigating officer's recommendation (see *Nova Scotia (Human Rights Commission) v. Annapolis Co. (Municipality)*, 2006 NSCA 55 at para. 24).

[36] Notwithstanding the strong body of caselaw favouring deference to the Commission and my determination that a decision going either way could be reasonable, I am of the view that the impugned decision is unreasonable. I make this finding given that the Commission's decision relied on a section of the *HRA* which, in context, does not make sense. After all, the facts disclose Ms. MacNaughton embarked on a six month investigation before making her recommendation. In rejecting her recommendation, the Commission said in their letter(s) communicating the decision that their reason not to refer was pursuant to s. 29(4)(f). The Commission's letter tracks the language of the subsection verbatim; i.e., "because there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act [*HRA*]." Given that an investigation had already taken place, I am of the view that this rationale does not make sense and therefore the decision is unreasonable. Indeed, when I recall Justice Fichaud's

words in *Egg Films*, I find that the Commission's analytical path is flawed (by relying on s. 29(4)(f)) and therefore their outcome is unreasonable.

[37] Scrutiny of the entirety of the Record reveals that the Commission did not inadvertently refer to this section. For example, the June 16, 2016 minutes also refer to s. 29(4)(f) and track the same language. Furthermore, it is clear from the Record that at no time did the Commission cite s. 29(4)(c) or (d).

[38] As part of their argument, the Province suggested either s. 29(4)(c) or (d) could found the decision not to refer. Similarly, Commission counsel argued an error must have been made in the recording of the section relied upon. Based upon my review of the Record, I categorically reject these submissions. In my view, had the Commission intended to rely on an alternative section, it was open for them to say so. They did not. Further, no evidence has been proffered to the effect that an error was made. Finally, it is apparent that the language of the s. 29(4)(f) was tracked, word for word, in the board minutes and letters signed by the Commission chair communicating the decision to the parties.

Discussion of Issue 2 - What is the proper remedy?

[39] Given my finding that the Commission's decision is unreasonable, my focus is on the remedies requested by the Applicants. In their Notice for Judicial Review, the Applicants firstly request an order in the nature of *certiorari*. *Certiorari* is a means of achieving judicial review. It is a common law writ issued from a superior court (such as the Nova Scotia Supreme Court) to a tribunal of inferior jurisdiction (such as the Commission). Nova Scotia's new *Civil Procedure Rules* came into effect on January 1, 2009. Under the former regime, Rule 56 maintained separate procedures for *mandamus*, *prohibition*, *certiorari, habeas corpus* and *quo warrento*, even if all these prerogative writs were sought by way of an application commenced by originating notice. The new Rule 7 provides for one common procedure for judicial review, commenced by the Notice for Judicial Review.

[40] Having regard to Rule 7, given my determination that the Commission's June 23, 2016 decision is unreasonable, I am of the view it should be quashed and set aside.

[41] More problematic are the Applicants' requests (contained in their reply brief) that the order:

- set aside the impugned reasons for the decision while also going on to determine the alternative grounds proposed by the Province, and then remitting it; or

- set aside the impugned decision, remitting the matter to the Commission in accordance with the Court's reasons which address the question of whether a *prima facie* case of discrimination has been made out.

[42] In my view, the above remedies are more in the nature of *mandamus*. *Mandamus* is a discretionary prerogative writ issued by a superior court and used to compel public authorities to perform their duties. An order of *mandamus* does not issue as of right and will not ordinarily be granted where another remedy is available. In considering a human rights case under former Rule 56, Saunders J. (as he then was) noted in *Nova Scotia (Executive Council) v. Kaiser*, 1999 CanLII 19098 (NS SC) at p. 6:

> When the Human Rights Commission fails in its duty to act fairly, the appropriate step is to seek relief from a court of superior jurisdiction for an order in the nature of certiorari. And when a Human Rights Commission fails in its duty to act fairly with respect to the dismissal of a complaint, the superior court ought refer the entire matter back to the Commission to be dealt with in accordance with the principles of fairness.

[43] Very recently in *Nova Scotia (Agriculture) v. Rocky Top Farm*, 2017 NSCA 2, Justice Saunders had cause to interpret Rule 7.11, noting:

> [92] There is nothing in *CPR* 7.11 which would suggest departing from the standard practice which is to frame and remit the question that the administrative decision-maker failed to ask or answer, for a proper determination.
>
> [93] The provisions of *CPR* 7.11 do not purport to present an exhaustive list of judicial relief. Rather, the Rule introduces a list of five possibilities by saying:
>
> > **Order following Review**
> >
> > **7.11** The court may grant any order in the court's jurisdiction that will give effect to a decision on a judicial review, including any of the following orders:
> >
> > (Underlining mine)
>
> …

> [95] *Civil Procedure Rule* 7.11 does not lessen, modify or abrogate the Supreme Court's inherent jurisdiction, as expressly provided for in s. 41(g) of the *Judicature Act*, RS c.240, s.1 which states:
>
> > Rules of law
> >
> > 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
> >
> > ...
> >
> > (g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;
>
> [96] It is settled law that the Court's inherent jurisdiction includes the authority to refer a matter back to the administrative decision-maker to be reconsidered. (See for example Sara Blake, *Administrative Law in Canada*, 4th ed. (Toronto: LexisNexis, 2006) at pp. 226-228; *Walker v. Keating* (1973), 6 N.S.R. (2d) 1 (S.C.(A.D.)); *Chandler et al. v. Alberta Association of Architects, et al.*, [1989] 2 S.C.R 848; *MacEachern v. Workers' Compensation Board (N.S.),* 2003 NSCA 45; *Nova Scotia (Community Services) v. Brenna*, 2006 NSCA 8; and *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts),* 2016 NSCA 80.

[44] Accordingly, I have decided to refer the matter back to the Commission for re-consideration. As a result, I do not propose to decide (as the Applicants have invited me to) the alternative grounds proposed by the Province and/or address the question of whether a *prima facie* case of discrimination has been made out. In due course, if the Commission decides to send the matter on to a Board of Inquiry, it will be the Board's role to make the call.

[45] By way of conclusion, two further issues require the Court's attention. Firstly, I feel compelled to address Commission counsel's contention that in the event of a referral back to the Commission that an entirely new investigation should occur. I would strongly urge the Commission not to proceed with a new investigation. In this regard, the within case is readily distinguishable from *Tessier*

v. Nova Scotia (Human Rights Commission), 2014 NSSC 65. In *Tessier*, Justice LeBlanc made key findings that the investigator breached procedural fairness (para. 66) and that the investigation was not thorough (para. 67). He accordingly quashed the Commission's decision and remitted the matter back with another investigation to be conducted by an investigator with no prior involvement with the complaint (para. 70). Here, I have found no such flaws in Ms. MacNaughton's investigation. Indeed, the Record reveals a thorough investigation and, not surprisingly, the parties have not alleged any problems. In the result, the re-consideration I have ordered should not involve a fresh investigation.

[46] The final issue which I will address concerns the Province's alternative argument that it was reasonable for the Commission to dismiss the complaint against the NECHS. Although not mentioned in their Notice of Participation, the Province made this submission in both their brief and oral argument. The "gist" of their argument is that the NECHS should not be regarded as an "aggrieved person" under the *HRA*.

[47] When I review the Record, it is clear that the Province made an identical argument before the Commission; however, there is nothing in the Record, inclusive of the decision whereby the Commission decided to single out or exclude the NECHS. In the result, I have decided the Commission should re-consider the entirety of the matter in respect of all of the Applicants.

Conclusion

[48] In conclusion, I will not decide the alternative grounds proposed by the Province and/or address the question of whether a *prima facie* case of discrimination has been made out. Rather, consistent with our Court of Appeal's approach, I choose to refer the entire matter back to the Commission to be dealt with in accordance with the principles of fairness and transparency but without a new investigation. At the same time, I will leave it to the Commission (in the event they decide to refer the matter to a Board of Inquiry) to decide whether to entertain the Province's (alternative) argument that the claim made by the NECHC should be dismissed.

[49] Accordingly, I hereby quash the decision of the Commission and order that the matter be reconsidered at their next board meeting. The decision should then be communicated to the parties in the clearest of terms. In all of the circumstances, I decline to award costs.

Chipman, J.