

**NEWFOUNDLAND AND LABRADOR HUMAN RIGHTS COMMISSION  
BOARD OF INQUIRY**

**BETWEEN:**

**DESIREE A. DICHMONT**

**APPLICANT**

**AND:**

**HER MAJESTY THE QUEEN IN RIGHT OF  
NEWFOUNDLAND AND LABRADOR, AS  
REPRESENTED BY THE MINISTER OF  
GOVERNMENT SERVICES AND LANDS**

**FIRST RESPONDENT**

**AND:**

**NEWFOUNDLAND AND LABRADOR  
HUMAN RIGHTS COMMISSION**

**SECOND RESPONDENT**

**BEFORE:      Adjudicator, Robby D. Ash**

**Place of Hearing:      Carbonear, NL**

**Dates of Hearing:      January 5 – 6, 2016**

**Date of Decision:      May 11, 2017**

**Appearances:      Philip Fourie; Derek Nowak  
and Deina Warren**

**Appearing on behalf of  
the Applicant**

**David G. Rodgers and Mark Sheppard**

**Appearing on behalf of  
the First Respondent**

**Donna Strong**

**Appearing on behalf of  
the Second Respondent**

**RULING ON MOTION TO RESTRAIN THE COMMISSION'S PARTICIPATION**

Desiree Dichmont, (the "Complainant"), resigned as a marriage commissioner when the Province insisted that marriage commissioners perform same sex marriages. The Complainant's resignation was motivated by her religious convictions. She subsequently filed a complaint with the Newfoundland and Labrador Human Rights Commission (the "Commission") alleging discrimination on the basis of religion. That application was summarily dismissed by the Commission without being referred to a Board of Inquiry for a full hearing. Following the

dismissal of her complaint, the Complainant filed an Originating Application with the Supreme Court of Newfoundland and Labrador, Trial Division (General) seeking judicial review of the Commission's decision. Justice Alphonsus E. Faour held the Commission's decision to summarily dismiss the complaint to be unreasonable and, pursuant to section 35 of the *Human Rights Act, 2010*, SNL 2010, c. H-13.1 (the "Act"), directed the Commission to refer the matter to this board of inquiry for adjudication.

At the outset of this hearing, the Complainant raised an issue regarding the proper role of the Commission in these proceedings. The Complainant submitted that the Commission should be a party to the hearing but should be precluded from arguing against the substantive merits of the complaint. The parties have asked Board of Inquiry to rule on this issue prior to proceeding with a hearing on the substance of the complaint.

**Does the Board of Inquiry have the jurisdiction to restrict or direct how the Commission may participate in a hearing before the Board?**

Section 37 of the Act establishes who the parties are to a complaint before a Board of Inquiry:

37. (1) The parties to a proceeding before a board of inquiry with respect to a complaint are
- (a) the commission, which shall have the carriage of the complaint;
  - (b) the person named in the complaint as the complainant;
  - (c) a person named in the complaint who is alleged to have been dealt with contrary to this Act;
  - (d) a person named in the complaint who is alleged to have contravened this Act; and

- (e) a person specified by the board, upon notice, and after that person has been given an opportunity to be heard against his or her joinder as a party.

The Complainant takes the position that the Commission's role is "more procedural than substantive" and that where the Commission does participate in a substantive manner at the hearing, it should only be permitted to do so where there is 'mutuality' of interest between the Complainant and the Commission. On the basis of the Complainant's written and oral submissions, I take this to mean that, when it comes to making submissions on the substance of the complaint, the Commission should only be permitted to participate where and when its position does not fundamentally conflict with that of the Complainant. It asks that I make an order restricting the Commission's participation accordingly.

Does the Board possess jurisdiction to make such an Order? In my view, the Board of Inquiry possesses a limited inherent jurisdiction to control its own process. Theoretically, such an Order could be made pursuant to this power governing the conduct of those who appear and make submissions before the Board. However, this Board would be exceeding its jurisdiction if it were to exercise such power in a manner inconsistent with the Act.

It may also be argued that the Board of Inquiry may find such jurisdiction in the Act itself. Subsection 38(1) of the Act states as follows:

- 38.** (1) A board of inquiry has the powers of a commissioner appointed under the *Public Inquiries Act, 2006*.

Subsection 5(2) of the *Public Inquiries Act, 2006*, SNL 2006, c. P-38.1 provides that:

- (2) A commission shall determine whether a person may participate in an inquiry, and how he or she may participate, after considering

- (a) whether the person's interests may be adversely affected by the findings of the commission;
- (b) whether the person's participation would further the conduct of the inquiry; and
- (c) whether the person's participation would contribute to the openness and fairness of the inquiry. (emphasis added)

It may be argued that this gives a Board of Inquiry jurisdiction to determine how a party may participate at the hearing. However, as noted above, this board would fall into jurisdictional error if such discretion were exercised in a manner inconsistent with the Act.

The Commission's role is to represent the public interest before the Board of Inquiry. More specifically, as discussed by the Ontario Court of Appeal in *McKenzie, supra* at paragraph 34, the Commission's role is to "advocate *its view* of the public interest" (emphasis added). The status of the Complainant and Commission as independent parties before the board is well-settled. While the commission is tasked with "carriage of the complaint" pursuant to paragraph 31(1)(a) of the Act, the Commission does not represent the Complainant. I do not view this statutory language as limiting the nature of the submissions the commission is permitted to put forth. While I agree with the position taken by the Complainant's counsel that this language suggests a more procedural than substantive role, I do not view it as stripping from the Commission the opportunity to participate in a substantive manner before the Board. The Commission's position in terms of its view of the public interest may align with that of the Complainant, or it may not. In coming to its position on its view of the public interest, I do not view the Commission as picking and choosing among rights or minority groups it wishes to advocate for. In this case, the Commission's position was arrived at following a review of submissions made by the Complainant and the First Respondent during the investigation phase of the complaints process. The Commission reached the conclusion that even if there was a *prima facie* case of discrimination made out, the First Respondent had met the case for demonstrating that the Complainant could not reasonably be accommodated. The Commission's summary dismissal of the complaint was

the subject of judicial review. Justice Faour of the Supreme Court of Newfoundland and Labrador, Trial Division (General) (as it then was) held the Commission's decision to summarily dismiss the complaint without referring it to a Board of Inquiry to be unreasonable. Pursuant to section 35 of the Act, Faour J. directed the Commission to refer the matter to a Board of Inquiry.

Now that this matter has been placed before a Board of Inquiry for adjudication the "wand of authority", to borrow a phrase from the Ontario Court of Appeal in *McKenzie, supra*, has been passed to the Board. The role of the Commission in the process has fundamentally changed. No longer is the Commission a neutral investigator or mediator examining the merits of the complaint to arrive at a position or reach a possible resolution. Once a Board of Inquiry is convened, the Commission becomes a party to the hearing. It is an independent party with equal, full party status just as the Complainant and Respondent, but is also tasked with "carriage of the complaint" or procedural responsibilities in seeing that the complaint gets heard. At this stage, the Commission is an equal party in an adversarial process.

There is nothing in the Act which suggests that the Commission's submissions must align with or not be contrary to the submissions of the complainant. However, the Ontario Court of Appeal in *McKenzie, supra*, at para 34, held that the Commission, in exercising its role as a party to the proceeding promulgating its view of the public interest cannot "derogate from the independent status of an individual complaint". While it may be uncommon for the Commission to take a position in opposition to a complainant before a Board of Inquiry, I do not view this as derogating, in any way, from the Complainant's status as an independent party before the Board of Inquiry. Her interests as an independent party are fully preserved. The Complainant's position, arguments, evidence and tactical decisions before the Board of Inquiry remain untouched by any influence of the Commission.

The Commission is entitled to argue its view of the public interest. In so doing, the Commission is not placing the rights of one minority group before another or suggesting there is or ought to be a hierarchy of rights. The Commission is merely repeating and advocating for the position it reached at the conclusion of the investigatory stage of the complaints process. Deciding whether or not the Commission's position should be accepted or rejected is the role of this Board after careful consideration of all the evidence and submissions made by all parties. The Commission represents an interest which might be adversely affected by the findings of the Board. The Commission's full participation would further the conduct of the inquiry.

Allowing all parties to freely state their positions and make submissions in relation to all issues would only serve to contribute to the openness, fairness and rigor of the inquiry. Restricting the degree and/or manner of participation of any party, including the Commission, would also be contrary to s. 38(2) of the Act:

- (2) A board of inquiry shall inquire into the matters referred to it and give full opportunity to all parties to present evidence and make representations, through counsel or otherwise. (emphasis added)

In consideration of the foregoing, I find that this board would exceed its jurisdiction if it were to limit the opportunity for the Commission to present its view of the public interest by only making submissions which have a 'mutuality' of interest with the Complainant's position.

If I am wrong, and this board does possess such jurisdiction, I decline to place the proposed restraints upon the Commission before the Board of Inquiry as I do not find that the Commission taking a position in opposition to the Complainant derogates from the status of the Complainant as an independent party to these proceedings, nor does it cause the Complainant any prejudice in the conduct of these proceedings.

The Commission shall be unrestrained in arguing its view of the public interest, just as the Complainant and Respondent are unrestrained in putting forth their positions.

The Complainant's motion is dismissed.