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August 23, 2019

Via Courier

J. Walter Thompson, Q.C.
958 Lindola Place
Halifax, NS B3H 4M1

Dear Chair Thompson:

**Re: Beth MacLean/Sheila Livingstone/Joseph Delaney and Disability Rights
Coalition v. Province of Nova Scotia and Nova Scotia Human Rights
Commission - Remedy
File No. H14-0418**

Please accept the following submissions with respect to the remedy phase of the above noted proceeding.

FACTS

On March 4, 2019, you determined, based on the facts and evidence presented, that the Province of Nova Scotia prima facie discriminated against Ms. Beth MacLean, Mr. Joey Delaney and the late, Ms. Sheila Livingstone.

ISSUE

What, if any, is the appropriate remedy for the individual Complainant's?

LAW

Section 34(8) of the Nova Scotia *Human Rights Act* provides a Board of inquiry with broad authority to tell anybody who has contravened the *Act* to do anything that constitutes full compliance with the Act and to rectify any injury caused to any person or to make compensation.

Essentially, a Board of Inquiry can order a remedy which ensures a complainant is put back into the position she/he would have been but for the discrimination.

The Board Chair is well versed regarding the purpose as well as the case law with respect to damages. Thus, there is no need to canvass every decision. However, there is one case that accurately and concisely delineates the goal of general damages. In *Graham v. Shear Logic Hairstyling*¹, Board Chair Crawford stated the following at paragraph 98:

As concerns a monetary award, I have taken into consideration the factors Bd. Chair Cusack set out in assessing general damages for humiliation, loss of dignity, self-respect, psychological and emotional harm in *Marchand v. 3010497 Nova Scotia Limited*:

- (a) the redress for the harm suffered by the discriminatory conduct, which in this case I consider to be economic, sociological (impacting an entire family) and emotional;
- (b) the need to ensure that a message is delivered to the Complainants and others that human rights must be respected; and
- (c) the need to ensure that the award does not appear to be so small as to constitute a minor cost of doing business, such as to encourage risk taking.

The Commission asserts that counsel for Ms. MacLean and Mr. Delaney is in the best position to determine the most fitting remedy for his clients. The Commission will support any reasonable remedy put forth provided it is in the public's interest.

The Commission views the claim of the late Ms. Livingstone differently than the other two individuals noted above.

Ms. Livingstone's older sister, Ms. Olga Cain, filed a claim on her behalf on July 23, 2014. Unfortunately, Ms. Livingstone passed away in October 2016.

There is case law pertaining to the death of a Complainant. For example, in *Viner v. Hudson Bay Company*², Board Chair Dennis James had to deal with a similar situation wherein the Complainant died before the hearing.

Board Chair James concluded that he did not have jurisdiction to hear the complaint advanced by the deceased's estate. Chair James relied on *British Columbia v. Goodwin Estate*³ where it was noted that:

“it is only the person whose rights have been violated who can seek a Charter remedy. But, as the Province points out, the provisions of the Code that permit representative complaints to be filed do not create any substantive rights. They are procedural. The

¹ 2014 CanLii 75502 (NSHRC).

² 2012 CanLii 98528 (NSHRC).

³ 2005 BCCA 585.

substantive rights are those of the person or persons who have suffered the Human Rights violation.”

The present case can be distinguished by the fact that Ms. Cain filed a complaint on behalf of her sister in her role as substitute decision maker. Nevertheless, as noted in *Viner (referring to Goodwin), supra*, that is procedural not substantive.

The substantive rights are those of the “person” who suffered a human rights violation. In this case, that is Ms. Livingstone. Hence, as a result of the Board of Inquiry’s finding, Ms. Livingstone is legally entitled to a remedy: not her estate nor Ms. Cain. Again, the essence of damage awards is to put the **Complainant** back into the position she would have been in if it were not for the discrimination.

During direct examination Ms. Cain testified that she continued with her sister’s complaint because she hoped it would help someone. As such, perhaps the Province would consider making a donation in Ms. Livingstone’s name/memory to assist individuals who require financial support/assistance to live in the community or to an organization like the Disability Rights Coalition.

If a donation is not possible, maybe something else can be done.

Although a remedy, per se, cannot be awarded to Ms. Cain, there is case law to support the notion that individuals who occupy capacities like hers, that is, a representative, parent, spouse etc. can be awarded damages for any harm visited upon them.

In *Borden v. Bob’s Taxi*⁴, Board Chair James considered the possibility of awarding damages to a mother who filed a complaint on behalf of her son’s. At paragraph 155 of the decision, Board Chair James stated:

The Board accepts the submission that Ms. Smith should receive compensation as she was **affected by the harm inflicted on her sons.** ...

The atrocious, yet peculiar case of *Y.Z. v. Halifax Regional Municipality*⁵, is another example of a Board Chair awarding damages to someone other than the Complainant.

Briefly, Y.Z., a Caucasian male who is married to an African Nova Scotian woman, worked with Halifax Regional Municipality (Metro Transit Maintenance Department). The decision makes clear that Y.Z. worked with several individuals who, collectively, had the mentality of Archie Bunker. As a result, he filed a formal complaint with the Commission alleging discrimination related to race, colour, ...of persons with whom he associated.

Board Chair Connors found HRM liable and awarded damages to Y.Z. and his spouse. Further to the award of damages to the Complainant’s spouse, Chair Connors relied on *Johnson v. Halifax Regional Police Services* and *Willow v. Halifax Regional School Board*.

⁴ 2015 CanLii 9153 (NS HRC) at paragraph 155.

⁵ 2014 CanLii 67576 (NSHRC).

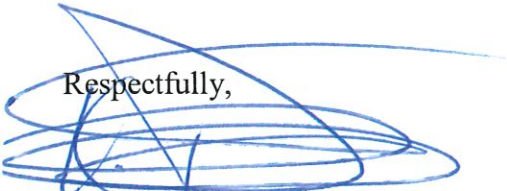
Chair Connors also considered the Supreme Court of Canada case of *Moore v. BC* where the court commented on remedies that are too “remote” from the scope of the complaint. Presumably, Chair Connors was alert to the reality that there must be a sufficient nexus between the ‘representative/non-complainant and the Complainant. At paragraph 47⁶ of the decision (Damages) Chair Connors noted the following with respect to Y.Z.’s spouse:

YZ’s spouse has testified as to the significant impact this matter has had on her. She has felt the loss of her husband, as have her children. She was off work for two years as a result of her own mental illness, which arose because of her support for Y.Z. YZ’s spouse travelled each day to the drawn-out proceedings with Y.Z. and stayed throughout all the testimony, despite being excluded in the early days as a witness.

Y.Z.’s spouse was awarded general damages in the amount of \$25,000.00 as well as pre-judgment interest.

Ms. Cain testified during the first phase of this proceeding with respect to the time she spent traveling to visit her sister, attend meetings and the like. Of course, there is also the unquantifiable emotional and mental cost that must be considered as well. It is anticipated she will give evidence again with a focus on the impact this ordeal has had on her person.

Respectfully,



Kendrick H. Douglas
Legal Counsel

- c. Kymberly Franklin and Kendrick H. Douglas, Legal Counsel for NSHRC
Vincent Calderhead and Katrin MacPhee, Legal Counsel for B. MacLean, S. Livingstone and J. Delaney
Kevin Kindred and Dorianne Mullin, Legal Counsel for Province of Nova Scotia

⁶ Board File No. 51000-30-H05-1860