NOVA SCOTIA COURT OF APPEAL

Citation: *Smith v. Nova Scotia (Human Rights Board of Inquiry)*, 2017 NSCA 27

Date: 20170411
Docket: CA 446226
Registry: Halifax

Between:

Tony Smith

Appellant

v.

Nova Scotia Board of Inquiry, under
the Human Rights Act, RSNS 1989, c. 214;
The Nova Scotia Human Rights Commission,
Capital District Health Authority and the
Attorney General of Nova Scotia

Respondents

Judge: The Honourable Justice Jamie W.S. Saunders

Appeal Heard: January 31, 2017, in Halifax, Nova Scotia

Subject: **Human Rights Complaint. Limitation Periods. Human Rights Act,** R.S.N.S. 1989, c. 214**. Allegations of Discrimination Based on Race and Retaliation. Board of Inquiry. Standard of Review. Awarding Costs Following Tribunal Appeals. Civil Procedure Rule 90.51.**

Summary: The appellant had been an employee of the CDHA or its previous governmental iterations since 1990. From 2005 until he chose to retire in 2012, he was employed as an occupational therapy assistant, part of a team offering mental health services to a particular patient population.

A Board of Inquiry was appointed to adjudicate a complaint initiated by the appellant in which he identified 2005 as being the year the alleged discrimination/retaliation (claimed to be based on his race and colour) began. The appellant said he

was the victim of repeated acts of discrimination by his employer which culminated in an eventual "wrongful" transfer to a location, not of his choosing.

After a hearing lasting 17 days the Board dismissed the complaint concluding that the dispute was not about "racism" and that the appellant was not chosen to move because of the color of his skin. Rather, he was relocated (along with two others) because his client-base comprised a different mentally ill population, which needed the kind of community support provided at the location to which the appellant had been transferred. The move was concurrent with other decisions involving a global re-organization by the CDHA of the various mental health services it offered. The Board found that employees, management, the unions, as well as the appellant himself were involved in and privy to these changes while still in the planning phase. The Board ultimately determined that the appellant's transfer was a health care decision and not the result of any discrimination or retaliation on the part of the CDHA.

The appellant appealed saying the Board erred in refusing to inquire into evidence of racism/retaliation from before 2005.

Held: Appeal dismissed. The appellant's submissions ignored or misstated the Board's strong findings and meticulous analysis. The appellant's arguments concerning the interpretation and application of the law had previously been rejected by this Court. The jurisprudence of this Court was clear, current, unambiguous and binding upon the Board in its adjudication of the appellant's complaint. The Board was correct in limiting itself to the parameters defined by its Chair.

To have permitted the appellant to reconfigure his complaint into a broad, sweeping allegation of "racism" said to have virtually permeated his entire working career, would be to turn the objective of Nova Scotia's human rights legislation on its head. Were the Board Chair to have permitted such an

inquiry, he would have clearly erred and been reversed on appeal.

The appellant failed to appreciate that his appeal had no realistic chance of success and would put all parties to a completely unjustified expenditure of time, resources and money.

Given the particular circumstances of this dispute (described in detail in the Court's analysis), this was a case where an award of costs against the appellant was merited. The Court's reasons went on to consider the principled basis upon which the discretion to impose costs might be exercised.

In dismissing the appeal, costs of $3,000 inclusive of disbursements, were imposed against the appellant, in favour of the CDHA.

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Respondents

Judges:	Beveridge, Saunders and Oland, JJ.A.
Appeal Heard:	January 31, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Beveridge and Oland, JJ.A. concurring.
Counsel:	Barry J. Mason, Q.C. and Laura Veniot, for the appellant Jason T. Cooke and Roy Stewart, Articled Clerk, for the respondent Nova Scotia Human Rights Commission Peter Rogers, Q.C. and Jillian Kean, for the respondent Capital Health District Health Authority Edward A. Gores, Q.C., for the respondent Attorney General of Nova Scotia (not participating)

Reasons for Judgment:

[1] On June 2, 2014, Donald C. Murray, Q.C. was appointed as a one-person Board of Inquiry to consider a complaint filed by the appellant with the Nova Scotia Human Rights Commission on February 21, 2012. In that complaint Mr. Tony Smith alleged discrimination by his employer, Capital District Health Authority, on the basis of race, colour, and physical disability, as well as a separate allegation of retaliation based on his having made a previous complaint under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214 ("the *Act*"). After a lengthy hearing, the Board filed a comprehensive decision dated November 6, 2015, dismissing Mr. Smith's complaint. (See *Smith v. Capital District Health Authority*, 2012 CanLII 101205 (N.S.H.R.C.) Note to reader: the reference to 2012 in the citation is confusing, given the fact that the hearing was conducted between January and June, 2015 and the Board's final decision which forms the subject of this appeal was rendered in November of that year. However, 2012 is the date that appears in the CanLII citation).

[2] On December 8, 2015, Mr. Smith's lawyer, Barry J. Mason, Q.C., filed a Notice of Appeal asking that the decision be set aside and a new hearing ordered. The grounds of appeal allege that the Board Chair erred in law by shifting the onus of proof onto the appellant, and by misinterpreting the limitation date set out in the *Act*.

[3] The appeal was vigorously contested by both respondents, Capital District Health Authority ("Capital Health" or "CDHA") and the Nova Scotia Human Rights Commission ("the Commission"). They each say that the appeal is entirely without merit and that the issues raised by the appellant which purport to engage questions of law have already been conclusively decided by this Court or are otherwise reasonable and therefore insulated from appellate review.

[4] After carefully considering the record and counsels' submissions I would dismiss the appeal with costs to the CDHA. Although we do not ordinarily award costs in tribunal appeals, I will explain in the last section of these reasons why I think we should.

[5] A rather detailed summary of the background, taken primarily from Capital Health's factum is necessary in order to provide context for the analysis that follows. I accept CDHA's account as being accurate, balanced and fair.

Background

[6] The appellant is a former employee of the CDHA or its previous governmental iterations since 1990. He was employed as an occupational therapy assistant at the Bedford/Sackville Mental Health Clinic ("BSMH") from 2005 until he chose to retire in 2012.

[7] Prior to his engagement as an occupational therapy assistant, Mr. Smith had been off work since 2000. Between 2000 and 2005 Mr. Smith was absent for a period of short-term illness, which turned into a period of long-term disability. He initiated a return-to-work process in the summer of 2004, ultimately resulting in his engagement as an occupational therapy assistant with the BSMH in 2005.

[8] The occupational therapy assistant position (among numerous other positions) was transferred to another department within the CDHA in 2012. This transfer from the BSMH to the Recovery and Integration "Hub" in Bedford/Sackville was communicated to Mr. Smith on December 9, 2011. It is this transfer which is central to Mr. Smith's human rights complaint.

[9] Prior to taking leave in 2000, Mr. Smith had been employed with a program called "Choices". Choices was a program originally operated by the Province of Nova Scotia's Department of Health, Drug Dependency Services Division. Mr. Smith's employment by the Province in the Choices program began in 1990. The responsibility for delivering drug dependency services was eventually transferred from the Province to CDHA's predecessor health authority, and then to the CDHA when the latter was created in 2000.

[10] In 1994 Mr. Smith contacted the Commission with respect to concerns he had surrounding his treatment by management at Choices. These concerns related to the appellant's belief that he was being discriminated against on the basis of his race and colour. Following an investigation, the Commission declined to forward Mr. Smith's grievance to a Board of Inquiry, stating that there was insufficient evidence to support a complaint of racism. This occurred in 1997 and was never challenged by seeking a judicial review. Mr. Smith continued in his employment with Choices after the Commission dismissed his complaint, and took medical leave in 2000, as noted earlier.

[11] Following his reassignment to the "Hub" in 2012, Mr. Smith approached the Commission which then began the process leading to these proceedings. The Commission reviewed Mr. Smith's allegations and prepared the complaint

according to its usual procedures. Mr. Smith signed the complaint on February 21, 2012. If he were dissatisfied with the Commission's drafting of the complaint, he never sought judicial review to expand its scope. His signature on the document evidences his consent to the framing of the complaint.

[12] Donald C. Murray, Q.C. was appointed in June, 2014, to act as Chair of a Board of Inquiry, convened to investigate and decide Mr. Smith's complaint.

[13] The hearing before Mr. Murray commenced on April 7, 2015. Prior to the start of the hearing, the CDHA had concerns surrounding the scope of the complaint, particularly having regard to the 12 month limitation period prescribed by s. 29(2) of the *Act*. Mr. Smith's complaint had included allegations dating beyond the 12 months preceding the filing of his complaint, thus bringing into question the limitation period.

[14] Accordingly, the Board convened a preliminary hearing where all parties made submissions as to the appropriate application of the limitation period and to clarify the overall scope of Mr. Smith's complaint. The Board delivered its written reasons on January 19, 2015 (*Smith v. Capital District Health Authority*, 2015 CanLII 1202 (N.S.H.R.C.)). These reasons form part of the record on appeal.

[15] In his preliminary ruling, Mr. Murray determined that he was bound by the complaint as drafted. The acts specified in the complaint related to events that occurred since 2005. The only specific instances of discrimination and retaliation alleged by the appellant were in relation to his re-assignment to the Bedford/Sackville Hub, and his involvement in a program to reduce innocent absenteeism.

[16] The Board found that in the circumstances, it was permitted to inquire into allegations (and hear evidence in relation thereto), beyond the 12-month limitation period, and back to the year 2005. This determination was based on Mr. Smith's signed complaint identifying 2005 as the year the discrimination/retaliation began. The Board's decision was also based on its interpretation of s. 29(2) of the *Act*.

[17] However, the Board ruled that it could only adjudicate a claim of discrimination/retaliation outside the 12-month limitation period if Mr. Smith and the Commission proved that the "last instance" of the alleged "ongoing" or "systemic" misconduct occurred within the 12 months that preceded the filing of the complaint.

[18] The "last instance" of alleged discrimination/retaliation was the "Hub" transfer decision, communicated to the appellant on December 9, 2011. If this transfer were found to constitute an act of discrimination/retaliation, the Board concluded that it could proceed to review activity in the post-2005 period because this "last instance" occurred within the 12 months preceding the filing of the complaint.

[19] Further, the Board found that it could hear evidence dating back to 1990, where such evidence would provide "background and context". In coming to these conclusions, the Board acknowledged its broad powers of inquiry granted under the legislation.

[20] Accordingly, the Board identified Mr. Smith's treatment at BSMH since 2005 as the appropriate starting point to inquire into his allegations of discrimination (whether in isolation or as part of a systemic pattern of offence), as well as retaliation, albeit acknowledging his ability to make findings about the events preceding the limitation date was contingent upon a finding of ongoing wrongdoing culminating in the Hub transfer. In doing so, the Board stated that going back to 2005 would provide the appellant and the Commission with ample opportunity to expose any such misconduct by CDHA and its employees, as well as permit the CDHA to "know the case it has to meet".

[21] At the hearing on the merits, the Board heard and received evidence and argument over the course of 17 days. The appellant gave *viva voce* evidence on direct examination for five of those days (with two brief intercessions of testimony from his wife and son), followed by two days of cross-examination and most of one-half day on re-direct examination. Much of the appellant's testimony related to events that pre-dated 2005, and was notionally provided to give the Board "background and context". Very little of his evidence revolved around the critical event that occurred within the limitation period, that being his transfer to the Hub.

[22] The Board also received hundreds of pages of documentary evidence from Commission counsel and Mr. Smith, most of which dated between 1990 and 2005.

[23] The Board also heard from a number of CDHA managers and employees, including Dorothy Edem, Cheryl Billard, Kimberley Fleming, and Susan Shaddick. One happens to be African Nova Scotian. Their testimony was accepted by Mr. Murray. Their evidence provided strong support for the Board's finding that the decision to transfer the appellant to the Hub was concurrent with other decisions involving a global re-organization by CDHA of the mental health services offered

to a particular patient population serviced by the appellant as an occupational therapy assistant, and to other clients by different staff in various professional capacities.

[24] In his analysis and conclusions the Board Chair noted that the appellant was not the only person affected by the re-organization. An entire branch of client service delivery was being re-assigned. The Board accepted that CDHA's patient population with "serious and long-term mental illness" would receive their services differently, going forward. The re-organization involved first, the shifting of tasks and clients, after which the staff that supported those clients were identified. Mr. Smith was among those staff members servicing CDHA patients with "serious and long-term mental illness", and was therefore subject to the re-organization.

[25] The Board also found that employees, management, the unions, as well as Mr. Smith himself, were involved in, and privy to these changes while still in the planning phase. These changes were not unique to the BSMH, and occurred throughout the CDHA. Such was the evidence of Ms. Susan Shaddick, manager of the Cole Harbour equivalent to the BSMH, and the Board relied on this evidence. The Board Chair ultimately determined that Mr. Smith's transfer to the Hub was a health care decision and not the result of any discrimination or retaliation on the part of the CDHA.

[26] The Board further determined that Mr. Smith's employment within the CDHA was never truly in jeopardy, as alleged in the complaint and as argued by the appellant on appeal. The Board found that there was no plan to get rid of the appellant. Neither was there ever any promise made that the location of his work would not change. The appellant was aware that he could and would be placed elsewhere if the proposed "trial" position did not work out. In the words of the Board Chair:

> …Mr. Smith always remained a permanent employee at Capital Health until he chose to retire in 2012.

[27] On May 1, 2015, the Board heard submissions from the CDHA to dismiss the complaint summarily for lack of evidence. That request was granted, in part, and those portions of the appellant's complaint insofar as they related to disability – and his placement on an innocent absenteeism monitoring system – were dismissed (reported as [2015] N.S.H.R.B.I.D. No. 7). That particular ruling by the Chair does *not* form part of this appeal. The effect of the Chair's ruling was to

narrow the focus of the complaint, which the Chair then went onto describe in ¶13 of his decision:

> … the decision that I was left to decide related to whether or not there was an act or behaviour sometime after February 21, 2011, which discriminated against Mr. Smith based on race or colour, or which was retaliatory for him having filed a human rights complaint in 1994. If so, I would then have to decide whether the act or behaviour was something unique, or part of a course of ongoing, previous conduct of the same character which affected Mr. Smith.

[28] I will turn now to a consideration of the issues which morphed significantly during the course of the appeal hearing.

Issues

[29] The Notice of Appeal filed by the appellant's counsel on December 8, 2015, described the grounds of appeal and relief sought as being:

> **Grounds of Appeal**
>
> The grounds of appeal are:
>
> (1) The Board of Inquiry erred in law by requiring that the appellant prove discrimination, at the initial stage, on a balance of probabilities. The appellant was only required to prove a *prima facie* case of discrimination on a balance of probabilities, with the onus then shifting to the respondent to provide a proper justification.
>
> (2) The Board of Inquiry misinterpreted the limitation date as set out in s. 29(2) of the *Human Rights Act*. The Board of Inquiry refused to place weight on evidence of discrimination that occurred before February 21, 2011 on the basis that the conduct was statute barred. S. 29(2) of the *Human Rights Act* bars liability for certain discriminatory conduct, it does not preclude a Board of Inquiry from considering evidence of events that occurred prior to one year before the complaint was filed.
>
> **Authority for appeal**
>
> The appellant appeals pursuant to s. 36 of the *Human Rights Act* and in accordance with *Civil Procedure Rule* 90.07.
>
> **Order requested**
>
> The appellant says that the court should allow the appeal and that the decision appealed should be reversed. The court should issue an order declaring that the Capital Health District Authority discriminated against the appellant based on race and colour and retaliated against him for filing a human rights

> complaint in 1994. Alternatively, the appellant says that the decision should be set aside and a new hearing should be ordered.

[30] It was not until counsel for both the CDHA and the Commission had completed their oral submissions, and the appellant's lawyer rose in reply, that we were told the appellant had abandoned the two grounds stipulated in his Notice of Appeal and that the "only issue" before us on appeal was the one expressed at the bottom of p. 6 of the appellant's factum:

> Did the Chair of the Board err in refusing to inquire into evidence of racism/retaliation from before 2005?

[31] That then is the issue I will consider in the balance of this judgment.

Analysis

[32] Having carefully reviewed the record together with the parties' lengthy written and oral submissions, I am satisfied, for reasons I will now explain, that there is no merit to Mr. Smith's complaint that the Board erred "in refusing to inquire into evidence of racism/retaliation from before 2005". On the contrary, the Board was correct in limiting itself to the parameters defined by its Chair.

[33] Respectfully, the lengthy submissions put forward by the appellant in his factum simply repeat the very same list of events and behaviours he perceives as constituting discriminatory conduct by his employer since 1994. What he describes as a "Concise Statement of Facts" ignores or misstates Mr. Murray's strong findings and meticulous analysis which led the Board to dismiss the complaint. It appears the appellant expects this Court to embark upon an entire "do-over", or order that such a task be undertaken by a new and differently constituted Board of Inquiry. That is not our role. To accept such an invitation would be to ignore the substance of the complaint placed before the Board by the Commission, as well as the jurisprudence of this Court which has explicitly and conclusively addressed the meaning and application of s. 29 of the *Act* regarding the tolling of limitation periods.

[34] After 17 days of hearings, and having considered the testimony of 15 witnesses, together with "several hundreds if not thousands of pages of documents as exhibits", it cannot be seriously suggested that the appellant did not have his complaint correctly and fully adjudicated by the Board.

[35] At the appeal hearing, the appellant's counsel, Mr. Mason, began his oral submission by describing Mr. Smith as a "human rights hero" in this Province, and took considerable umbrage with what he described as the "shameful" description of Mr. Smith that appears at ¶31 of Capital Health's factum:

> 31. Therefore, Board made no finding of fact that Smith's job was ever in jeopardy, insecure, or that Smith's perception of such problems were at all reasonable. There are many people who have honest subjective perceptions that are wrong and which may be described in a non-medical sense as paranoid or narcissistic.

[36] When his turn came for reply, Capital Health's counsel, Mr. Peter M. Rogers, Q.C., responded to the appellant's rebuke. Mr. Rogers explained – properly and fairly in my view – that while he was loathe to cast any personal aspersions against the appellant, he was obliged, in good faith, to answer to the charge on behalf of his client. Mr. Rogers pointed out that it was the appellant himself who chose to put these facts in evidence as part of his case-in-chief, through the medical report of his psychiatrist, Dr. E.M. Rosenberg, M.D., which appears to have been prepared at the request of Mr. Mason, as it was addressed to him.

[37] Whether the appellant enjoys the reputation ascribed to him by his counsel is not before us, and ordinarily would be irrelevant to our consideration of the merits of his appeal. But it is important to mention here because it illustrates the depth of the schism that divides the parties on appeal and helps explain why the CDHA has taken such a strong and unusual position claiming that it is entitled to a substantial award of costs – $5,000 was proposed – even though this is a tribunal appeal.

[38] I would begin my consideration of what the appellant now says is the "only issue" by commending Mr. Murray for his thorough, well-reasoned and articulate analysis of the many important questions and voluminous record placed before him for determination. The Chair's reasons reflect a clear understanding and proper application of the law. His careful and clearly expressed findings of fact and credibility find ample support in the record.

[39] For convenience I reproduce again p. 6 of the appellant's factum which says:

> Did the Chair of the Board err in refusing to inquire into evidence of racism/retaliation from before 2005?

This alleged error, so the appellant says, tainted the Board's consideration of the entire complaint. Mr. Smith says the "fatal flaw" in the Board's analysis appears in ¶67 of the decision. To put the appellant's argument in context, I will reproduce ¶67-72 of the Board's decision, but before doing so, will place Mr. Tom Payette in the narrative.

[40] The principal theory put forward by Mr. Smith at the inquiry was that his former frontline supervisor, Mr. Tom Payette, had branded him as a "troublemaker" which later led to discriminatory action with respect to Mr. Smith's duties, responsibilities, and placements.

[41] He says Mr. Murray's "error" in refusing to investigate the years prior to 2005 skewed his investigation and his adjudication of the complaint.

[42] I will now return to the Board's reasons. Mr. Murray said:

> 67. Such comments by Tom Payette to Mr. Bechard (as well as others which it is unnecessary to detail), provided the significant potential link in Mr. Smith's employment history between his time at Choices, and his employment after 2005. Those comments would have deserved close attention if I had the jurisdiction to consider Mr. Smith's 2005 return to work challenges – which I cannot without a link to something that occurred after February 21, 2011. Furthermore, as pointed out by counsel for Capital Health during final submissions, and as I have referred to earlier, there is nothing articulated in Mr. Smith's 2012 human rights complaint about not being returned to a position in the Choices program.
>
> 68. Even if I were to accept that Mr. Payette's comments were accurately recounted by Mr. Bechard, and I have no other evidence to consider a different conclusion, I have nothing in evidence to suggest that Mr. Payette's attitude had anything to do with the 2011 reorganization of community mental health services, or the decision to place Mr. Smith at "the Hub" in Sackville. In short, I have nothing in evidence to suggest that Tom Payette's attitude towards Tony Smith leaked through to or continued to contaminate any employment decision affecting Mr. Smith in 2011. Tom Payette's views were not a factor in the task allocation decisions made by Kim Fleming, Cheryl Billard, Dorothy Edem, or Susan Shaddick.
>
> 69. I appreciate that Mr. Smith made an effort to insinuate that Kim Fleming behaved towards him in a negative way – and therefore that she may have had similar attitudes towards him as had been harboured by Tom Payette. I heard from Ms Fleming. She denied being influenced in her supervision of Mr. Smith by anything attributable to Mr. Payette. Instead she was concerned about:
>
> a) the efficient deployment of human resources within her clinic,

> b) Mr. Smith's level of effort, and eventually
>
> c) how staff attitudes towards her management style were distracting staff from the work that needed to be delivered to the public with mental health needs.
>
> I am unable to conclude that Ms. Fleming made any decision, let alone a discriminatory decision within the meaning of the *Act*, based Mr. Smith's race or colour; or in retaliation because he had previously made a human rights complaint in 1994.
>
> *Conclusion*
>
> 70. Mr. Smith's sensitivity towards supervision intensity and employment task assignment was, and remains, real. Mr. Smith had reason from early on in his employment at the Choices program to be concerned that employment decisions which he did not control, or which he sometimes did not understand, might in fact be motivated by his race and colour. Indeed it was clear from Mr. Smith's evidence at several turns that he was highly sensitive to the potential that any employment issue that did not go according to his preference, or that he did not understand, was in fact a somewhat shadowy way to take advantage of him, or to discriminate against him because of his race or colour, or was at least systemically racist. The reality of Mr. Smith's feelings, and concerns, are not enough on their own to establish a discriminatory act, or behaviour, or a discriminatory course of conduct by Capital Health or its staff. Mr. Smith's concerns justified an inquiry – an inquiry which I have made based on the evidence provided to me. However, in order for me to make a finding of discrimination based on race or colour, or a finding of retaliation, the evidence needs to establish on a balance of probabilities that race or colour or retaliation was a factor in a decision made about him.
>
> 71. There was no link established in the evidence between any of Tom Payette's behaviours and attitudes and employment decisions, with those made or communicated to Mr. Smith in 2011 by Kim Fleming. There was also no decision or behaviour made in relation to Mr. Smith by anyone at Capital Health after February, 2011, in which his race, colour, or his previous human rights complaint, was a factor.
>
> 72. I have concluded that there was no act or behaviour towards Mr. Smith by any individual at Capital Health, nor by that organization in any systemic way, in which Mr. Smith's race or colour, or his prior human rights complaint, was a factor. I am unable to find that he suffered any discrimination during the time that I have authority to consider. Mr. Smith's complaint, supported by the Nova Scotia Human Rights Commission, is therefore dismissed.

[43] The appellant says the Board *had* the jurisdiction to look beyond the specific allegations contained in the appellant's complaint. Further, the appellant says the Board erred in misapprehending and misstating the "link" between the time he spent at Choices and his employment after 2005. Instead, the appellant says the "link" was racism per se which, he says, went all the way back to 1990. Thus, he

says the Board erred in "refusing" to go back into that long, involved history. As part of that complaint the appellant says the Board denied him the opportunity to "amend" his complaint and that he was virtually taken advantage of because he was "unrepresented".

[44] Respectfully, the appellant's submission should be rejected for at least eight reasons. First, he never made a motion or formal request seeking leave to "amend" his complaint. Second, it is inaccurate to say that he was "unrepresented" at the hearing. In fact, Mr. Smith had the assistance of two senior lawyers representing the Nova Scotia Human Rights Commission who put forward the appellant's complaint over the course of 17 days' worth of hearings. Further, on appeal to this Court, the Commission and its counsel now join with the CDHA in saying that the appeal is entirely without merit and ought to be dismissed. That in itself is a remarkable turn of events and deserves emphasis. Third, Mr. Murray had no authority to amend the appellant's complaint, in the manner now demanded, even if he were asked to do so. The appellant's submissions concerning the interpretation and application of the statutory provisions relevant in this case, have already been rejected by this Court.

[45] Fourth, the formal complaint is not a document written or produced by the complainant; rather, it is a document prepared and filed by Commission investigators and counsel after thoroughly examining the case and deciding that it warranted an inquiry. Obviously the document is based on instructions received from the complainant. The answers provided by the appellant to the questions on the form could not be clearer. I will repeat the material parts of the complaint signed by Mr. Smith on February 21, 2012, verbatim:

> **I, Tony Smith, complain against the Capital District Health Authority (CDHA) that from 2005 and continuing, the CDHA discriminated against me with respect to my employment because of my race/color and physical disability. I also believe I was retaliated against for filing a complaint with the Human Rights Commission.**
>
> 1. What is your protected characteristic(s)? Please explain.
>
>   I am African Nova Scotian. I also have a herniated disc.
>
> 2. When did the alleged discrimination begin?
>
>   In 2005 I was offered a return to work position with the Capital District Health Association (CDHA) at the Bedford/Sackville Clinic as an Occupational Therapist Assistant (OTA). I was advised if I accepted the position that it would be designated as a permanent Full Time position.

3. Please provide example(s) of discriminatory treatment you say you experienced by the Respondent.

   On January 27, 2011, I was informed that my position was not actually permanently funded. However, since my return to work five (5) other people in my department have received a permanent full time placement. Two of those five positions were newly created funded positions.

   Two years ago I was experiencing severe back pain and diagnosed with bulging herniated disk. In December, 2010 I was placed on an Attendance Management Program. Placement on the program is at the discretion of managers. Other Caucasian employees missed more time than I had, but were not placed on the Attendance Management Program. I believe my race was a factor in placing me on the program.

   I have now been removed from my position from the clinic and moved to the Hub.

4. Why do you believe the treatment you received is because of your protected characteristic?

   In the past I had expressed concerns about being treated differently on account of my race/color and filed a complaint with the Human Rights Commission. Since then, other staff members have been given permanent full-time funding. Furthermore, other staff members have also missed more time than I have, but not placed on the Attendance Management Program.

5. Do you believe you are the only person who has experienced this treatment?

   Yes. My position is the only one not to be given permanent funding.

6. How did this affect you?

   I am being forced to relocate to the Hub, which is a pilot program. I have stability where I am now. I have had to see a psychiatrist due to this situation and am currently off work because I am having a relapse with depression.

7. How did you try to resolve the problem?

   In January, 2011 I brought my concerns to the attention of Cheryl Billard (Manager of Mental Services). My unit manager (Darcy Bouchard) is also aware of my concerns.

8. When did you last have contact with the Respondent? What happened?

   On December 9, 2011 I was told I was going to be placed in the Hub.

I refer to all the above information and allege that these actions constitute discrimination on account of race/color/physical disability and retaliation

> **and that they are prohibited under Section 5(1)(d)(i)(j)(o), and 11 of the Nova Scotia Human Rights Act.**
>
> **I have read (or had read to me) the above allegations and to the best of my knowledge, the information is true and accurate.**

[46] As is obvious, there is nothing in the entire complaint (by reference to date, words or otherwise) which would suggest that Mr. Smith had any intention to refer to facts said to have occurred prior to 2005.

[47] Fifth, based on this Court's jurisprudence, the Board would be prohibited from permitting an amendment to the complaint so as to take the inquiry all the way back to 1990, as now urged by the appellant. Had the Board Chair acceded to the appellant's request on appeal that he ought to have been allowed to "amend" his complaint and take it back to "the beginning, 1990" he would have clearly erred and been reversed on appeal.

[48] Sixth, I would summarily reject the appellant's assertion that being allowed to "amend" his complaint by taking it from 2005 back to 1990 would be "simply procedural". On the contrary, it would be hard to imagine a change that could be more substantive or prejudicial to the respondent. Such an expanded inquiry would have involved other, prior employers besides Capital Health, from whose ranks or records the availability of witnesses or material evidence would be completely unknown.

[49] To somehow permit Mr. Smith to now advance a broad, sweeping allegation of "racism" which he says virtually permeated his employment conditions throughout his entire working life, would be to turn the remedial purpose and objectives of Nova Scotia's human rights legislation on their head.

[50] Seventh, it is trite to observe that the procedural safeguards contemplated in our human rights legislation were intended to permit a focused and robust inquiry into the facts, that is fair to both the complainant, and to the person or institution whose actions are said to be discriminatory.

[51] It is a fundamental principle of law that a person accused must always be told the case they have to meet, and be given an opportunity to make full answer and defence. The kind of inquiry now urged by the appellant on appeal would leave Mr. Smith's former employer and the Board without any boundaries with which to prepare and present a defence, or guide the inquiry, respectively. Any

confidence or reliance placed upon the limits established by this Court's jurisprudence would be ethereal and illusionary.

[52] A key objective of human rights legislation is to be remedial, in the sense that the process for inquiring into and exposing acts of discrimination must be expeditious in order to be effective. Otherwise the salutary benefits of public scrutiny and meaningful redress in the face of demonstrated violations, is lost. The efficient and timely disposition of complaints is in the best interests of both complainants, and those whose behaviour is impugned. It is also in the public interest. People and businesses need to get on with their lives. Delayed or unnecessarily protracted human rights litigation does not improve with age.

[53] The processes, and various checks and balances established in Canada's human rights jurisprudence, make it clear that fairness is extended to all sides – complainants and accused, alike – so that a party "charged" can know the case one has to meet, and is given the opportunity to make full answer and defence.

[54] That is the law, and it does not flex, or bend, or turn itself inside out, to suit the particular circumstances of the complaint, or the complainant.

[55] Eighth, and finally, the appellant's interpretation and expression of the law is simply incorrect.

[56] Contrary to the appellant's submissions, the Board did not err in its interpretation of s. 29(2) of the Act which reads:

> (2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

[57] In his factum at ¶29, the appellant argues that "[t]he Chair made an error of law when he determined that he was not entitled to consider [evidence of past] events, on the basis of the *Human Rights Act* limitation period". The appellant's assertion is incorrect. Mr. Murray did consider evidence of past events to the extent he was permitted to do so by law.

[58] At ¶9 of his decision, Mr. Murray said:

> … The limitation provisions in the *Act* require that I be able to find a distinct discriminatory act or behaviour within 12 months of the filing of his complaint

> before I can go back in time and adjudicate as to whether there had been previous or ongoing behaviour of the same character.

[59] Similarly, at ¶9-12 of his preliminary decision defining the scope of the inquiry, Mr. Murray said:

> [9] The *Act* concurrently restricts my authority to inquire into and to adjudicate upon actions or conduct. For distinct instances of alleged discriminatory acts or conduct, these must have occurred within 12 months of the date of the complaint: *Izaak William Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18 (CanLII), at paras.24, 36. The *Izaak Walton Killam* case dealt with a specific event that occurred on a clearly identifiable date.
>
> [10] Where the allegation is that there has been an *ongoing* act of discrimination, or ongoing discriminatory behaviour, then it is only necessary that the last *instance* occurred within the 12 months prior to the signing of the complaint to satisfy the limitation period. If there is a "last instance" within 12 months of the complaint, there is no apparent statutory restriction on how far back my authority to inquire could extend. This is particularly important with respect to claims involving systemic discrimination, or complaints related to patterns or habits of behaviour in relation to specific individuals which are perceived as discriminatory.
>
> ...
>
> [12] ... Based on this approach to limitation provisions in human rights legislation, "ongoing" discrimination in our *Act* would therefore appear to contemplate behaviour that is recognizable as a series of separate but successive actions involving the complainant, each of which could constitute a violation of the *Act*.

(Underlining mine)

[60] The 12 months' time limitation was definitively considered by this Court in *Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18. There, my colleague Justice Bryson emphasized that "[t]he limitation period clearly tolls from the events described in s. 29(2)" (¶36). The Court in that case was similarly reviewing a Board of Inquiry's interpretation of how to apply the limitation period set out in section 29(2). The *IWK* case provided a clear statement on the matter of complaints being out of time under section 29 of the *Human Rights Act*:

> [21] Although Human Rights legislation enjoys a special status in Canadian law, such legislation is not exempt from the normal principles of statutory interpretation. As the Supreme Court of Canada said in *Potash*:

> [19] I accept that human rights legislation must be interpreted in accordance with its quasi-constitutional status. This means that ***ambiguous language*** must be interpreted in a way that best reflects the remedial goals of the statute***. It does not, however, permit interpretations which are inconsistent with the wording of the legislation***.
>
> ...
>
> [24] So we begin with the words the Legislature has used. To repeat, these are:
>
> > **29(2)** Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.
>
> Those words seem clear. One hardly needs a dictionary to interpret "within"...
>
> ...
>
> [33] While the outcome in this case is unfortunate for Mr. Patterson, it is the inevitable result of the Legislature's clearly expressed intention that a 12 month limitation should run from the conduct complained of, and the failure of the Commission to address the complaint within that limitation period.

(Underlining mine)

[61] The Board in this case was also charged with investigating the appellant's allegations of "ongoing" misconduct. Section 29(2) states that where such an allegation is made, the complaint must be made "within twelve months of the last instance of the action or conduct if the action or conduct is ongoing". In his preliminary decision defining the scope of inquiry, the Board gave careful consideration to the meaning of the words "ongoing" and "last instance". This interpretation of section 29(2) was not only reasonable, it was favourable to the appellant: the Board rejected the submission of the respondent that for ongoing misconduct to be found, the type and nature of discrimination (rather than just the grounds) would have to be the same or similar.

[62] The "last instance" of alleged ongoing misconduct was the appellant's transfer to the Hub. The Board found this complaint to be without merit, and therefore its adjudication of other allegations of misconduct necessarily ceased at that point.

[63] This Court has also addressed the issue of the "use" of evidence occurring outside the limitation period as proof of discrimination in events occurring within the limitation. The proper and improper application of such evidence was

explained by my colleague Justice Bourgeois in *Nova Scotia Liquor Corporation v. Nova Scotia (Board of Inquiry)*, 2016 NSCA 28 where she said:

> *G. Did the Board err in law by treating statute barred conduct that was not discriminatory under the Act as evidence of ongoing misconduct by the Corporation?*
>
> [97] Ms. Kelly complained that she was prohibited from working at a wine fair in November 2004 because she was pregnant, although she did end up working at the event in a different capacity. Before the Board the NSLC challenged the veracity of Ms. Kelly's account, but also argued that the complaint would be statute barred in any event...
>
> [98] The NSLC submits that the Board appeared to accept its argument with respect to the wine incident being statute barred, but then proceeded in its reasons to throw the practical effect of that finding in doubt. The Board's reasoning and conclusion help underscore the source of the concern.
>
> ...
>
> [105] With respect, I disagree with the Commission. The fact that it is entirely unclear what the Board was endorsing as the possible evidentiary use of the non-discriminatory conduct is concerning. Was the Board suggesting it can be referenced for mere historical context? Was the Board suggesting it can be referenced to prove subsequent non-barred conduct is discriminatory? Was the Board suggesting that it can be referenced and utilized in some fashion in imposing a remedy for any conduct that is found to be discriminatory? The NSLC asserts that if the Board intended to propose that statute-barred conduct can be used as supportive evidence of later acts of discrimination, such is clearly contrary to s. 29(2) of the *Act*, and the case authorities. ...
>
> ...
>
> [107] I am satisfied that neither case supports the proposition that conduct found to **not** be a stand alone act of discrimination and statute-barred "is evidence to prove ongoing misconduct". The Board then cites the recent decision of this Court in *Izaak Walton Killam Centre v. Nova Scotia (Human Rights Commission), supra*. Clearly that decision does not support the proposition that s. 29(2) can, or should, be interpreted as permitting statute barred conduct to be used as "evidence to prove ongoing misconduct".
>
> ...
>
> [115] Here the Board definitively concluded the wine fair incident was not "evidence of an ongoing complaint". But can it be evidence of something else? It is puzzling what the Board meant by "historical conduct" or "ongoing misconduct". If the Board was suggesting that statute-barred conduct could be used as evidentiary support for more recent allegations of discrimination, such is problematic.

> [116] Section 29(2) is clear. If a complainant alleges discriminatory conduct which does not fall within the 12 months preceding a complaint, it can only ground liability under the legislation if it is found to be "ongoing". There is no other form of misconduct contemplated in the *Act*, other than a finding of discrimination as defined therein. In my view, should a board make a finding of current discrimination based on statute-barred conduct, that would constitute an improper end-run around the limitation period specified in s. 29(2).

(Underlining mine)

[64] This Court's analysis in *NSLC* clearly shows that Mr. Murray would not be permitted to consider evidence in the way suggested by the appellant. This is so even if the Board suspected that events outside the 12 month period amounted to discrimination or retaliation. Those events – and any finding in relation thereto – are out of time. The analysis must start within the 12 months preceding the filing of the complaint and move backwards in time, not chronologically.

[65] In keeping with this approach, the Board first made a finding that there was no discriminatory/retaliatory conduct by Capital Health within the 12 month limitation period. In making this finding, the effect was to limit its ability to use evidence of events occurring before this time. The Board was arguably not limited in its consideration of evidence of past events introduced simply for narrative and context, and the Board did indeed hear such evidence. The Board was not, however, permitted to make a finding, let alone bound to make a finding of the alleged discriminatory or retaliatory significance of that evidence, where no act of discrimination or retaliation arose within the 12 month limitation period.

[66] The appellant argued that the Board applied an "unjustifiably strict reading" to his complaint "when it decided … not to inquire into events that occurred prior to 2005". Once again, the appellant is incorrect. This Board was legally bound to adjudicate only those allegations that are put to it by the Nova Scotia Human Rights Commission in the complaint. This was precisely the issue that came before this Court in *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114. In that case, the Nova Scotia Department of Environment appealed the decision of a Board of Inquiry constituted under the *Act*. The Board had allowed amendments to Ms. Wakeham's complaint that greatly broadened the scope, and added a new complaint of discrimination on the prohibited grounds of mental disability. The amendments also changed the date of the impugned conduct from February 21, 2012 to February 14, 1999.

[67] The Court overturned the amendments. In doing so, my colleague Justice Farrar at ¶19 and 23 of his reasons said:

> [19] The effect of the amendments is to have a complaint which circumvents all of the procedures under the human rights regime, including intake, investigation, attempts at resolution, consideration for referral, and ultimately referral or dismissal by the Commissioners. As I will explain, this is inconsistent both with the *Human Rights Act* and settled jurisprudence. While a Board of Inquiry has significant powers, it is ultimately a statutory tribunal governed and limited by the provisions of the parent legislation – in this case the *Human Rights Act*. The *Human Rights Act* simply does not allow a Board of Inquiry to approve substantive amendments.
>
> …
>
> [23] As a statutory tribunal, a Board of Inquiry's source of powers and privileges flow out of express provisions of the *Act*. The *Act* does not give a Board of Inquiry the power to amend complaints.

[68] Finally, as to the appellant's complaint that the Board denied him the opportunity to contest the form or content of his complaint, Justice Farrar's conclusions at ¶74, 75, and 82 are clear:

> [74] Ms. Wakeham is effectively arguing that the Human Rights Commission should not be allowed to control the investigation and referral of human rights complaints. Her position is completely contrary to the law that exists in Nova Scotia. …
>
> [75] The Supreme Court of Canada in *Comeau* dealt squarely with the role of the Human Rights Commission with regard to the filing and referral of complaints. For ease of reference, I will repeat what the Supreme Court of Canada said when describing the role of the Human Rights Commission:
>
> > [20] The *Act* sets up a complete regime for the resolution of human rights complaints. Within this regime, the Commission performs a number of functions related to the enforcement and promotion of human rights. With regard to complaints, it acts as a kind of gatekeeper and administrator. …
>
> …
>
> [82] If Ms. Wakeham disagreed with the way in which the Commission handled her complaint, she should have sought judicial review of the decision. She did not. Her argument amounts to a request for this Court, in the first instance, to judicially review the complaint process. That is not our role. Her submission is without merit.

(Underling mine)

[69] In this case, the Commission drafted the complaint and instructed the inquiry into events from 2005 forward. Deference is owed to that decision. Two very senior and experienced Commission counsel acted for the appellant throughout this lengthy inquiry. He cannot now use this appeal as a vehicle to argue against something that should have been challenged by judicial review in 2012, if it merited challenge at all.

[70] The state of the law surrounding all of the appellant's complaints was long-settled. The jurisprudence of this Court was clear, current, unambiguous and binding upon this Board in its adjudication of the appellant's complaint. I am satisfied that the Board's approach was correct. Mr. Smith's failure to appreciate or recognize the current state of the law, was unfortunate.

[71] For all of these reasons, there is nothing here which could possibly justify our intervention.

Costs

[72] Capital Health says this is a special case that merits an award of costs, not withstanding the fact that it arises in the context of a tribunal appeal. I agree.

[73] In Nova Scotia, we have adopted a "no costs" approach in administrative law appeals.

[74] *Civil Procedure Rule* 90.51 says:

> **90.51** No costs may be ordered paid by or to a party in a tribunal appeal unless the Court of Appeal orders otherwise.

[75] I don't know the reason the default position in Nova Scotia is to neither award nor impose costs in a tribunal appeal. I need not search for a definitive answer in this case. It is enough to observe that our Rule is different than the approach taken in other jurisdictions. A quick review of the rules of court in Alberta, Saskatchewan, Manitoba, Ontario and Newfoundland, for example, indicates that the courts in those provinces have a general power to award costs on appeals from civil disputes without any limitation or distinction made regarding costs in tribunal appeals.

[76] While it is true that we do not typically award or impose costs in a tribunal appeal, there are cases where we have. The question here is whether we are prepared to exercise our discretion by imposing costs against the appellant.

[77] I will start by describing the origins of the default position *against* costs in tribunal appeals.

[78] As we know, our own rules of procedure were completely rewritten with the publication of the *Civil Procedure Rules (1972).* Prior to the adoption of those CPRs, procedural rules for superior courts in Nova Scotia were prescribed in *The Rules of the Supreme Court* Schedule to *The Judicature Act 1950,* c. 11. The power of the Court of Appeal to award costs was provided at Order LVII, s. 5:

> [t]he court shall have power to make such order as to the whole or any part of the costs of the appeal as is just.

[79] This broad general authority, which did not differentiate in the award or imposition of costs according to the *type* of appeal, was changed with the adoption of our *Civil Procedure Rules (1972).* This shift in approach to costs in tribunal appeals first appeared in CPR 62.27:

> **62.27** No costs shall be ordered paid by or to any party to a tribunal appeal or an appeal under Rules 56 or 58 or an appeal from a judgment in an action relating to a statute or tribunal, unless the court, <u>for special reasons</u>, so orders.

(Underlining mine)

[80] A further change to the Rule was made in 1977 when CPR 62.27 was amended to read:

> **62.27** Unless otherwise ordered by the Court in its discretion, no costs shall be ordered paid by or to any party to a tribunal appeal.

[81] This language prevailed from 1977 until 2009 when our *Civil Procedure Rules* underwent a substantial revision, leading to the current language:

> **90.51** No costs may be ordered paid by or to a party in a tribunal appeal unless the Court of Appeal orders otherwise.

[82] From all of this, it would appear that the current "default position" has existed in Nova Scotia for 45 years.

[83] While it is true that we do not typically award or impose costs in a tribunal appeal, there are cases where we have. For example, in *Nova Scotia (Human Rights Commission) v. Canada Life Assurance Co.*, [1992] N.S.J. No. 5 (C.A.) costs of $2,000 plus disbursements were awarded on appeal in a case where:

> … The Commission may have considered this a test case to obtain an interpretation of the Act. Unfortunately, the respondent was placed in a position where it had to defend its position through an expensive four-day Board of Inquiry hearing and an appeal. Under the circumstances, the respondent should be awarded the costs it seeks in successfully opposing the appeal. … The costs should be paid by the Commission…as the Commission was the principal appellant.

[84] *Patient X v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 41 came to us on appeal from judicial review. Despite this slightly different genesis, the case provides some useful commentary surrounding the types of circumstances where costs may be warranted in the administrative law context:

> [82] At the appeal hearing, the College requested costs should the appeal be dismissed. It was submitted that Patient X's appeal was a misplaced attempt to address issues which were not properly before the Court, resulting in a costly legal proceeding. It was submitted that a modest award of costs was warranted.
>
> [83] Patient X argued she should not be subject to a cost award if her appeal was unsuccessful, as she was not at fault for anything that had happened, in fact, she was the victim.
>
> [84] Costs were not awarded in the court below against Patient X in recognition of her financial circumstances. The lack of a costs award there however, does not preclude an award, if warranted, on appeal. Nor does the fact that Patient X is a self-represented litigant, rule out the possibility of a costs award against her, if warranted.
>
> [85] I am of the view that an award of costs is appropriate. Although the issues she attempted to raise are certainly important to her, and some also have a broader societal importance, most of what Patient X attempted to raise in this Court simply did not belong in front of us. Patient X was of the mistaken view that she could somehow turn a complaint to the College about a doctor, and the subsequent review of the resulting disciplinary decision, into a claim at the Court of Appeal for monetary damages for assault, breach of privacy and other complaints. Notwithstanding the seriousness of the allegations made by Patient X, matters simply do not work that way.
>
> [86] Patient X clearly misunderstands the role of this Court. She came before us looking for an outcome which is impossible for us to give. In pursuing that outcome, she caused unnecessary expense to the other parties. Self-represented litigants, even those with an arguable issue to be considered, must realize that there may be financial consequences to bringing a matter which is found to be without merit.
>
> [87] In light of the circumstances, the College submits a "token" award of costs be considered. I am of the view that an award of costs in the amount of $500.00

> payable by Patient X to the College is warranted. Dr. Y made no request for costs. As such, I would not order any.

[85] Other cases where the Court has exercised its discretion and awarded costs on appeals from tribunal decisions would include: *Chester District (Municipality) v. Certain Ratepayers of Chester District (Municipality)*, 2000 NSCA 19; *Lewis v. Halifax (Regional Municipality) North West Community Council*, 2001 NSCA 98; *Truro (Town) v. Creelman*, 2003 NSCA 96; *Dipersio v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2004 NSCA 139; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2005 NSCA 70; *Heritage Trust of Nova Scotia v. Halifax (Regional Municipality)*, 2007 NSSC 28; and *Can-Euro Investments Ltd. v. Nova Scotia (Utility and Review Board)*, 2008 NSCA 123.

[86] None of these cases provide any consideration of the "no costs" rule, or the reasons for deviating from it. Further, in cases where CPR 90.51 is invoked to not impose costs, the tendency has been to simply say that we:

> [49] … see no reason to depart from our customary practice which is to decline to award costs in appeals from administrative tribunals. None of the circumstances here are so unique or exceptional as to call for a variation. … (*New Scotland Soccer Academy v. Nova Scotia (Labour Standards Tribunal)*, 2012 NSCA 40.)

See as well *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24 at ¶76.

[87] From this brief summary, it is clear that a formal "test" for when costs might be awarded in tribunal appeals, has not been articulated. That is understandable. Every situation will be addressed on a case-by-case basis. From my consideration of these and other cases, it appears to me that our choosing whether or not to award costs pursuant to CPR 90.51 might be prompted by a host of factors which could be said to include: the merits of the appeal; the nature or novelty of the issues in dispute; the conduct of the parties; the parties' personal and financial circumstances; and considerations to do with achieving overall fairness and justice between the parties.

[88] Accepting as I do the circumstances presented by Mr. Rogers on behalf of the CDHA, I find that this is a case where imposing costs against Mr. Smith in favour of Capital Health is warranted. The appellant had a long and fulsome hearing before the Board. He was represented by two senior, experienced lawyers engaged by the Commission. The Board's reasons reveal a clear analysis strongly

rooted in the law and amply supported by the evidence. Time set aside for meaningful reflection and second thought should have indicated that the prospects for successfully challenging the Board's decision were futile.

[89] Mr. Smith had every opportunity to present the complaint he signed. His evidence was thoroughly considered by the Board. The Board Chair was satisfied that this case is not about "racism". The CDHA called five witnesses who all gave evidence about the real reason Mr. Smith was being moved to the Hub. Mr. Smith was not chosen to move because of the color of his skin. He was chosen (along with two others) because his client-base comprised the chronically mentally ill who needed the kind of community support provided by the Hub. With his background, Mr. Smith was able to deal with the needs of those clients. He was not qualified to deal with the "acute mentally ill patients", and those individuals had to be treated in a different setting.

[90] The Board believed the witnesses called by the CDHA. Mr. Murray's strong findings and clearly articulated reasons for dismissing Mr. Smith's complaint are fully grounded in the record. Mr. Murray considered the evidence carefully, from the most favourable standpoint as it concerned the appellant. Having done so, the Board was satisfied that there was no link between his stated complaint and "racism". The record establishes that Mr. Smith accepted the transfer in a written email he sent to his superiors. This is just one illustration, from a host of other facts, rooted in the evidence and thoroughly addressed by the Board, which caused Mr. Murray to conclude that the CDHA's actions toward Mr. Smith were not motivated by racism, and that the Authority had not discriminated against him in any way.

[91] The jurisprudence of this Court, which bound the Board in its deliberations, is clear, explicit and unambiguous. The hearing lasted 17 days. As Mr. Murray's decision makes clear, he reviewed several hundreds if not thousands of pages of documents introduced as exhibits. The Chair bent over backwards to fairly and effectively adjudicate the appellant's human rights complaint. He gave the appellant considerable leeway in presenting the historical context to the discrimination he alleged. The record on appeal – transcribed, copied and bound as it must be – is voluminous. Respectfully, there was no basis for bringing this appeal.

[92] Deciding to impose costs under CPR 90.51 should not be arbitrary. The choice to exercise our discretion to impose costs should be done on a principled

basis. Respectfully, the appellant failed to recognize that the Board's decision was beyond reproach. He failed to understand that binding jurisprudence prohibited the Board from adopting the approach urged at the inquiry and repeated here. He failed to grasp the fact that his grounds of appeal – whether as originally cast or as reconfigured in this Court – found no support in the record. He failed to review and evaluate his grounds of appeal such that it was not until Capital Health and the Commission had finished their oral submissions, and counsel for the appellant offered his final reply, that the respondents and the panel hearing the appeal were told the appellant was abandoning the grounds stipulated in his Notice of Appeal, and would be relying upon a single issue referenced in his factum. In sum, the appellant failed to appreciate that his appeal had no realistic chance of success and would put all parties to a completely unjustified expenditure of time, resources and money.

[93] These failings warrant an award of costs to the CDHA in this case, which I would fix in the amount of $3,000, inclusive of disbursements.

[94] At the hearing, counsel for the Commission did not seek costs.

Conclusion

[95] I would dismiss the appeal and award costs of $3,000 inclusive of disbursements payable forthwith by the appellant to the Capital District Health Authority.

Saunders, J.A.

Concurred in:

Beveridge, J.A.

Oland, J.A.