

Form 7.05

2016

Hfx. No. 4 5 6 7 8 2

Supreme Court of Nova Scotia

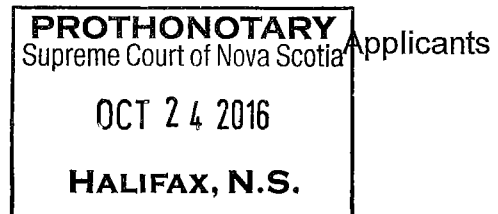
Between:



**Warren Reed, Gerry Post, Ben Marson, Jeremy MacDonald, Kelly McKenna,
Paul Vienneau**

and

Nova Scotia Human Rights Commission



Respondent

Notice of Judicial Review

**To: The Attorney General of Nova Scotia representing Her Majesty the Queen in
right of the Province of Nova Scotia and Nova Scotia Environment**

Request for judicial review

The Applicants request judicial review of a decision by a decision-making authority, namely the decision of Darryl MacPherson, Human Rights Officer (the "Decision-Maker") of the Nova Scotia Human Rights Commission (the "Commission"), which decision refuses to accept the complaint filed by the Applicants pursuant to the *Human Rights Act*, RSNS 1989, c 214.

Decision to be reviewed

The decision is dated September 14, 2016. The authority under which the decision is made is the *Human Rights Act*, RSNS 1989, c 214. The decision was first communicated to the Applicants on September 16, 2016. Attached to this Notice is a copy of the decision.

Grounds for review

The Applicants seek review on the following grounds:

1. The Applicants brought a complaint to the Human Rights Commission pursuant to the *Human Rights Act* made against the province of Nova Scotia alleging that it selectively enforces the *Health Protection Act* and other statutes in a manner that discriminates against individuals with disabilities, denying them fundamental health protections. In particular, the province of Nova Scotia and its agents selectively enforce the requirements under the *Food and Safety Regulations* made under s. 105 of the *Health Protection Act* which provides that food establishments must have public washrooms in a convenient location and which meet the building code. Washrooms that meet building code are accessible washrooms and the Province of Nova Scotia permits to exist washrooms that are not accessible by individuals in wheelchairs. It is alleged in the complaint that the Province of Nova Scotia only selectively enforces these requirements and does so in a manner that results in discrimination against individuals with disabilities.
2. The Applicants initially complained to the Human Rights Commission and on August 4, 2016 Tamara Powell, Human Rights Officer for the Nova Scotia Human Rights Commission refused to accept the complaint. The Human Rights Officer told the Applicants that the Ombudsman has jurisdiction over the complaint. When the Applicants disputed this conclusion, the Applicants were told by the Human Rights Officer to bring the matter to Mr. MacPherson, Human Rights Officer (Intake Analyst).
3. By letter dated August 9, 2016, the Applicants re-issued their complaint to Mr. MacPherson, which complaint was again rejected by letter dated September 14, 2016 and communicated to the Applicants on September 16, 2016.
4. The Applicant seek review on the grounds that the decision-maker erred in fact, or in law, or both, by refusing to accept the complaint made:
 - a) The decision-maker failed to give any consideration to the adverse consequences of selective observation of public health regulations.
 - b) The decision-maker failed to consider the particular health vulnerabilities of the Applicants.
 - c) The decision-maker concluded that the Applicants could not complain about the Government of Nova Scotia's selective enforcement of legislation in a discriminatory manner but would be required to complain against each establishment that is the beneficiary of such selective enforcement.
 - d) The decision-maker concluded, without any reasoning, that though the *Human Rights Act* prevails over all other statutes (unless specifically exempted), the Canada Building Code and the *Building Code Act* effectively prevail in this case.

- e) The decision-maker improperly considered irrelevant factors, namely, that the Applicants could complain against certain establishments though the Applicants clearly stated the complaint was about how the Government of Nova Scotia selectively enforces the law to the disadvantage of disabled persons.
 - f) The decision-maker failed to cite any grounds in the *Human Rights Act* that would permit the Commission to refuse to accept the complaint.
 - g) The decision-maker failed to cite any grounds in Section 29 of the *Human Rights Act* that would permit the decision-maker to dismiss the complaint.
 - h) The decision-maker failed to provide adequate reasons for certain parts of his decision, and failed to provide any reasons at all for certain parts of his decision; such failures, each of which and together, constitute a denial of natural justice.
5. Such further and other grounds as may appear prior to the hearing of this matter.

Order proposed

The Applicants request an Order:

1. Directing that the Human Rights Commission initiate and carry out an investigation of the Applicants' complaint in accordance with the *Human Rights Act*.
2. Directing that costs be awarded to the Applicants.

You may participate

You may participate in the judicial review if you file a notice of participation no more than ten days after the day a copy of this notice for judicial review is delivered to you. Filing the notice entitles you to notice of further steps in the judicial review.

Record to be produced

The Applicants foresee no difficulty obtaining the record, all of which should be in the possession of the Nova Scotia Human Rights Commission. The record will contain:

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- the Applicants' correspondence directed to the Human Rights Commission;
 - the letter of August 4, 2016 from Tamara Powell, Human Rights Officer with the Human Rights Commission;

- any and all records in the possession of the Human Rights Commission created or considered by the Commission in respect of the Applicants' complaint; and
- the letter of September 9, 2016 from Darryl MacPherson, Human Rights Officer with the Human Rights Commission;

The Applicants do not anticipate that it will take the Commission very long to produce the record, as all of its contents should be in the possession of the Commission.

Notice to decision-making authority

The respondent, the Human Rights Commission, is required by Civil Procedure Rule 7 (Judicial Review) to file one of the following no less than five days after the day the decision-making authority is notified of this proceeding by delivery of a copy of this notice for judicial review:

- a complete copy of the record, with copies of separate documents separated by numbered or lettered tabs;
- a statement indicating that the decision-making authority has made arrangements with the Applicants to produce of the record, providing details of those arrangements, and estimating when the return will be ready;
- an undertaking that the decision-making authority will appear on the motion for directions and will seek directions concerning the record;
- a summary of reasons given orally without a record and your certificate the summary is accurate, if you gave reasons orally and not on record.

If you fail in this regard, a judge may order costs against you including a requirement that you indemnify each other party for any expenses caused by your failure, such as expenses caused by an adjournment if that is the result.

Stay of proceedings or other interim remedy

The Applicants will not make a motion for a stay of the enforcement of the decision under judicial review.

Filing and delivering documents

Any documents you file with the Court must be filed with the office of the Prothonotary at the Law Courts, 1815 Upper Water Street, in Halifax, Nova Scotia, telephone 902-424-4900.

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a Judge orders it is not required.

Contact information

The Applicants designate the following address:

David TS Fraser
McInnes Cooper
Suite 1300, Purdy's Wharf Tower II
1969 Upper Water Street
PO Box 730
Halifax, NS B3J 2V1

Telephone: 425-6500
Facsimile: 425-6350

E-Mail: david.fraser@mcinnescooper.com

Documents delivered to this address are considered received by the Applicants on delivery. Further contact information is available from the Prothonotary.

Motion for date and directions

At 11:00 am on the 7 day of November, 2016, the Applicants will appear before a Judge at the Law Courts, 1815 Upper Water Street in Halifax, Nova Scotia, to make a Motion for an Order giving directions for the judicial review including a date and time for the hearing of it. The Judge may make an order or provide directions in your absence if you or your counsel fail to attend, and the Court may determine the appeal without further notice to you.

Signature

Signed October 24, 2016



Signature of Counsel

David TS Fraser
Counsel for the Applicants

Prothonotary's certificate

I certify that this Notice for Judicial Review was filed with the Court on October 24, 2016.



Deputy Prothonotary

Caroline McInnes
Prothonotary



Human Rights Commission

Dispute Resolution

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September 14, 2016

Warren Reed, Kelly McKenna, Jeremy MacDonald, Ben Marston, Gerry Post and Paul Vienneau
406-1540 Summer Street
Halifax, NS
B3H 4R9

Dear Mr. Reed *et al*

RE: Your human rights inquiry
File No.H16-1629

As you know, a decision was made by Commission staff (Human Rights Officer Tamara Powell) that your human rights complaint could not be accepted by the Commission. In your submissions, you requested this decision be reviewed. I have completed the requested review.

After careful consideration of the information you provided, we remain unable to accept your complaint. The reasons for this decision are set out below.

In brief, in your correspondence with HRO Powell, you stated "Our complaint is that the section is selectively enforced. It is enforced to the benefit of everyone except people who use wheelchairs. As a subset of persons with disabilities, wheelchair users are a protected category under the Nova Scotia *Human Rights Act*. Enforcement that excludes only this category of Nova Scotians is therefore a violation of the *Act*." In your correspondence to me, you went on to state you want to file a complaint against the "*Environmental Health and Food Safety Division of Nova Scotia Environment, the Minister of Environment, and the Chief Public Health Officer for the discriminatory enforcement of Food Safety Regulations made under Section 105 of the Health Protection Act*."

In coming to this decision, I have considered the following:

- All correspondence between you and Commission staff, including, but not limited to your most recent email to HRO Powel (August 4, 2016) and your Request for Reconsideration to me (August 9, 2016).
- *Health Protection Act*
- *Building Code Act*

Analysis

First, enforcement of Part 2 of the Health Protection Act does not reside with the Department of Environment. Rather, enforcement rests with the Department of Agriculture and Fisheries.

Second, I would like to take this opportunity to address your interpretation of HRO Powell's suggestion that you contact the Office of the Ombudsman. In your Request for Reconsideration, you stated the following:

"Powell suggests the Ombudsman is the proper avenue of redress. We have no intention of pursuing that. It would suggest that the government is subject to a different standard when it comes to human rights; that a serious violation has only administrative implications."

The Office of the Ombudsman does in fact have a mandate to ensure the proper administration of provincial and municipal government departments. Given that the concerns you raise involve the manner in which the Environmental Health and Food Safety Division is carrying out their responsibilities, it would appear HRO Powell was correct in referring you to the Office of the Ombudsman. Having said this, there is no reason why another government department could not carry out a simultaneous parallel investigation under their respective mandate(s).

You are correct in stating the Government of Nova Scotia and any department therein has a responsibility to adhere to Human Rights law. Human rights legislation is quasi-constitutional. Therefore, it in effect binds the crown to the standards set out under human rights legislation. That is, human rights legislation prevails over all other legislation with the exception of those which specifically references an exemption. However, one must bear in mind, respective government departments cannot operate beyond the parameters of the legislation they operate under.

With this in mind, legislation seldom operates in isolation. In the case at hand, the legislation in question is also subject to the *Building Code of Canada*, which has been adopted by the Province of Nova Scotia. Adherence to the *Building Code Act* is enforced based on the standards in place at the time of construction. It is not enforced retroactively. Therefore, the Department of Environment or Agriculture have no authority to enforce the legislation in question in the manner for which you are requesting. Having said this, should a pre-existing food establishment undertake renovations, the Department of Agriculture would have the authority at that point to consider the matter.

While the Department of Environment or Agriculture does not have the authority to address your concerns with pre-existing food establishments, the Nova Scotia Human Rights Commission does. However, such an inquiry would require a person to file a complaint against the specific service provider as each case must be assessed on its own merits. As an independent, impartial government agency, the Commission is subject to the rules of natural justice. Among other principles, compliance with the rules of natural justice requires the Commission to operate in an unbiased manner and allow potential respondents to present their case. There may be circumstances in which a service provider may experience an undue hardship to make structural changes to their business. The Commission is uniquely qualified to make assessments having regards to cost, outside sources for funding and health a safety factors. While the role of the Commission is to ensure full participation for all members of the human family, non-compliance for reasons of undue hardship does not require a business to close their doors.

Finally, in your allegations, you state that the Department of the Environment “enforce the regulations in such a way as to discriminate against persons with physical disabilities...” In fact, other segments of the population also experience challenges when trying to access such services. For example, older persons and persons with children experience similar challenges when accessing certain establishments.

Summary

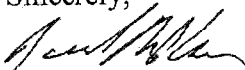
With all of the above in mind, and in summary, the Commission is entrusted to carry out investigations into potential human rights violations, regardless of who the possible respondent might be, so long as the organization falls within provincial jurisdiction and they are the properly identified respondent. This may very well include the examination of any statute under provincial jurisdiction. In your case, you are looking to bring action against the Department of Environment. They are an incorrectly named respondent. In your submissions, you referenced several service providers who you believe are in violation of the *Human Rights Act*. However, you have stated “we stress that we make no complaint against them.” In the event that you change your mind, an officer with the Commission would be happy to assess your complaint for jurisdiction.

Second, the Commission is well aware that technical compliance with the *Building Code Act* may not meet the substantive equality various groups in society have a right to access. This possible shortcoming is not restricted to persons using wheelchairs. On this point, I want to advise you that I have initiated steps to ensure the Commission is in the process of undertaking proactive steps for greater interaction between the *Building Code Act* and the *Human Rights Act*. Such an approach will create greater awareness of the *Human Rights Act* to builders and designers, who are more familiar with the standards set out in the *Building Code Act*. This will assist in ensuring future businesses adhere to standards that promote a more universal design, thereby creating greater accessibility.

Finally, not unlike other forms of legal proceedings, the *Health Protection Act* must be administered with the principles of natural justice in mind. Any possible restaurant owner has a right to a fair hearing which would include the opportunity to be heard. The *Health Protection Act* contemplates this right and grants the Minister the privilege of discretion. Such a right contemplates differences in circumstances and such legal defences as an undue hardship. As such, it is mandatory to review matters on an individual basis.

I understand that you may be disappointed with this decision. However, the decision is final and your file with the Dispute Resolution unit will now be closed.

Sincerely,



Darryl MacPherson
Human Rights Officer
(Intake Analyst)