No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF PRINCE EDWARD ISLAND)

BETWEEN:

NOEL AYANGMA

APPLICANT

and

FRENCH LANGUAGE SCHOOL BOARD

RESPONDENT

ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENT

APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Section 40 of the Supreme Court of Canada Act, R.S.C. 1985, c. S-26)

NOEL AYANGMA, Applicant
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TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO: KAREN A. CAMPBELL, QC
JESSICA M. GILLIS
Queen Street, Charlottetown PE C1A 7N8
For the Respondent, the English Language School Board

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IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE PRINCE EDWARD COURT OF APPEAL)

BETWEEN:

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and

THE FRENCH LANGUAGE SCHOOL BOARD

RESPONDENT

THE ENGLISH LANGUAGE SHOOL BOARD

RESPONDENT

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Applicant, Noël Ayangma hereby applies pursuant to section 40(1) of the ***Supreme Court Act***, R.S.C. 1985, c. S-26, as amended, for leave to appeal, from the Judgment and Order of the Prince Edward Island Court of Appeal (Case No. S1-CA 1408 dated July 31st, 2019 and August 28th, 2019 respectively, which judgement and order, though allowed the Applicant's appeal from the decision of the Supreme Court of Prince Edward Island dated December 21, 2018, on the main ground of appeal, but nonetheless ruled that the Human Rights Commission and/or its Human Rights Panel were both courts of competent jurisdiction pursuant to section 24(1) of the *Charter,* and that it was an abuse of process to conduct parallel proceeding alleging discrimination both in Court and before the Human Rights Commission.

AND FURTHER TAKE NOTICE that the said Application for leave shall be made on the basis of the following two specific grounds raising an issue of national importance.

Ground#1: *Ayangma v. Eastern School Board*, 2000 PESCAD 12, is still goof law Notwithstanding subsequent Supreme Court of Canada cases:*Nova Scotia (Workers' Compensation Board) v.Martin and Lasseur*, 200 SCC 54; R. v. Conway, 2010 SCC 22; and *Doré v. Bureau du Québec,* 2017, 2012 SCC 12 as it does bring The doctrine of abuse of process into play?

Ground#2: The Court of Appeal erred in law and committed a jurisdictional error when it concluded that it would be an abuse of process to run concurrent proceedings in two different fora (at paras.130-132) and thereby clearly reversed its previous decision (*Ayangma v. Eastern School Board 2000 PESCAD 12)*, which decision was based on the Federal Court decision in *Perera v. Canada*, affirmed by the Federal Court of Appeal in *Perera v. Canada*, [1997] F.C.J. No. 199 and *Perera v. Canada (1998) 1998 CanLII 9051 (FCA)*. These decisions unanimously found that Human Rights Commissions and the Human Rights Panels or tribunals, were not courts of competent jurisdiction to grant the remedies available pursuant to s.24(1) of the *Charter* and that it was not an abuse of process to pursue and/or maintain parallel proceedings before both the Human Rights Commission and the Court or tribunal based on the same set of facts and in particular when it held that:

> [130] ...in the future Charter issues which arise in the course of a human rights proceeding must be decided by the HRC/HRP.
>
> [131] This is because the *HRA* creates a specialized tribunal to hear claims for discrimination in, amongst other things, employment. The *HRA* does not contain express or specific language to oust the jurisdiction of s.96 courts which are courts of general jurisdiction for hearing of all cases. Still a superior court should decline to hear such a claim out of respect for the Legislature's policy choice to have all discrimination complaints heard by an HRC. This accords with the policy objective of effective access to justice and avoidance of duplication or abuse of process.
>
> [132] It would be an abuse of process to run current proceedings in two different fora. To be clear, the power of an HRC/HRP is limited by its constating statute and it therefore does not have the power to hear stand-alone Charter issues. The HRC/HRP only has the power to deal with Charter issues in cases where the essential factual character falls within the HRC/HRP's specialized statutory jurisdiction which is complaints properly made under the *HRA.*

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DATED at the City of Charlottetown in the Province of Prince Edward Island this 23rd day of September, 2019.

NOEL AYANGMA

TO: THE REGISTRAR OF THIS COURT

AND TO: **KAREN A. CAMPBELL, QC**
JESSICA M. GILLIS
Queen Street, Charlottetown PE C1A 7N8
For the Respondent, the English Language School Board

NOTICE TO THE RESPONDENT

A respondent may serve and file a memorandum in reply to this application for leave within 30 clear days after service of the within application. If no reply is filed in that time, the Registrar will submit this application for leave to the Court for consideration pursuant to section 43 of the *Supreme Court Act.*

Dated this 23rd day of September 2019.

NOEL AYANGMA, Applicant
75 Cortland Street
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Tel:(902) 628-1333 or 628-7934
noelayngma@yahoo.ca

TO: THE REGISTRAR OF THIS COURT

AND TO: **KAREN A. CAMPBELL, QC**
JESSICA M. GILLIS
Queen Street, Charlottetown PE C1A 7N8
For the Respondent, the English Language School Board

FORM 25B CERTIFICATE

I, **Noel Ayangma,** hereby certify that:

1. This file sealed in the courts below

   NO

2. There is a ban on the publication of evidence or the names or identity of a party or a witness.

   NO

3. There is confidential information on the file that should not be accessible to the public by virtue of specific legislation.

   NO

SIGNED BY

NOEL AYANGMA

September 23rd, 2019

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SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: *Ayangma v. FLSB and ELSB*, 2018 PESC 43

Date:20181116
Docket:S1-GS-26718
Registry: Charlottetown

Between:

Noel Ayangma

Plaintiff

And:

The French Language School Board and
The English Language School Board

Defendants

Before: The Honourable Justice James W. Gormley

Appearances:

Noel Ayangma, on his own behalf
Mary Lynn Kane, Q.C. and Meaghan Hughes solicitors for the defendants

Place and Date of Hearing: May 17, 2018
Charlottetown, Prince Edward Island

Place and Date of Judgment: November 16, 2018
Charlottetown, Prince Edward Island

STATUTES REFERRED TO: ***Rules of Civil Procedure,*** Rule 21.01(1)(b); ***School Act,*** RSPEI 1988, c. S-2.1; ***Charter of Rights and Freedoms***

CASES CITED: ***Ayangma v. FLSB and ELSB,*** 2016 PESC 12; ***Ayangma v. FLSB and ELSB,*** 2017 PECA 18; ***Hunt v. T & N PLC,*** [1990] SCR 959 (SCC) ; ***Knight v. Imperial Tobacco Canada Ltd.,*** 2011 SCC 42; ***HZPC America's Corp. v. True North Seed Potato Co.,*** 2007 PESCTD 23; ***Ayangma v. Commission Scolaire de Langue Française,*** 2014 PESC 18; ***Kahkewistahaw First Nation v. Taypotat,*** 2015 SCC 30; ***Auton (Guardian ad litem of) v. British Columbia (Attorney General),*** 2004 SCC 78; ***CMT et al. v. Gov't of PEI et al.,*** 2016 PESC 4; ***Bhasin v. Hrynew,*** 2014 SCC 71; ***Ayangma v. PEI Teachers Federation,*** 2013 CarswellPE 70; ***Ayangma v. P.E.I. Teachers' Federation,*** 2014 PECA 9; ***Law Society of Upper Canada v. Skapinker,*** [1984] 1 SCR 357; ***Canadian Egg Marketing Agency v. Richardson,*** [1988] 3 SCR 157; ***Club Pro Adult Entertainment Inc. v. Ontario,*** 2006 CarswellOnt 8170; ***R. v. Conway,*** [2010] SCC 22

Gormley, J.:

[1] The Defendants seek the Plaintiff's Amended Statement of Claim be struck. Specifically the Defendants request:

> (a) An order or a judgment striking out the Amended Statement of Claim, pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*, in whole or in part as it discloses no reasonable cause of action; or,
>
> (b) In the alternative, an order dismissing the Plaintiff's action as being frivolous or vexatious or otherwise an abuse of the process of the court pursuant to Rule 21.01(3)(d) or Rule 25.11 of the *Rules of Civil Procedure*; and
>
> ...
>
> (d) Costs of the motion on a substantial indemnity basis; and ...

Procedural Background

[2] The following is a review of the preceding actions taken in regards to this matter.

[3] The original Statement of Claim was filed by Noel Ayangma ("Ayangma") against the two defendants, the French Language School Board ("FLSB") and the English Language School Board ("ELSB") on July 21, 2015. A Notice of Intent to Defend was filed on August 6, 2015 by both the FLSB and the ELSB. The ELSB and the FLSB have not, as of yet, filed a defence to either the original Statement of Claim nor the Amended Statement of Claim.

[4] The Defendants filed an original Rule 21.01 motion on August 20, 2015. The Defendants sought and obtained an order from the Supreme Court of Prince Edward Island on August 28, 2015 which allowed the Defendants 14 days from the date of a decision being rendered in the Rule 21.01 motion to file a Statement of Defence if required. On September 30, 2015, the Defendant's motion, similar in nature to the present motion, to dismiss the Amended Statement of Claim was heard by the Supreme Court of Prince Edward Island in ***Ayangma v. FLSB and ELSB***, 2016 PESC 12.

[5] On March 30, 2016 the Supreme Court rendered its decision which granted the Defendants' motion to strike the original Statement of Claim. Ayangma appealed the decision. The appeal was heard on May 25, 2017. The Court of Appeal rendered its decision on September 29, 2017 wherein it sent the matter back to the Supreme Court to be reheard due to the insufficiency of reasons provided in the decision (see: ***Ayangma v. FLSB and ELSB***, 2017 PECA 18). Ayangma filed an Amended Statement of Claim ("Amended Claim") on January 8, 2018. The present motion was then filed March 16, 2018 by the ELSB and the FLSB.

[6] As I have the benefit of the Prince Edward Island Court of Appeal decision in

regards to the original Statement of Claim as filed by Mr. Ayangma, I refer to the portion of that decision which outlines the background and the context of the human rights complaints made by Mr. Ayangma in ***Ayangma v. FLSB and ELSB***, 2017 PECA 18:

Background

[3] Mr. Ayangma moved to Canada from Cameroon, Africa. He is a Canadian citizen and has been a resident of Prince Edward Island since 1987. He is black. He speaks and writes English and French. He holds a Bachelor's Degree in Education in Linguistics (BEd), a Master's Degree in Business Administration (MBA), a PhD., and a Master's Certificate in Project Management (MCPM). He holds a Level 6 teaching certificate from the Province of PEI.

[4] The School Boards were established pursuant to the provisions of the *School Act*, R.S.P.E.I. 1988, CAP. S-2.1 which was repealed in 2016, and replaced by the *Education Act*, R.S.P.E.I. 1988, Cap. E-.02, proclaimed August 20, 2016. They are charged with the responsibility of delivering French and English education in Prince Edward Island.

[5] Mr. Ayangma has been involved in litigation with the School Boards since 1998. This present claim relates to a failure to hire based on breach of his rights, being discrimination on the basis of the prohibited grounds, pursuant to Section 15 of the *Charter*. He has also filed human rights complaints against the School Boards on the same facts. There have been a number of applications for judicial review as well as a number of appeals from the decisions rendered on those applications.

[6] The Human Rights Commission made a finding in 2005 that Mr. Ayangma had been discriminated against by the English School Board in relation to various teaching positions he applied for. This Court upheld that finding in ***Ayangma v. Eastern School Board & ano.***, 2008 PESCAD 10 (CanLII), and ordered, among other things, that the School Board issue a letter of apology to Mr. Ayangma and review its hiring policies as well as its

policies on cultural and linguistic diversity.

[7] Mr. Ayangma was employed by the English Language School Board for the 2009-2010 school year. At the end of that school year, on July 10, 2010, the Board wrote to Mr. Ayangma and informed him that his job performance had been unsatisfactory and that he would not be considered for future employment. He commenced an action against the School Boards alleging discrimination. That litigation was settled by a Settlement Agreement and a Release dated February 6, 2012. In the Release, Mr. Ayangma released the School Boards *"from all liabilities on all outstanding matters in contemplation by the parties at the time and from any future claims arising from the same set of facts, and from matters arising from new facts"* (Statement of Claim, para.21).

Human Rights complaints

[8] Prior to commencing this proceeding and filing a statement of claim Mr. Ayangma filed a human rights complaint against the French Language School Board on similar facts alleging that he was directly and systemically discriminated against by the French Language School Board on the basis of *"race, color, ethnic, or national origin and race,"* and that he was equally or better qualified than those considered, interviewed and hired for the Director General position. That complaint was dismissed by the Executive Director on March 26, 2013 on two grounds: I) the Release executed between the parties acted as a defence to the complaint, and ii) the complaint was without merit.

[9] An application for judicial review of the Executive Director's decision was upheld by the Supreme Court in ***Ayangma v. La Commissionaire Scolaire et al.***, 2014 PESC 18 (CanLII). The applications judge found the Release acted as a defence to any claim for any position applied for prior to the signing of the Release. The Supreme Court order was appealed to this Court, but was dismissed before the scheduled hearing date due to non-compliance with a security for costs order ***(Ayangma v. PEI H.Rts.Comm. & La Commission Scolaire***, 2015 PECA 4 (CanLII)).

[10] Mr. Ayangma also filed a human rights complaint against the English School Board alleging he had been discriminated against because he was not interviewed in 2013 in a competition for the Director of Human Resources position. The Executive Director investigated that complaint and dismissed it on April 10, 2017, on the basis that Mr. Ayangma failed to establish a *prima facie* case that his color, race, and ethnic or national origin were factors for being denied an interview.[1]

[7] Rule 21.01(1)(b) states as follows:

To any Party on a Question of Law

21.01 (1) A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

...

(b) under clause (1)(b).

[8] The two leading cases from the Supreme Court of Canada which provide direction to a court on a Rule 21.01(1)(b) motion are ***Hunt v. T & N PLC***, [1990] SCR 959 (SCC) and ***Knight v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42.

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[1] I note that the reference to the "Statement of Claim" in paragraph 7 of the decision of Justice Murphy is a reference to the original Statement of Claim which is not the subject of this motion. For clarity, I am aware that it is Amended Statement of Claim filed as of January 8,2018 which is the subject matter of this motion.

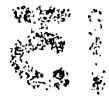
[9] Although the Rule itself is beguilingly simple the test as delineated by the Supreme Court is more complex. In the most recent of the decisions, Chief Justice McLauchlin had this to say:

> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263, at para. 15; Hunt v. Carey Canada Inc., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (CanLII), [2007] 3 S.C.R. 83; *Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.

[10] The court went on to provide the rationale for such a rule and the ability to strike pleadings at this stage of the process in the following passages:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

> [20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to



> grips with the parties' respective positions on those issues and the merits of the case.
>
> [21] ... Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[11] In addition, the claimant must clearly plead the facts upon which it relies in making any claim. In ***Knight v. Imperial Tobacco***, the Supreme Court reiterates that consideration in the following passage:

> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[12] In summary there are a number of factors which must be kept front of mind when dealing with a motion to strike. They include:

1. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading disclose no reasonable cause of action.

2. The claim has no reasonable prospect of success.

3. The motion proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven.

4. It is incumbent on a claimant to clearly plead the facts upon which it relies in making its claim.

5. The claimant may not be in a position to prove the facts pleaded at the time of the motion, it may only hope to be able to prove them but plead them it must.

6. The facts plead are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not plead, the exercise cannot be properly conducted.

[13] The Supreme Court also indicated that such a motion does not take place in a vacuum. The Supreme Court was clear to indicate that the court must take into consideration the context of the law and the litigation process. (***Knight v. Imperial Tobacco***, para. 25)

Determining the Plaintiff's claim in order to consider the motion to strike.

[14] In order to make a determination as to whether or not the Plaintiff's claim has a reasonable prospect of success, it is incumbent upon the court to determine what the Plaintiff is attempting to claim. In most circumstances, and in most pleadings, the claim is patent and obvious. Particularly in situations where the drafter of the claim has an intimate knowledge of the ***Rules of Civil Procedure***, one can usually expect that the claim will be succinct and well defined. In other circumstances, where the spirit and the substance of the ***Rules of Civil Procedure*** are not followed, determining what the Plaintiff is attempting to claim can be a challenge. I find Ayangma's claim to be a challenge to interpret due to the lack of specificity and its repetitive nature.

[15] The general tone and spirit of the claim is captured in the first paragraph wherein it states:

> [1] The Plaintiff, Noël Ayangma claims against the Defendants No. 1 and No.2, jointly and severally, damages pursuant to s.24(1) of the Charter including general, special and punitive damages and *restitutio in integrum*, putting him where he would have been, but for the Defendants No.1 and No.2's willful (SIC) of his constitutional, statutory and contractual rights,

> arising from their abusive, illegal and discriminatory conduct against him which conduct was geared at both discriminating against him and denying him the right to pursue the gaining livelihood in the province he lived and had lived for almost three (3) decades as detailed below:

[16] Setting aside the grammatical errors, the Plaintiff sets up the premise that three separate claims will be made which in general terms are: 1) a constitutional breach; 2) a statutory breach; and 3) a contractual "rights" breach by the abusive; illegal, and discriminatory conduct of both Defendants as they attempted to deny the Plaintiff the right to pursue his livelihood in PEI.

[17] In order to determine if this is a situation where it would be appropriate to strike the pleadings of the Plaintiff, it will be necessary to review each of the specific claims made by the Plaintiff to determine if this is a situation where it is a plain and obvious case, assuming the facts pleaded to be true, that the pleadings disclose no reasonable cause of action.

[18] Before I examine each of the specific claims made by the Plaintiff, it is important to be clear as to what material can be examined. As Justice Jenkins, as he then was, stated in the decision of ***HZPC America's Corp. v. True North Seed Potato Co.***, 2007 PESCTD 23, in para. 7:

> [7] A motion under subrule 21 .01(1)(a) is a very early motion for summary judgment. The material before the Court for consideration is specifically limited. The parties are agreed regarding the limited material for consideration. Under Rule 21.01(2), no evidence is admissible, except with leave or on consent. The pleading under consideration is deemed to include documents incorporated by reference and which form an integral part of the party's case. The Statement of Claim specifically incorporates by reference the Producer/Grower contract made between the Plaintiff and True North.

[19] In this situation, there are two items which are deemed to be incorporated by

reference as they form an integral part of the Plaintiff's claim. They are: 1) the release dated February 6, 2012 ("The Release"); and 2) the collective agreement between the education negotiating agency and the Prince Edward Island Teachers' Federation dated July 1, 2010 - September 30, 2013 (the "Collective Agreement").

[20] The Plaintiff refers to the Release in paragraphs 34 and 63 and elsewhere in the Amended Claim.

The specific claims made by the Plaintiff.

1) **The *Charter of Rights and Freedoms* s. 15(1) claim**

[21] In the Amended Claim, the Plaintiff refers to two specific hiring and recruitment competitions which the two Defendants conducted. An example of the language used by the Plaintiff can be found in the following paragraph of the Amended Claim:

> [6] The Plaintiff also states claim (SIC) rights guaranteed him under s-s.15(1) and 6(2)(b) of the *Charter* have been violated by the Defendants No.1 and No.2. Specifically, the Plaintiff charges the Defendants No.1 and No.2 engaged in hiring and recruitment practices using a Release that had been executed on February 6th, 2012, which was before the advertisements of both the position of Director General on May 16th, 2012 and the position of Director of Human Resources, that operated or was applied so as to discriminate against him and deny him the right to pursue the gaining of livelihood, in Prince Edward Island without a proper cause.

[22] I agree with the characterization made by the defendant in its submissions that the Plaintiff claims that in some way the two Defendants breached s. 15(1) of the *Charter* while conducting two separate competitions for two separate school board positions.

[23] The two positions as referred to in the Amended Claim were as follows:

1) the position of Director General with the French Language School Board of August 2012; and

2) the position of Director of Human Resources with the English Language School Board in September of 2013.

[24] Ayangma refers repeatedly in the Amended Claim to the Release between the Plaintiff and both Defendants. The centrality of the Release was described in the decision of the Court of Appeal in ***Ayangma v. FLSB and ELSB,*** supra at para. 7 as referred to previously.

[25] Therefore as part of the litigation context, the Release repeatedly referred to in the present Amended Claim is the same release which resulted in the litigation and decision rendered in ***Ayangma v. Commission Scolaire de Langue Française,*** 2014 PESC 18. In that decision, the court found that the Release was a defence to any claim concerning the position of Director General (see paras. 34 and 36). This decision was appealed but dismissed due to non-compliance with a security for costs order that had been issued in favour of the French Language School Board and leave to appeal to the Supreme Court of Canada was denied by judgment dated December 3, 2015. Therefore, I do consider that this Release is part of the litigation context and should be considered when assessing whether or not there is a reasonable prospect of success of the present Amended Claim.

Analysis of the *Charter* Section 15(1) claim.

[26] Section 15(1) of the *Charter* states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination

and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[27] ***Kahkewistahaw First Nation v. Taypotat,*** 2015 SCC 30 at para. 21 states that:

> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

[28] I would also refer to the decision of ***Auton (Guardian ad litem of) v. British Columbia (Attorney General),*** 2004 SCC 78 at para. 27, wherein Justice McLachlin stated as follows:

> [27] In order to succeed, the claimants must show unequal treatment under the law — more specifically that they failed to receive a benefit that the law provided, or was saddled with a burden the law did not impose on someone else. The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens "of the law". Combatting discrimination and ameliorating the position of members of disadvantaged groups is a formidable task and demands a multi-pronged response. Section 15(1) is part of that response. Section 15(2)'s exemption for affirmative action programs is another prong of the response. Beyond these lie a host of initiatives that governments, organizations and individuals can undertake to ameliorate the position of members of disadvantaged groups. [emphasis added]

[29] One can see from this statement by Chief Justice McLachlin, the importance of identifying a specific law which is then challenged by the citizen.

[30] Chief Justice McLauchlin went on to state as follows:

> [29] Most s. 15(1) claims relate to a clear statutory benefit or burden. Consequently, the need for the benefit claimed or burden imposed to emanate from law has not been much discussed. Nevertheless, the language of s. 15(1) as well as the jurisprudence demand that it be met before a s. 15(1) claim can succeed.

Specific claims against each defendant

[31] Although the language of the Amended Claim is repetitive and the claims pursuant to s. 15(1) of the *Charter* and, for that matter, s. 6 of the *Charter* are repeated a number of times and are plead in conjunction with other elements of the claim the following are examples of the specific claims against each of the Defendants.

[32] In regards to the FLSB, the Amended Claim states as follows:

> 1.1.2 The Defendant's breach of the Plaintiff's *Charter* rights arising from the Defendants' discriminatory hiring practices and policies including for (SIC) the violations of the Plaintiff's rights protected under:
>
> 1.1.2.1 s. 15(1) of the Charter not to be deprived of by systemically discriminating against him in his search for employment, and specifically when it denied him the opportunity to compete for the position of Director General advertized on May 16th, 2012, on (SIC) basis of race, colour, national origin and age;

[33] In regards to the defendant ELSB, the Plaintiff's claim specifically states:

> 1.2.2 The Defendant's willful abuse of authority when it disguisedly/constructively retired the Plaintiff at age 58-59, contrary to

s.15(1) of the *Charter* when it not only declared on July 5th, 2010, that it will not consider the Plaintiff for any future employment, but also when it clearly carried through its illegal and discriminatory declaration in September 2013, when it denied him under false pretenses, the opportunity to compete for the position of Director of Human Resources under false pretenses;

...

1.2.5 The Defendant's breach of the Plaintiff's *Charter* rights, statutory and contractual rights arising from the its discriminatory hiring practices and policies, and in particular its breaches of the Plaintiff's rights protected under:

1.2.5.1 s. 15(1) of the *Charter* not to be deprived of by systemically discriminating against him over a period of more than two (2) decades in his search for employment in the province on basis of race, colour, national origin and age, when it denied him in September 2013, the opportunity to compete for the position of Director of Human Resources on the basis of his race, colour national origin and age and screened in and interviewed three candidates that were no better qualified and hired a candidate, Mr. Wayne Noseworthy who ~~that~~ did not even meet the minimum education and training requirements advertised;

...

[6] The Plaintiff also states claim (SIC) rights guaranteed him under s-s.15(1) and 6(2)(b) of the *Charter* have been violated by the Defendants No.1 and No.2. Specifically, the Plaintiff charges the Defendants No.1 and No.2 engaged in hiring and recruitment practices using a Release that had been executed on February 6th, 2012, which was before the advertisements of both the position of Director General on May 16th, 2012 and the position of Director of Human Resources, that operated or was applied so as to discriminate against him and deny him the right to pursue the gaining of livelihood, in Prince Edward Island without a proper cause.

[34] As is clear from the Amended Claim, there is no specific reference in any of these provisions to any specific legislation. It is at this stage that I am reminded of the remarks made by Justice Campbell in ***CMT et al. v. Gov't of PEI et al.***, 2016 PESC 4 at para. 52:

> [52] ... The defendants are not required to scour through a lengthy statement of claim to ascertain which details sprinkled throughout the document might constitute actions the plaintiffs view as conspiratorial.

[35] Unfortunately, the court and the defendant are left in a similar position with the Plaintiff's Amended Claim.

What law does the Plaintiff rely upon to ground his *Charter* s. 15(1) challenge?

[36] In the Amended Claim, the Plaintiff alleges breaches of the ***School Act***, specifically in para. 1.2.1.2 the Plaintiff alleges:

> 1.2.1.2
>
> ...
>
> The Defendant's willful abuse of process and breach of statutory rights that can only be exercised by the Minister of Education, pursuant to s.3(2) of the *School Act* for cause and in accordance with the regulations, and not the employer or anyone acting on its behalf, as in the present, when it disguistedly/constructively suspended and/or revoke the Plaintiff's instructional license by declaring on July 5th, 2010, that it will not consider the Plaintiff for any future employment.

[37] Section 3(2) of the ***School Act***, in place at the time reads as follows:

B. Instructional Licenses and Authorizations

3. (1) The Minister may issue an instructional license to a person based upon the standards and criteria recommended by the Certification and

Standards Board and approved or varied by the Minister.

(1.1) The Minister may refuse to issue an instructional license to a person on the grounds

(a) that the person held an instructional license or its equivalent in another province that was revoked;

(b) that the person does not meet the standards and criteria referred to in subsection (1); or

(c) set out in the regulations.

(2) The Minister may suspend or revoke an instructional license for cause in accordance with the regulations.

[38] To be specific, I find no connection between s. 3(2) of the ***School Act*** and the s. 15(1) *Charter* claim. There are no specifics plead by the Plaintiff to link or create any s. 15(1) claim. There are no specifics by the Plaintiff to link the allegation that there is a s. 15(1) *Charter* breach to s. 3(2) of the ***School Act***. I would note that s. 3(2) of the ***School Act*** is plead in a similar fashion in paragraphs 3(2), 9, 20, 29 and 30 of the Amended Claim. Yet, no material facts have been plead in regards to any law which has created a distinction or been applied in a manner which distinguishes against the Plaintiff on the basis of any protected ground.

[39] In addition, the only other legislation plead in the Amended Claim is at para. 21 and is simply a reference to the ***Companies Act*** and the powers conferred thereby to the ELSB.

[40] Section 3(2) of the ***School Act*** deals with the suspension or revocation of an instructional license for cause. It is interesting to note that the Plaintiff states and the court must interpret it as fact that:

> [16] The Plaintiff holds the highest teaching licenses that can be issued in both the provinces of Prince Edward Island (Cert.6) and Newfoundland and Labrador (Cert.7). This is combined with more than 21 years of approved teaching experience by the Province of Prince Edward Island. In addition to the holding the highest teaching licenses from both the provinces of Prince Edward Island (Cert.6) and Newfoundland and Labrador (Cert.7), the Plaintiff also holds a Bachelor Degree in Education in Linguistics (BEd), a Master's Degree in Business Administration (MBA) and PhD. (Para. 16 of the Amended Claim)

[41] Therefore the only legislative provision that the Plaintiff cites which could be capable of providing the grounding of a s. 15(1) *Charter* claim has no application to this litigation as the Plaintiff states as a fact that he has the "highest teaching licenses" that can be issued in both the provinces of Newfoundland and Prince Edward Island. Therefore the court is left with no legislative provisions to consider and on that basis, I find on that aspect of the claim, the Plaintiff has no reasonable prospect of success.

Can the Plaintiff rely upon the Release to ground its s. 15(1) *Charter* claim?

[42] In an attempt to follow the spirit of ***Knight v. Imperial Tobacco,*** I must be generous and err on the side of permitting any novel but arguable claim to be considered. Therefore, even though I have reviewed all overt references to specific legislation which could ground the Plaintiff's s. 15(1) claim, I will go on to examine

the other potential government action or documents which appear to be used by the Plaintiff to support his s. 15(1) *Charter* claim.

[43] As the Amended Claim makes clear, the Release is central to the claim as defined by Ayangma. It is referred to early and repeatedly, for instance in para. 1.1.1 of the claim. Similarly para. 1.2.1.1 specifically alleges a blend of a general duty of honesty and a constitutional obligation pursuant to s. 6.2(b) and s. 15(1) of the *Charter*, combined with the Defendants general duty of honesty in the performance of its contractual obligations. The Plaintiff also refers to the Release in para. 6 of the claim.

[44] In simple terms I understand the claim of the Plaintiff to be that he personally suffered repeated and systemic denial of employment in Prince Edward Island. First as a result of the letter of July 5, 2010, which is referred to on numerous occasions throughout the Amended Claim, which indicated that he would not be considered for any future employment. Then as a result of the Release executed on February 6, 2012 which was executed prior to the advertisements for both of the two positions, the Director General position and the Director of Human Resources positions by the two respective Defendants.

[45] Therefore in an attempt to bring as generous an approach to the Amended Claim as possible I will consider whether or not the Release is a law which could ground the s. 15(1) claim of the Plaintiff as both the pleadings imply and the Plaintiff suggests.

[46] I have reviewed the Release and I do find that it is incorporated by reference in the Amended Claim and forms an integral part of the claim and I recognize that it has been provided to the court. I agree with the position taken by the Defendants that the Release is not a law which could be relied upon to ground a s. 15(1) *Charter* claim. It relates to the settlement of specific actions commenced by Mr. Ayangma against the Defendants. As the Defendants contend, there are no ongoing obligations of the Defendants pursuant to the Release. The only contractual obligation the

Defendants assumed by preparing the Release was the obligation to pay Mr. Ayangma $370,000 which was acknowledged by Mr. Ayangma to have been received. I agree with the Defendants that even if the Release were considered to be a law for purposes of a s. 15(1) *Charter* claim, there are no supporting material facts plead by Ayangma to create a benefit or impose a burden. Therefore I find that the Release cannot be used by the Plaintiff to ground a s. 15(1) *Charter* claim.

Can the Defendants' hiring policies and practises be the law upon which the Plaintiff's s. 15(1) claim is based?

[47] On a number of occasions in the Amended Claim the Plaintiff refers to the "discriminatory hiring practices and polices of the Defendants" (see for example para. 8 of the Amended Claim). As the Defendants point out, the only reference to any specific policy is a reference in para. 1.2.4 of the Amended Claim which states as follows:

> 1.2.4 The Defendant's breach of their ~~his~~ own hiring practices and policy (Policy #501) which purpose (SIC) of this policy is to provide for a consistent recruitment and hiring process that promotes equal employment opportunities and ensures the most qualified candidates are selected for positions advertised, and when in particular it screened in three candidates that it knew and/or ought to have known based on the minimum criteria advertised and their resumes were no better qualified than the Plaintiff, and proceeded to hire one of them and the successful candidate, Mr. Wayne Noseworthy whom on the record before the Defendant did no even meet the basic minimum educational and training requirement advertised;

[48] I have reviewed the Amended Claim in detail in regards to the allegations made with respect to the hiring policies and procedures and am unable to find any material facts plead which actually support the conclusory position taken by the Plaintiff. In other words, the Plaintiff has said on a number of occasions throughout the Amended Claim that the Defendants have breached their hiring practises and policies but have provided absolutely no detail indicating how that has happened and more importantly how it relates to a s. 15(1) claim. There are no specifics of any policy or practise plead in the Amended Claim which would lead either of the

Defendants to providing a benefit or imposing a burden that is not provided or imposed on others. Therefore I am unable to find that the alleged polices or practises as plead could be the foundation for a s. 15(1) claim.

Can the Collective Agreement be the law upon which the s. 15(1) claim is based?

[49] I accept that the portions of the Collective Agreement provided by the Defendants are incorporated into the Amended Claim and form an integral part of the claim.

[50] It would appear the Plaintiff is also attempting to rely upon the Collective Agreement in the Amended Claim to ground his s. 15(1) *Charter* claim. As the Plaintiff states in para. 1.2.2 of the Amended Claim he was "disguisedly/constructively retired at the age of 58-59 on July 5th, 2010" in particular in that the Defendants would not consider the Plaintiff for any future employment. Therefore as the Plaintiff pleads, his employment with the Defendants was not continued after 2010.

[51] Sections 1.07, 1.117 and 3.02 of the Collective Agreement apply to teachers who are defined as those "actually employed by an employer under a contract as determined by regulations of the ***School Act***, in a teaching, administrative or other professional capacity relating to education other than supervisory personnel as defined under s. 1 (aa) of the ***School Act***. Therefore after July 5, 2010, according to the pleadings of the Plaintiff he was never employed by either of the Defendants. As he was no longer a teacher as defined in para. 1.17 of the Collective Agreement he is not in a position to be able to rely upon the Collective Agreement for purposes of pursuing an argument pursuant to s. 15(1) of the *Charter*. Even upon the most broad and generous interpretations of the Amended Claim a s. 15(1) *Charter* breach cannot be grounded upon the Collective Agreement as plead.

[52] In conclusion, the s. 15(1) *Charter* claim of the Plaintiff must fail as the Plaintiff has failed to establish the law which applied to him in such a manner that ended up

distinguishing against him on the basis of race, colour, nationality, ethic origin or age. Therefore I dismiss the s. 15(1) *Charter* claims pursuant to Rule 21.01(1) as the claim as plead discloses no reasonable chance of success even on a generous reading of the Plaintiff's claim.

Does the Plaintiff have a claim pursuant to the Defendants duty of honest performance of contractual obligations?

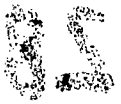
[53] The Plaintiff alleges that the Defendants breached their "duty of honesty in their performance of their contractual obligations" which requires it not to make representations that are false (see Amended Claim, para. 3).

[54] The Defendants suggest that the Plaintiff is alleging that both Defendants breached the common law duty of honest performance of contractual obligations and refers the court to the decision of ***Bhasin v. Hrynew***, 2014 SCC 71.

[55] In ***Bhasin***, Justice Cromwell stated as follows when he defined the duty of honesty:

> [73] ... I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance...

[56] It is clear in the reasons of Justice Cromwell that the key to such a duty arising is that a contractual relationship exists between the two parties.



[57] In order for the Plaintiff to succeed, there has to be an existing contractual relationship between the Plaintiff and the two Defendants.

Is there a contractual relationship between the Plaintiff and the French Language School Board?

[58] The substance of the Plaintiff's claim is set out in the following paragraphs:

> [51] On May 16th, 2013, just a few months before the Defendant No. 2 initiated the staffing of the position of Director of Human Resources, the Defendant No. 1 advertised the position of School Board Superintendent.
>
> [52] The Plaintiff states that unlike the position of Director of Human Resources, the position advertised by the Defendant No.1 did call for a teacher with a cert. 6 license and relevant teaching experience, which the Plaintiff possessed at all material times.
>
> [53] The Plaintiff states that he applied for the position as advertised on May 16th, 2013 by submitting an application and a resume indicating that he not only met all the minimum qualifications advertised by the Defendant No.1, but he also exceeded all of them.
>
> [54] The Plaintiff further states that whether he was employed as a teacher or not at the time he applied for the position of Director General in May of 2012, the collective agreement applied to him as a licensed teacher in this province as confirmed by the Prince Edward Island Teachers' Federation.
>
> ....
>
> [56] The Plaintiff states the sole basis advanced by the Defendant No. 1 for not considering his application was solely because according to it, the settlement reached between him and the Defendant No.1 to with the

Release he signed on February 6th, 2012 precluded him not only from applying for any employment with the Defendant No.1 in the future and that it ~~he~~ could deny him employment and therefore discriminate against him with impunity.

[59] In essence the Plaintiff claims that he applied for a position of Director General which was advertised on May 16, 2013 and though qualified the FLSB did not interview him for the position. His further allegation is that this was based on the Release signed by the Plaintiff on February 6, 2013. I have reviewed the Release and the only obligation it created for either of the Defendants was to pay the sum of $370,000 to the Plaintiff. All of the other responsibilities fall to Ayangma. There is no continuing contractual obligation created by the Release which either of the Defendants could be breaching. As there are no contractual obligations owed by the FLSB pursuant to the Release there is no potentiality for a claim by the Plaintiff against the FLSB pursuant to the duty of honest performance of contractual obligations.

What contractual relationship exists between the Plaintiff and the ELSB?

[60] The key portions of the Plaintiff's Amended Claim in regards to this aspect of his claim are as follows:

1.2 Specifically, the Plaintiff's claim against the Defendant No.2 is for:

1.2.1 The Defendant's breach of its general duty of honesty in the performance of its constitutional obligations under s.6 (2)(b) and 15(1) of the *Charter* not to deny a citizen of this province the right to pursue the gaining livelihood in the province where he lives and had lived for three (3) decades, and specifically when it represented, after the Release was signed on February 6th, 2012, that the denial of the Plaintiff the opportunity to compete for the position of Director of Human Resources, in 2013 was:

1.2.1.1 First, because the effect of the Release and the fact by signing the Release, the Plaintiff gave up his rights not to be discriminated against in the

future and because it covered any future acts of discriminatory (SIC) to have been perpetrated against him by the Defendant No.2 and therefore it can discriminate or deny the Plaintiff employment with impunity;

1.2.1.2 Second, because of according to it, the Plaintiff lacked one of minimum qualifications, an (SIC) in particular a senior human resources experience in complex unionized environment;

....

1.2.3. The Defendant's breach (SIC) its general duty of honesty in the performance of its contractual obligations when it falsely represented that its refusal to continue to employ the Plaintiff as a teacher for the 2010-2011 school year, was due to the Plaintiff's performance during the 2009-2010 school year, despite any proper performance evaluation performed in accordance with art.29.01 of the collective agreement between the Defendants as represented by the Government of Prince Edward Island (The Education Negotiating Agency) and the Prince Edward Island Teachers' Federation (PEITF) despite a total lack of a proper performance;

[3] In addition, the Plaintiff also pleas (SIC) the general breach by the Defendants of their duty of honesty in their performance of their contractual obligations which requires it not to make representations that are false, as in the present case, and as well as upon a breach of the statutory right protected under s.3(2) of the *School Act* which prohibits any illegal and abusive act that may constitute a suspension and/or revocation of his instructional license, unless made by the Minister and for cause.

...

[10] The Plaintiff also states that he has also been denied the opportunity for ~~to~~ growth, prosperity and retirement in peace, as would any other teacher and citizen of this province with similar educational and professional training, causing the Plaintiff to spend a very large chunk of life in courts

and suffer consequences in his attempts to right the wrong done to him and his family, since he moved to this province in 1987 which is over three (3) decades.

[27] The Plaintiff states that notwithstanding a clear finding that he had been discriminated against by the Defendant No.2 against over a period of 11 years, the Defendant No.2 nonetheless, at the end of the 2009-2010's school year, refused to continue to employ him under false pretence and without cause or proper evaluation whatsoever as required under art. 29 of the Collective Agreement, suggesting that *"At the end of your fixed term contract, school administration had no evidence that the defined minimum standards had been met"*.

[61] Even giving the most generous of readings to the Plaintiff's Amended Claim I have come to the conclusion that this portion of the Plaintiff's Amended Claim must fail.

[62] The Plaintiff is revisiting the termination of his employment with the ELSB which took place in 2010. As he alleges, it was due to the "plaintiff's performance during the 2009-2010's school year". The Plaintiff himself admits and pleads in para. 34 and 39 of the Amended Claim that "any allegation of discrimination brought prior to the February 6, 2012's settlement had been gone and that from now on the Plaintiff could go ahead and apply for employment with the Defendant No.2". Therefore even maintaining the internal logic of the Amended Claim, the Plaintiff raises a duty of honest performance of contractual obligations on the one hand but then admits that there is no claim prior to February 6, 2012, in another portion of the Amended Claim. Therefore this portion of the claim should be, and is struck as it has no reasonable prospect of success.

[63] The Plaintiff makes a similar claim against the ELSB as it did against the FLSB for an additional breach of the duty of honest performance of contractual obligations in paragraphs 34 through 50 of the Amended Claim. These fail for the same reasons and the same logic which was applied to the claim made against the FLSB. To put it simply there was no contractual obligation between Mr. Ayangma and the English

Language School Board as of September, 2013. Therefore as there was no continuing contractual relationship, the decision of ***Bhasin*** has no applicability and there is no reasonable prospect that such a claim can succeed.

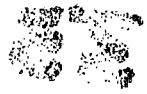
Allegations of systemic discrimination/claims arising prior to February 6, 2012

French Language School Board

[64] The allegations of systemic discrimination have been made by the Plaintiff against the French Language School Board relating to the decision by the FLSB not to award the Plaintiff the position of Director General. As the Defendants have pointed out, the court has already dealt with the issue of the Release and its impact on Mr. Ayangma's ongoing claims against the FLSB. In the decision of Justice Key in ***Ayangma v. Commission Scolaire de Langue Française,*** at para. 34 Justice Key stated:

> [34] Mr. Ayangma's complaint states that the discrimination went back as far as 2008, and continued on after the Release was signed in 2012. He further stated, during the course of the hearing, that he did apply for the Director General's position a number of times prior to signing the Release but he did not, before 2013, make a complaint of discrimination when he was not awarded the position.
>
> ...
>
> [36] Therefore, it was reasonable for the Executive Director, in looking at Mr. Ayangma's complaint, to review the Release and determine the complaint was not "a new matter" (p.3 March 26, 2013 letter; p.7 Record) and that the complaint was captured within the Release which Mr. Ayangma had signed on February 6, 2012. The Release acted as a Defence to any claim for any position applied for prior to the signing of the Release. [My emphasis]

[65] As this court has already ruled in regards to the effect of the Release any claim by Mr. Ayangma that systemic discrimination should lead to him receiving further



compensation from the same party or parties will not be supported by this court. Therefore any general systemic discrimination which the Plaintiff pleads took place in regards to the job competition for Director General which he applied for prior to signing the Release cannot and should not succeed. This portion of the Amended Claim is struck as there is no reasonable prospect that it will be successful.

English Language School Board

[66] The Plaintiff has plead as part of his claim his understanding of the effect of the Release of February 6, 2012. In particular, he stated the following as part of his Amended Claim:

> [34] The Plaintiff further states that though his prior action against the Defendant No.2 resulted in a settlement and a signing of the Release on February 6, 2012, meaning that any allegation of discrimination brought prior to the February 6th, 2012's settlement had been gone (SIC) and that from now on the Plaintiff could ~~can~~ go ahead and apply for employment with the Defendant No.2. This (SIC) was unfortunately not the case....

[67] Furthermore at para. 39 of the Amended Claim, the Plaintiff stated:

> [39] The Plaintiff states as soon as the position of Director of Human Resources was advertised and based on his understanding of the effect of the Release he signed on February 6th, 2012 and his further understanding of the fact that any conflict opposing him and the Defendant No.2 had been settled and was therefore behind them, including its unconstitutional rhetoric statement that it will not consider the Plaintiff for any future employment, he applied for the position of Director of Human Resources by submitting a letter of application and a resume on September 9th, 2013.

[68] Regardless of whether or not the Plaintiff has alleged in his Amended Claim that there has been systemic discrimination, any such claim prior to February 6, 2012 is, as he acknowledges, unsustainable as a result of the Release. The Defendants also

point out that the Release's retroactive application with respect to any past matters between the parties has also been reviewed by this court, specifically in ***Ayangma v. Prince Edward Island Teachers' Federation,*** 2013 CarswellPE 70 at para. 3 wherein Justice Mitchell stated explicitly that:

> [3] ... This Release is one that you signed and it very, very, very clearly releases the Eastern School Board, not the PEITF, but Eastern School Board of the Eastern School District from amongst other things, any and all causes of action and grievances which exist now or, paraphrasing here, or be discovered to exist. And which in any way relate to and arise out of any. past dealings. Not limited to any actions or omissions by the releases, the School Board and those others which occurred before the signing of its final release and in addition any matters directly or indirectly related to the claims. So, yes, this thing does have retroactivity, anything that happened previous to February 6, 2012, is covered....You agree not to make any claim or take any proceeding, including but not limited to a duty o any kind whatsoever owed or breached however so arising and includes collective agreements or other grievances including arising out of the past dealing and it puts you on the hook for solicitor client costs if you happen to do that.

[69] This decision of Justice Mitchell was confirmed by ***Ayangma v. P.E.I. Teachers' Federation,*** 2014 PECA 9 (leave to appeal to SCC refused) wherein the Court of Appeal specifically stated:

> [8] The Release arose in conjunction with other court actions commenced by Mr. Ayangma against the ESD and other defendants. Between 1998-2011 Mr. Ayangma commenced numerous court proceedings against various parties, including the ESD. In February 2012, all matters between them were settled. Under the terms of settlement recorded in a memorandum of settlement, Mr. Ayangma received $370,000. in consideration for releasing and discharging the ESD from all liability arising from all Mr. Ayangma's past and future actions and grievances and settled all outstanding actions.

[70] Therefore echoing the comments as expressed in ***Knight v. Imperial Tobacco***, considering this aspect of the claim in the context of the law and the litigation process this aspect of the claim has no reasonable chance of succeeding .

***Charter* claims s. 6(2)(b)**

[71] Section 6(2)(b) of the *Charter* states:

> 2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> ...
>
> (b) to pursue the gaining of a livelihood in any province.

[72] The Plaintiff invokes s. 6(2) in a number of provisions in the Amended Claim including 1.1.2.2 and 1.2.5.2, paras. 5 and 6. In all of the references the Plaintiff misconstrues the right created by s. 6(2)(b) of the *Charter*.

[73] In ***Law Society of Upper Canada v. Skapinker***, [1984] 1 SCR 357, the court stated as follows:

> 36 I conclude, for these reasons, that cl. (b) of subs. (2) of s. 6 does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found. The two rights (in cl. (a) and in cl. (b)) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence...

[74] I note as well the decision of the ***Canadian Egg Marketing Agency v. Richardson***, [1988] 3 SCR 157:

> 74 Accordingly, whether laws "discriminate among persons primarily on the basis of province of present . . . residence" involves a comparison of residents of the origin province who attempt to make their livelihood in a destination province, with residents of the destination province who also make their livelihood in the destination province. As mentioned above, a livelihood may be pursued by means of production, marketing, or performance. In each case, the appropriate comparison group will depend upon the nature of the livelihood which is restricted. In *MacKinnon, supra*, for example, a fisherman resident in Nova Scotia was prohibited from fishing in the waters off the Newfoundland coast (which were considered to be a part of the province of Newfoundland). In determining whether he was being discriminated against on the basis of residence, the Nova Scotia fisherman had to be compared to Newfoundland fisherman or fishermen of other provinces who also wished to fish in that destination province (i.e. Newfoundland)...

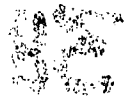
[75] I am unable to find any properly plead claim relating to s. 6(2) mobility rights in the Amended Claim. I agree with the position of the Defendants that there have been no material facts provided to the court by way of the pleadings which could be believed to suggest the Plaintiff has been discriminated against under any law based on his province or territory of residence. The invocation of s. 6(2) of the *Charter* appears to be a total misinterpretation of the mobility rights created therein. Therefore in regards to all references in all claims put forward by the Plaintiff wherein s. 6(2) is invoked, I find that those claims should be struck. If I understand the Plaintiff's claim as framed, he is simply indicating that he has a right to work in Prince Edward Island which has been thwarted by the actions of the Defendants. I can discern no material facts plead which would establish the potential mobility claim as contemplated by the Supreme Court in the ***Canadian Egg Marketing Agency*** decision. There is no discussion of an "origin province" or a "destination province" or any legislative or government action creating barriers to the mobility of the Plaintiff.

Should the Amended Statement of Claim be struck without leave to amend pursuant to Rule 21.01(1)(b)?

[76] I have reviewed the entirety of the Amended Claim and have come to the conclusion that none of the claims as plead considered in the context of the law and the litigation process have any reasonable chance of succeeding. The issue then becomes, is this a situation where the Plaintiff should be allowed to amend his statement of claim? At this stage of the analysis it is important to remember the procedural process which has transpired. To be specific, the original Statement of Claim was filed on July 25, 2015. The original motion to strike was brought on September 30, 2015. A decision of the Supreme Court was rendered on March 30, 2016, this was appealed to the Court of Appeal with a decision being rendered September 29, 2017 sending the matter back to the Supreme Court for rehearing. The Plaintiff has had the benefit of proceeding through the process, hearing the arguments made by counsel for the Defendants and appearing at both levels of court wherein a detailed analysis of the original Statement of Claim and its deficiencies was conducted.

[77] The Plaintiff then filed the Amended Claim on January 8, 2018 which is the subject of this motion. To believe that the Plaintiff has not had sufficient opportunity to plead the material facts considering the procedural history of this matter, is not a reasonable position to take.

[78] I also have the benefit of having reviewed the decisions provided by Defendants' counsel including ***Club Pro Adult Entertainment Inc. v. Ontario***, 2006 CarswellOnt 8170 (ONTSCJ) which certainly provide the court the ability to strike claims without leave to amend where the pleadings do not disclose reasonable causes of action even in situations for alleged *Charter* violations. I am satisfied that this is an appropriate case for such an Order and do find that this is a situation where the Plaintiff has had ample opportunity to remedy the deficiencies of the pleadings and has not done so. Therefore I order that the Amended Claim be struck in accordance with Rule 21.01(1)(b) without leave to amend.



[79] As I have dealt with the Amended Claim in its entirety I will not address the arguments made by the Defendants with respect to the frivolous, vexatious and abuse of process issues pursuant to Rule 21.01(3)(d) and Rule 25.11.

***R. v. Conway* and the issue of a court of competent jurisdiction.**

[80] I note that in the decision of the Court of Appeal in ***Ayangma v. FLSB and ELSB***, 2017 PECA 18, Justice Murphy pointed out that *"Prior to commencing this proceeding and filing a statement of claim Mr. Ayangma filed a human rights complaint against the French Language School Board on similar facts alleging that he was directly and systemically discriminated against by the French Language School Board..."*.

[81] Similarly the Plaintiff also filed a human rights complaint against the English Language School Board alleging he had been discriminated against as he was not interviewed in the 2013 competition for the Director of Human Resources position. This matter was investigated by the Executive Director and dismissed on April 10, 2017 on the basis that Mr. Ayangma failed to establish a *prima facie* case that his colour, race, ethnic or national origins were factors for being denied an interview.

[82] In the Amended Claim Mr. Ayangma states in para. 7 as follows:

> [7] The Plaintiff states that as an individual and a litigant who had been repeatedly and systemically denied employment and the right to pursue gaining livelihood in this Province, he has a right under s-s.24(1) of the *Charter* to apply to a court of competent jurisdiction to obtain a remedy that it considers appropriate and just in the circumstances, if he can establish that his rights under s.15(1) and/or 6.(2) of the *Charter* have been violated, notwithstanding any process commenced under the *Human Rights Act*.

[83] The Plaintiff relies upon the decision of ***Ayangma v. Eastern School Board***, 2000 PESCAD 12 (PEI Court of Appeal) which followed such cases as ***R. v. Mills***, [1986] 1 SRC 863 among others. In its decision, it reached the conclusion that the Human Rights Commission was not a court of competent jurisdiction within the meaning of that phrase as used in s. 24(1) of the *Charter*. This reliance by the Plaintiff has led him to the conclusion that maintaining two actions; one in front of the Human Rights Commission and then a separate action in the Supreme Court is the appropriate procedural path to follow.

[84] I asked the parties to address their minds to the decision of ***R. v. Conway***, [2010] SCC 22 and whether or not it has changed the law in regards to this issue. In particular in ***R. v. Conway***, the court states as follows:

> [78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1). [Emphasis mine]

[85] The court went on to state as follows:

> [79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals... The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in Mills, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all

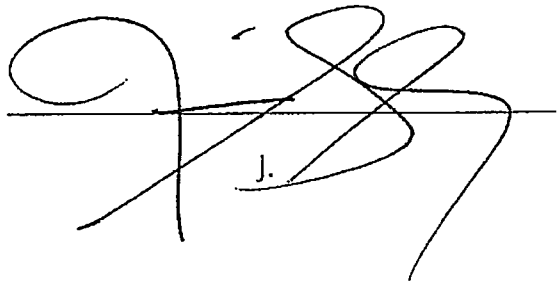
> matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction...

[86] Although it is my understanding that the Plaintiff limited himself to non-*Charter* remedies in front of the Human Rights Commission, it appears that the claims in both venues are based on the same facts and in essence are substantively the same claim. The Plaintiff took the position based on the PEICA decision of 2000 that this is the appropriate procedure to follow. In light of the ***Conway*** decision, I am doubtful that is the case and raise the issue as it appears to be unnecessary for an administrative tribunal and a court to plow the same well tilled ground.

Costs

[87] As the Defendants have been successful in their motion to strike the Plaintiff's Amended Claim without leave to amend pursuant to s. 21.01(1)(b) of the ***Rules of Court***, I award the Defendants partial indemnity costs. If the parties are not able to resolve the issue of costs within 30 days of the date of this decision, I will allow both parties a further 10 days in which to make brief written submissions on the subject and I will provide the parties with a final ruling in regards to that issue.

Dated: November 16, 2018



42

Court File No.: S1-GS - 26718

SUPREME COURT OF PRINCE EDWARD ISLAND
(General Section)

BEFORE THE HONOURABLE JUSTICE GORMLEY DATE: NOVEMBER 22 2018

BETWEEN:

NOEL AYANGMA

PLAINTIFF

AND:

THE FRENCH LANGUAGE SCHOOL BOARD
THE ENGLISH LANGUAGE SCHOOL BOARD

DEFENDANTS

ORDER

WHEREAS the Plaintiff filed a Statement of Claim on July 21, 2015.

AND WHEREAS by decision dated March 30, 2016 the Supreme Court of Prince Edward Island, on a motion by the Defendants to strike the claim, struck out the Statement of Claim;

AND WHEREAS by decision dated September 29, 2017 the Prince Edward Island Court of Appeal, on an appeal by the Plaintiff, sent the matter back to the Supreme Court of Prince Edward Island to be reheard;

AND WHEREAS the Plaintiff filed an Amended Statement of Claim on January 8, 2018;

AND WHEREAS the Defendants filed a motion on March 16, 2018 seeking to strike the Amended Statement of Claim pursuant to Rule 21.01;

AND WHEREAS the motion was heard on May 17, 2018;

AND UPON reading the motion record and written submissions of the parties;

AND UPON hearing the submissions of Meaghan Hughes on behalf of the Defendants and the submissions of the Plaintiff, Mr. Ayangma;

THIS COURT ORDERS that the Amended Statement of Claim be struck in accordance with Rule 21.01(1)(b) of the Rules of Court without leave to amend for the reasons provided in the written decision dated November 16, 2018;

THIS COURT FURTHER ORDERS that the Defendants are entitled to partial indemnity costs as agreed upon by the parties. If the parties are unable to agree on costs within 30 days of the written decision, they shall be provided an additional 10 days to make written submissions on costs following which a decision on costs shall be rendered by this court.

(SGD.) JAMES W. GORMLEY
J.

_____
J.

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Court File No.: S1-GS - 26718

SUPREME COURT OF PRINCE EDWARD ISLAND
(General Section)

BEFORE THE HONOURABLE JUSTICE GORMLEY DATE: DECEMBER 17, 2018

BETWEEN:

NOEL AYANGMA

PLAINTIFF

AND:

THE FRENCH LANGUAGE SCHOOL BOARD
THE ENGLISH LANGUAGE SCHOOL BOARD

DEFENDANTS

ORDER

WHEREAS the Defendants made a motion pursuant to Rule 21.01(1)(b) of the *Rules of Court* requesting that the Plaintiff's Amended Statement of Claim be struck without leave to amend was heard on May 17, 2018, at 42 Water Street, Charlottetown, Prince Edward Island;

AND WHEREAS the Defendants' motion was granted for the reasons provided in the written decision dated November 16, 2018;

AND WHEREAS the Defendants were awarded their costs on the motion on a partial indemnity basis;

AND WHEREAS the parties have reached an agreement on costs as evidenced by the communications filed;

THIS COURT ORDERS that the Plaintiff shall forthwith pay the costs of the Defendants in the agreed upon amount of $7,229.45, including legal fees, disbursements and HST on legal fees and disbursements.

(SGD.) JAMES W. GORMLEY
J.

J.

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Court File No.: S1-GS - 26718

SUPREME COURT OF PRINCE EDWARD ISLAND
(General Section)

BETWEEN:

NOEL AYANGMA

PLAINTIFF

AND:

THE FRENCH LANGUAGE SCHOOL BOARD
THE ENGLISH LANGUAGE SCHOOL BOARD

DEFENDANTS

ORDER

COX & PALMER
Dominion Building
97 Queen Street, Suite 600
Charlottetown, PE C1A 4A9

Per: Mary Lynn Kane, Q.C.
File No.: 17750-74

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PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: ***Ayangma v. FLSB & ELSB***, 2019 PECA 22

Date: 20190731
Docket: S1-CA-1408
Registry: Charlottetown

BETWEEN:

NOËL AYANGMA

APPELLANT

AND:

FRENCH LANGUAGE SCHOOL BOARD and ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENTS

AND:

THE PRINCE EDWARD ISLAND HUMAN RIGHTS COMMISSION

INTERVENOR

Before: Chief Justice David H. Jenkins
Justice Michele M. Murphy
Justice John K. Mitchell

Appearances:
Noël Ayangma, the Appellant on his own behalf
Karen A. Campbell, Q.C., and Jessica M. Gillis, counsel for the Respondents
Jonathan B. Greenan, counsel for the P.E.I. Human Rights Commission, Intervenor

Place and Date of Hearing	Charlottetown, Prince Edward Island June 24, 2019
Place and Date of Judgment	Charlottetown, Prince Edward Island July 31, 2019

Written Reasons by:
Chief Justice David H. Jenkins

Written Reasons by:
Justice John K. Mitchell

Concurred in by:
Justice Michele M. Murphy

APPEALS - Civil procedure and practice - Motion to strike statement of claim - Claim for discrimination in violation of s.15(1) Charter rights.

Appeal from decision striking out statement of claim on the ground that it discloses no reasonable cause of action - plaintiff's primary claim that defendant School Boards discriminated against him in employment competitions and thereby violated his s.15(1) Charter rights should not have been struck out - Appeal allowed in part.

BY MITCHELL J.A.:

COURT OF COMPETENT JURISDICTION -

In light of subsequent decisions of the Supreme Court of Canada the court reconsidered ***Ayangma v. Eastern School Board***, 2000 PESCAD 12.

Administrative tribunals with the power to decide questions of law and from whom constitutional jurisdiction has not been clearly withdrawn have the authority to resolve constitutional questions that are linked to matters properly before them.

The statutory provisions set out in the ***Human Rights Act*** and in particular, s.28.3 do not lead to the conclusion that the Legislature intended to exclude the Charter from the scope of questions of law to be addressed by a human rights panel.

The Human Rights Commission/Human Rights Panel has a robust arsenal of remedies within the ***Human Rights Act*** sufficient to provide an effective and vindicatory remedy to redress a Charter breach.

The Human Rights Commission/Human Rights Panel is a court of competent jurisdiction empowered to deal with Charter issues that arise in the course of a human rights proceeding. It would constitute an abuse of process for a person to maintain proceedings in two fora on the same or substantially the same facts.

Authorities Cited:

BY JENKINS C.J.P.E.I.:

CASES CONSIDERED: ***Ayangma v. Eastern School Board***, 2000 PESCAD 12; ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur,*** 2003 SCC 54; ***R. v. Conway***, 2012 SCC 22; ***Eldridge v. British Columbia (Attorney General)***, [1997] 3 S.C.R. 624; ***Auton (Guardian ad litem of) v. British Columbia (Attorney General)***, 2004 SCC 78; ***Ayangma v. French School Board***, 2010 PESC 31; ***Ayangma v. French School Board***, 2010 PECA 16;

Hunt v. Carey Canada Inc., [1990] S.C.R. 959; ***Knight v. Imperial Tobacco Canada Ltd***, 2011 SCC 42; ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497; ***Gosselin v. Quebec (Attorney General)***, [2002] 4 S.C.R. 429; ***Ayangma v. French School Board and Arsenault***, 2008 PESCTD 39.

STATUTES CONSIDERED: ***Human Rights Act***, R.S.P.E.I. 1988, Cap. H-12, ss.6(1), 28.2(2), 28.3, 28.4, 28.6; ***Canadian Charter of Rights and Freedoms***, s.52 of the ***Constitution Act, 1982***, ss.1, 6(2)(b), 15(1), 24(1), 32(1)(b), 52; ***Judicature Act***, R.S.P.E.I. 1988, Cap. J.2-1, s.21(2)(a); ***Public Inquiries Act***, R.S.P.E.I. 1988, Cap. P-31, s.26(5); ***School Act***, R.S.P.E.I. 1988, Cap. S-2.1, s-s.3(2) (repealed 2016); ***Education Act,*** R.S.P.E.I. 1988, E-.02.

RULES CONSIDERED: **Prince Edward Island Rules of Civil Procedure,** Rule 1.04, 21.01(1)(b), 21.01(3)(d), 25.11.

BY MITCHELL J.A.:

CASES CONSIDERED: ***Ayangma v. Eastern School Board***, 2000 PESCAD 12; ***R. v. Conway***, 2010 SCC 22; ***Doré v. Barreau du Québec***, 2012 SCC 12; ***R. v. Mills***, [1986] 1 S.C.R. 863; ***Eastern School Board v. Montigny and Ayangma***, 2007 PESCTD 18; ***Ravndahl v. Saskatchewan***, [2009] 1 S.C.R. 181; ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC 54; ***Cooper v. Canada (Human Rights Commission)***, [1996] 3 S.C.R. 854; ***Cooper v. Canada (Human Rights Commission)***, 1996 CanLII 152; ***King v. Government of P.E.I.***, 2018 PECA 3; ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers Association***, 2011 SCC 61; ***Cairns v. Prince Edward Island (Human Rights Commission)***, 2017 PECA 16; ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929; ***Hryniak v. Mauldin***, 2014 SCC 7; ***Starz (Re)***, 2015 ONCA 318; ***Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79***, 2003 SCC 63; ***New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan***, 2008 SCJ No. 46; ***Ayangma v. The French School Board***, 2002 PESCAD 5; ***Andrews v. The Law Society of British Columbia***, [1989] 56 D.L.R. (4th) 1 (SCC).

HUMAN RIGHTS CASES CONSIDERED: ***Burge v. Prince Edward Island (Liquor Control Commission Board of Inquiry)***, Gerald R. Foster, Q.C.; ***McGill v. Atlantic Turbines***, January 1997; ***MacKinnon v. Inn on the Hill***, decided 2 February 2012; ***Dallaire v. Les Chevaliers de Colomb***, 2011 H.R.T.O. 639.

STATUTES CONSIDERED: ***Human Rights Act***, R.S.P.E.I. 1988, Cap. H-12, ss.3, 4, 6(1), 28.2(2), 28.3, 28.4, 28.6; ***Canadian Charter of Rights and Freedoms***, s.52 of the ***Constitution Act, 1982***, ss.1, 15(1), 24(1), 52; ***Public Inquiries Act***, R.S.P.E.I. 1988,

Cap. P-31, s.26(5).

RULES CONSIDERED: **Prince Edward Island Rules of Civil Procedure,** Rule 21.01(1)(b).

Reasons for judgment:

JENKINS C.J.P.E.I.:

[1] This appeal is from a decision that allowed a respondents' motion to strike out the plaintiff's Amended Statement of Claim pursuant to Rule 21.01(1)(b) of the **Rules of Civil Procedure**, in whole, on the ground that it discloses no reasonable cause of action. Reasons for judgment leading to the order are published in ***Ayangma v. FLSB and ELSB***, 2018 PESC 43.

[2] The plaintiff is black in colour, and immigrated from Cameroon, Africa to Canada and Prince Edward Island in 1987. He is qualified as a teacher in P.E.I. and has qualifications in business administration and experience in school administration. The plaintiff claims that both respondent School Boards discriminated against him based on colour, systemically over many years from 1998 onward, and specifically in May-August 2012 regarding hiring competitions – for the position of FLSB Director General in August 2012, and for the position of ELSB Director of Human Resources in September 2013. The plaintiff's primary claim is for discrimination against him in violation of his s.15(1) Charter rights, regarding which he claims both systemic discrimination and discrimination in the specific employment competitions. His statement of claim contains additional claims for breach of general duty of honesty in performance of contractual obligations, wilful abuse of statutory authority, and denial of his s.6(2) Charter right to pursue the gaining of a livelihood in this province.

Motions to strike out statement of claim on the ground that it discloses no reasonable cause of action

[3] The plaintiff's claim has been caught in the Rule 21.01(1)(b) preliminary motion stage for a long time. The original statement of claim was filed on July 21, 2015. This appeal is the next of many steps toward disposing of the respondents' motion to strike out the statement of claim. On August 20, 2015 the School Boards promptly filed a motion to strike on the ground that the claim discloses no reasonable cause of action. This was followed by some to and fro as to the requirement for the School Boards to file a statement of defence. After the initial motion to strike out the statement of claim was heard, a decision granting that motion was rendered. The plaintiff appealed from that decision. The appeal was heard in 2017, and was allowed on the ground that the reasons given for granting the motion to strike were

insufficient. The Court of Appeal remitted the matter back to the Supreme Court to be reheard. Court of Appeal reasons for judgment are published in ***Ayangma v. FLSB and ELSB***, 2017 PECA 18. The plaintiff filed the current Amended Statement of Claim on January 8, 2018. The School Boards then filed the motion to strike that is now the subject matter of this appeal. That motion was heard and decided in 2018. The notice of appeal was filed on December 19, 2018.

[4] On the motion that is the subject of this appeal, the School Boards as defendants moved before a judge in accordance with Rules 21.01(1)(b) and 25 to strike out the plaintiff's pleading, in whole or in part, on the ground that it discloses no reasonable cause of action. They request in the alternative that the plaintiff's action be dismissed as being frivolous or vexatious or otherwise an abuse of the process of the court. The defendants asserted that the plaintiff's claim (1) fails to disclose a reasonable cause against the defendants; (2) attempts to impose duties and assert rights that are not recognized by law that present no reasonable likelihood of success; (3) does not provide a concise statement of material facts on which the plaintiff relies pursuant to the **Rules of Civil Procedure**; (4) fails to otherwise conform with the rules of pleading; and (5) is in its entirety frivolous and vexatious and an abuse of the process of the court.

[5] The motions judge rendered full and thorough reasons for judgment. He struck out the plaintiff's statement of claim in its entirety as not disclosing any reasonable cause of action. Having done so, he chose not to address the School Boards' alternative ground of frivolous, vexatious and abuse of process.

[6] The motions judge cited the applicable test, explained his careful review of the plaintiff's particular assertions, and then set out his understanding of what the plaintiff is attempting to claim. He noted he experienced a challenge in interpreting the claim because he found the plaintiff, a self-represented though experienced litigant, did not follow the spirit and substance of the **Rules of Civil Procedure**, and this resulted in the claim lacking specificity and being repetitive. The motions judge identified three separate claims, which he categorized in general terms as: *"(1) a constitutional breach; (2) a statutory breach; and (3) a contractual 'rights' breach by abusive, illegal, and discriminatory conduct of both Defendants as they attempted to deny the Plaintiff the right to pursue his livelihood in P.E.I."*

[7] He then set out to apply the test in Rule 21.01(1)(b) to the plaintiff's claim. He stated, correctly in my view:

> [17] In order to determine if this is a situation where it would be appropriate to strike the pleadings of the Plaintiff, it will be necessary to review each of the specific claims made by the Plaintiff to determine if this is a situation where it is a plain and

> obvious case, assuming the facts pleaded to be true, that the pleadings disclose no reasonable cause of action.

[8] Regarding the claim for constitutional breach, he found the plaintiff was attempting to put forward a claim of violation of his Charter of Rights and Freedoms s.15(1) rights. He agreed with the characterization made by the School Boards that the plaintiff claims that in some way each School Board breached s.15(1) of the Charter while conducting a competition for a School Board position. He identified the two competitions in issue as:

(1) the position of Director General with the French Language School Board of August 2012; and

(2) the position of Director of Human Resources with the English Language School Board of September 2013.

He found that the Release, which is incorporated by reference into the statement of claim, is part of the litigation context and should be considered when assessing whether or not there is a reasonable prospect of success.

[9] Ultimately, he determined that the plaintiff's s.15(1) Charter claim does not disclose a reasonable cause of action because it does not identify or show unequal treatment under a specific law. He reviewed the School Boards' hiring practices, provisions of the ***School Act***, R.S.P.E.I. 1988, Cap. S-2.1 (repealed 2016), the Release, and the applicable collective agreement in that context. Following his analysis, he found that the plaintiff's s.15(1) Charter claim must fail as the plaintiff failed to show a connection between his claim and the facts and law. He found the plaintiff did not plead any specifics to link or create any s.15 claim to *"any law which has created a distinction or been applied in a manner which distinguishes against the Plaintiff on the basis of any protected ground."* He concluded that as the court was left with no legislative provisions to consider, the Charter claim for breach of the plaintiff's s.15(1) rights has no reasonable prospect of success even on a generous reading of the plaintiff's claim.

[10] He struck the plaintiff's claim for breach of duty of honest performance of contractual obligations because the statement of claim does not disclose an existing contractual relationship between the parties and therefore lacks a necessary factual underpinning for a claim.

[11] He struck the claim for systemic discrimination based on claims arising prior to the Release on February 6, 2012 because it has been judicially determined that the Release acts as a defence to any claim for any position applied for prior to signing the

Release.

[12] He struck the claim based on s.6(2)(b) of the Charter for breach of mobility rights because he found that the plaintiff's claim misapprehends the function of the mobility rights provision with the result that no claim was properly pleaded in that regard.

[13] He held the statement of claim should be struck without leave to amend because the plaintiff had previous opportunity to remedy deficiencies in the pleadings and had not done so and the pleadings do not disclose any reasonable cause of action even for alleged Charter violations.

[14] The motions judge asked the parties to address their minds to a supplementary question regarding the right of a plaintiff to pursue parallel proceedings in the Human Rights Commission ("HRC") and the Supreme Court. He noted that the plaintiff relies on the decision of ***Ayangma v. Eastern School Board***, 2000 PESCAD 12, (***"Ayangma 2000"***) in which the Court of Appeal held that the HRC is not a court of competent jurisdiction within the meaning of that phrase used in s.24(1) of the Charter, and accordingly the plaintiff could pursue his Charter claim in the Supreme Court. He posed the question of whether the law in that regard has changed by the Supreme Court of Canada in ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur***, 2003 SCC 54, and ***R. v. Conway***, 2012 SCC 22, and related cases. He then made an observation short of a decision. It appears to him that the claims in both venues are based on the same facts and in essence are substantively the same claim, and that although the plaintiff took the position based on the Court of Appeal decision in ***Ayangma 2000*** that this is the appropriate procedure to follow, in light of the Supreme Court of Canada direction in ***Conway***: *"I am doubtful that is the case and raise the issue as it appears to be unnecessary for an administrative tribunal and a court to plough the same well-tilled ground."*

[15] He awarded the School Boards their costs of the motion on a partial indemnity basis.

Appeal

[16] The plaintiff appealed. The notice of appeal contains five grounds, which plead these errors:

(1) invoking the Supreme Court of Canada decision in ***Conway*** to restrict his rights to be heard by a court of competent jurisdiction;

(2) misunderstanding the Charter claim and the effect thereon of the

Release and proceedings in the HRC;

(3) misconstruing the main issues before him, in particular failing to determine whether the School Boards engaged in hiring or recruitment practices that discriminated against him on the basis of race, national origin, colour and/or qualifications;

(4) failing to apply his mind to the issues before him, particularly his allegations of systemic discrimination, the effect of the Release on any claim for systemic discrimination, and the effect of the Release on the claim against the FLSB regarding the Director General position which was post-Release, and thereby erroneously finding that there was no reasonable prospect of success for the Amended Statement of Claim; and

(5) misconstruing the issues when he found that the Statement of Claim *"failed to establish the law that applied to him"*, and also that the applicable Collective Agreement applied to him regarding his specific claims, finding there was no continuing contractual obligation and thereby no duty of honest performance of contractual obligations, and misconstruing the mobility right created by s.6(2)(b) of the Charter.

[17] Counsel for the respondent School Boards distilled and reframed the appellant's issues and thereafter the parties presented the appeal within this revised framework. The questions as reframed by counsel ask whether the motions judge made an error in:

1) restricting the appellant's rights to be heard by a court of competent jurisdiction by relying on ***R. v. Conway***, 2010 SCC 22 to dismiss the Amended Statement of Claim?

2) finding that the Release could not ground a s.15(1) Charter claim?

3) finding that the alleged discriminatory policies or practices as pleaded could not ground a s.15(1) Charter claim?

4) finding there was no reasonable prospect that the appellant's claims of systemic discrimination would be successful?

5) (a) finding that the Collective Agreement could not ground a s.15(1) Charter claim;

(b) finding there is no reasonable prospect that the appellant's claim for breach of duty of honest performance would be successful; and

(c) finding that the Amended Statement of Claim contains no properly pleaded claim relating to s.6(2) Charter mobility rights?

Analysis of appeal

- *Summary of decision*

[18] I would uphold as reasonable the decisions of the motions judge to strike out the plaintiff's claims described in reframed ground of appeal #5 based on: a) breach of the collective agreement; b) breach of contractual duty of honest performance, and c) breach of the plaintiff's Charter s.6(2) mobility rights. However, in my opinion ground #3 should be allowed. The finding that the plaintiff's claim for breach of his s.15(1) Charter equality rights does not disclose a reasonable cause of action is based on an error of law and must be set aside. Regarding grounds #1, 2, and 4, as I will explain, these grounds merit comment but do not need to be decided. Following is a summary of my opinion regarding the restated grounds of appeal:

(1) The motions judge did not decide the issue of parallel proceedings. He raised the question and limited his opinion to an expression of doubt about the utility of plowing the same well-tilled ground. An opinion short of a decision does not preclude the plaintiff's action. I agree with the School Boards' submissions that this portion of the judgment is obiter.

(2) I understand that the motions judge was trying to discern whether the Release can be viewed as a law upon which the plaintiff could ground his claim. I don't think that is Mr. Ayangma's purpose. As I understand it, whether or not the Release could ground a s.15(1) Charter claim regarding the two employment competitions is not the issue. His claim is that the School Boards are relying on the Release as a license to discriminate. Both competitions were post-Release. The Release could well be an evidential factor. The motions judge appropriately found that the Release is part of the litigation context. There is no basis for striking any pleading about the Release.

(3) The reason the decision that the alleged discriminatory policies or practices as pleaded could not ground a s.15(1) Charter claim is incorrect is that it does not consider the plaintiff's claim that the School

Board administrators by their actions caused a Charter breach, and the law permits that kind of claim even where breach of the law enabling their actions is not in issue. The decision proceeds on the narrow premise that the claim must identify a law that is breached, or link the facts pleaded to a law which denied the plaintiff equal protection or benefit. That premise is too narrow because it excludes consideration of the impugned actions of the School Board administrators, acting under a valid law that does not and could not authorize discrimination discriminating against the plaintiff. Board actions is the thrust of the plaintiff's claim.

The Supreme Court of Canada stated in ***Eldridge v. British Columbia (Attorney General)***, [1997] 3 S.C.R. 624, that the Charter applies to provincial litigation in two ways. One, legislation may be found to be unconstitutional on its face because it violates a Charter right and is not saved by s.1. Two, the Charter may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. The Charter applies to action taken under statutory authority, and such action is valid only if it is within the scope of that authority. Thus the limitations on statutory authority which are imposed by the Charter flow down the chain of statutory authority and apply to regulations, bylaws, orders, decisions, and all other action, whether legislative, administrative, or judicial, which depends for its validity on statutory authority.

The motion judge's decision to strike the plaintiff's s.15(1) Charter claim is based on the premise that the plaintiff did not identify or ground his claim in any specific law. That is too narrow an interpretation of s.15(1) Charter obligations and rights. The ensuing analysis is thereby without proper foundation. The focus of the plaintiff's claim is on the actions of the School Boards; however, the reasons decline to deal with that in the absence of a identification of a breach of law.

The Court of Appeal should apply the correct legal principle and go on to decide whether the respondent's have shown that the plaintiff's claim does not disclose a reasonable cause of action for his s.15(1) Charter claim. In my opinion, that is not shown. Accordingly, the plaintiff's s.15(1) Charter claim should not be struck out pursuant to the respondents' Rule 21.01(1)(b) motion.

(4) My opinion regarding issue #3 advises caution in approaching issue #4.

"I agree with the motions judge that the Release precludes Ayangma from bringing claims against the School Boards for any specific breach of hiring practice that occurred prior to the date of the Release. That said, the Release should not be used as an evidentiary bar in Ayangma's pursuit of his s.15(1) Charter claims for discrimination in post-Release employment competitions. Discrimination is seldom overt. Allegations or evidence of historic systemic discrimination may well be probative and relevant to proving discrimination in the specific hiring competitions that remain the subject of the Amended Statement of Claim. I don't see any reason to strike out any pleading regarding systemic discrimination. It would be for the trial judge to decide on admissibility and, if applicable, relevance of various evidence of systemic discrimination in face of the Release."

(5) In my opinion, the motions judge was correct in these three determinations:

(a) the Collective Agreement could not ground a s.15(1) Charter claim, because the plaintiff, although qualified as a teacher, was not an employee when he applied for the positions, and so would not have been covered by the Collective Agreement for his claims. It is unnecessary to address the issue of exclusive jurisdiction created by the grievance provisions of the Collective Agreement;

(b) as there is no contract between the plaintiff and either respondent, there is no reasonable prospect of success for the appellant's claim of breach of duty of honest performance; and

(c) the s.6(2) Charter mobility rights claim is based on an expressed misapprehension of its purpose and accordingly not pleaded sufficiently to support a reasonable cause of action.

- *Review of decision striking out claim for breach of his s.15(1) Charter rights*

[19] The plaintiff's primary claim is for discrimination based on breach of his s.15(1) Charter rights. As mentioned, the determination that this claim does not disclose a reasonable cause of action and should be struck out is based on the underlying premise that a claim must be based on a specific law. The motions judge proceeded based on the Supreme Court direction in ***Auton (Guardian ad litem of) v. British Columbia (Attorney General)***, 2004 SCC 78, at para.27, which advises that in

order to succeed the claimants must show unequal treatment under the law. Following that direction, the motions judge found (at ¶29, 30, 38) that it is important to identify the specific law which a citizen is challenging, and found there is no connection between s.3(2) of the ***School Act*** and the plaintiff's s.15(1) Charter claim and no material facts are pleaded in regard to any law which has created a distinction or been applied in a manner which distinguishes against the plaintiff on the basis of any ground protected by s.15(1) of the Charter. He also found that neither the Release nor the applicable Collective Agreement can be viewed as a law upon which a s.15 claim can be based.

[20] Though thoughtful and well written, I believe the reasons miss out on canvassing the essence of Mr. Ayangma's claim. The analysis rejects the plaintiff's contention that the School Board actors discriminated against him and that this is a sufficient basis upon which to ground his claim for discrimination. The reasons do not take into account, and instead reject that basis for a claim. The Supreme Court of Canada directed in ***Eldridge***, which directions were followed by the Court of Appeal in ***Ayangma v. French School Board***, 2010 PECA 16, on a previous Ayangma s.15 Charter breach claim regarding an employment competition. Those decisions state that although the legislation itself may not infringe the Charter, the action of a school board administration performing as a government agent in the application of legislation may violate the Charter. In that scenario, the legislation itself remains valid; however, the claimant may have a remedy under s.24(1) for unconstitutional action. ***Auton*** and ***Eldridge*** dealt with different situations.

[21] In ***Eldridge***, the claim was that a provincial government's failure to provide funding for sign language interpreters for deaf persons when they receive medical services violated s.15(1) of the Charter. The claimants asserted that because of the communication barrier that existed between deaf persons and health care providers, they received a lesser quality of medical services than hearing persons. They contended that failure to pay for interpreters infringed their right to equal benefit of the law without discrimination based on physical disability. La Forest J. found it was not the impugned legislation that infringed the Charter. Rather it was the actions of particular entities – in that case hospitals and medical services commission – exercising discretion conferred by legislation, that did so. The Supreme Court held that the Charter applies to those entities for that particular activity, insofar as they were acting pursuant to powers granted to them by statutes. This statement by La Forest J. in ***Eldridge***, which is followed and set out in ***Ayangma v. French School Board***, 2010 PECA 16, at ¶31-32, provides the directions and rationale, and reconciles with ***Auton***:

> [31] In ***Eldridge v. British Columbia (Attorney General),*** [1997] 3 S.C.R. 624; [1997] S.C.J. No. 86 at para. 20, the Supreme Court of Canada

reaffirmed that the Charter applies to provincial legislation. LaForest J. writing for the Court made clear that the Charter can apply to provincial legislation in two ways. First, the legislation on its face may violate the Charter. Secondly, the legislation itself may not infringe the Charter; however the action of the government agents in the application of the legislation may violate the Charter. In the latter case, the legislation itself remains valid; however, the claimant may have a remedy under s. 24(1) for unconstitutional action.

[32] LaForest J. also stated in Eldridge at paragraph 21:

> [21] The s. 32 jurisprudence of this Court has for the most part focused on the first type of Charter violation. There is no doubt, however, that the Charter also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his **Constitutional Law of Canada** (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:
>
> > Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.
> >
> > The sentiment of Lord Atkin in speaking of a constitutional prohibition addressed solely at the legislative branch is also apposite: "The Constitution", he wrote, "is not to be mocked by substituting executive for legislative interference with freedom"; see ***James v. Cowan***, [1932] A.C. 542 (P.C. Australia), at p. 558.

[33] In ***Auton (Guardian ad litem) v. British Columbia***, [2004] 3 S.C.R. 657, at paragraph 27, the Supreme Court of Canada reaffirmed that the purpose of s. 15(1) is to combat discrimination and improve the position of disadvantaged groups in Canadian Society. The Court stated that to succeed with a claim that one's right to equality has been infringed, a claimant must show unequal treatment under the law and specifically that the claimant failed to receive a benefit

> which the law provided, or that the claimant was subjected to a burden the law did not impose on someone else.
>
> [Emphasis added.]

[22] Accordingly, the order striking out the plaintiff's statement of claim on the ground that it discloses no s.15(1) discrimination cause of action should be set aside.

- *Court of Appeal should decide whether claim discloses reasonable cause of action*

[23] It remains to be decided whether the plaintiff's s.15(1) Charter claim for discrimination should be struck out on the ground that it discloses no reasonable cause of action or allowed to proceed to trial. In my view, the Court of Appeal should decide this issue rather than remitting it back to the motions judge. The statement of claim and the complete motion record are before us, and there was no evidence on the motion. A Court of Appeal determination of the issue is permitted by s.21(2)(a) of the ***Judicature Act***, and is consistent with Rule 1.04, which promotes processes that secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

- *Plaintiff's claim discloses reasonable cause of action*

[24] As was the case in ***Eldridge*** (¶19), there are two distinct Charter issues in this case. The first is to identify the precise source of the alleged s.15(1) violations. Again, as in ***Eldridge***, it is not the legislation that potentially infringes the Charter, it is the actions of the particular entities – here the FLSB and the ELSB – exercising discretion conferred by their enabling legislation, the ***School Act***, that does so. (In 2016, the ***School Act*** was repealed and replaced by the ***Education Act,*** R.S.P.E.I. 1988, E-.02. Since the events in issue prior to the repeal, my expectation is that the ***School Act*** would be the pertinent statute.) The second question is whether the Charter applies to those entities in performing the impugned functions.

[25] The first question in an analysis is whether the actor in carrying out the impugned act is part of government. While this is a question for careful analysis because performing a function or an activity that is public in nature is not sufficient in and of itself to attract Charter scrutiny, in my view school boards in performing the employment competitions in issue are quite clearly government entities exercising government powers.

[26] By virtue of s.32(1)(b), the Charter applies to the legislature and government of each province in respect of all matters within the authority of the legislature. The

Charter applies to provincial legislation, including the ***School Act***. As mentioned, the Charter may be infringed by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid but pursuant to s.24(1) of the Charter a remedy for unconstitutional action may be sought. In this case, the statement of claim asserts that the FLSB and ELSB discriminated against him in the conduct of their respective hiring exercises for particular administrative positions.

[27] In my view, the Charter applies to the School Board actions that Ayangma puts into issue in the proceeding. The school boards are government entities and in carrying on hiring competitions they are exercising powers that are truly governmental in nature. Under the ***Education Act***, and the ***School Act***, there is inter-connection between the Minister's powers and responsibilities for administration under Part II and the *"education authority"* (school board) management functions under Part III, and the Minister reports to the Legislature for all activities. The ***School Act*** empowers and requires the school boards to carry out school administration, which includes hiring for administrative positions. The ***School Act*** does not purport to permit or condone discrimination. Accordingly, the plaintiff would be entitled to equal treatment in the administration of the hiring competitions.

[28] This was the finding by the Supreme Court and the Court of Appeal on similar facts in ***Ayangma v. French School Board Gabriel Arsenault***, 2008 PESCTD 30, at ¶61 and 2010 PECA 16, at ¶35-36. In that case the Ayangma's claim was for discrimination in hiring competitions for principal and teacher positions with the French School Board. The Board performance of its competitions was the focus of the court review.

[29] As the Supreme Court of Canada directed in ***Hunt v. Carey Canada Inc.***, [1990] S.C.R. 959, and in ***Knight v. Imperial Tobacco Canada Ltd***, 2011 SCC 42, on a motion to strike for not disclosing a reasonable cause of action, a claim will only be struck if it is plain and obvious assuming the facts to be true, that the pleading discloses no reasonable cause of action. The question is whether the plaintiff's statement of claim pleads the essential elements and facts upon which to base a s.15(1) Charter claim.

[30] Under s.15(1), every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Section 15(1), like other Charter rights, is to be generously and purposively interpreted. Section 15(1) serves two distinct but related purposes. First, it expresses a commitment – deeply ingrained in our social, political and legal culture – to equal worth and human dignity for all

persons. This entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. Secondly, it "*instantiates*" a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society (***Eldrige, supra***, at ¶54).

[31] In ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497, the Supreme Court of Canada developed the framework of analysis for a s.15 claim. The respondents' motion being limited to the threshold question of whether the statement of claim discloses a reasonable cause of action, it is sufficient to confine discussion to a statement of the applicable test. In ***Gosselin v. Quebec (Attorney General)***, [2002] 4 S.C.R. 429, the Supreme Court summarized the three broad inquires set out in ***Law***:

> [17] To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds. In this case, the first two elements are clear, and the analysis focuses on whether the scheme was discriminatory.

The ***Law*** framework is discussed and was applied by Cheverie J. in a previous s.15(1) claim by Mr. Ayangma for discrimination in employment competitions in ***Ayangma v. French School Board and Arsenault***, 2008 PESCTD 39.

[32] My assessment advises that the plaintiff's Amended Statement of Claim passes the test for disclosing a reasonable cause of action. The plaintiff claims that each of the FLSB and ELSB discriminated against him in their conduct of the hiring processes for the FLSB Director General position and the ELSB Director of Human Resources position. He sets out a sufficient factual basis upon which to advance his claims. His claim asserts he immigrated to P.E.I., is black, is qualified for the position, applied for the position, was not considered for the FLSB Director General position, and was screened out for the ELSB Director of Human Resources position, that the hiring processes were applied unevenly or and that a person either unqualified or less qualified than him was awarded the position.

[33] More particularly, the statement of claim pleads these facts:

¶13	plaintiff is a black man born in Cameroon, Africa, who moved to Prince Edward Island in 1987;
¶14	as a black man, plaintiff belongs to a group of people suffering from (listed) disadvantages in Canadian society, and thereby protected under s.15 of the Charter;
¶15	plaintiff's claim is about the defendants filling of two positions: • FLSB Director General, advertised by the FLSB on May 16, 2012 • ELSB Director of Human Resources, advertised by the ELSB on September 17, 2013
¶16 & 17	plaintiff is a qualified teacher, with business administration qualifications and training in administration
¶18, 19, 20	FLSB and ELSB are established under the ***School Act*** and have responsibility for delivering education services in P.E.I.
¶22 ff	there is a long history of litigation over discrimination involving him and the defendants
¶23, 27	plaintiff was successful on a previous claim against ELSB based on discrimination
¶1	defendants wilfully breached their constitutional, statutory and contractual rights; their conduct was geared at both discriminating against him and denying him the right to pursue the gaining of a livelihood; s.15(1) of the Charter is pleaded and particularized: FLSB denied him an opportunity to compete for the position of Director General advertised on May 16, 2012 on the basis of race, colour, national origin and age; ELSB specifically represented after the Release was signed that the plaintiff would be denied opportunity to compete for the position of Director of Human Resources in 2013, and wilfully abused the process by suspending or revoking his instructional license, etc.; ELSB breached its own hiring practices and policies when it screened him out and screened in three candidates it knew or ought to have known were no better qualified than him, and proceeded to hire one of them as the successful candidate, one who did not even meet the basic minimum educational and training requirement advertised; in September 2013 the ELSB denied him opportunity to compete for the position of Director of Human Resources on the basis of his race, colour, national origin and age.

¶2	Section 15 of the Charter prohibits the discrimination that occurred; the plaintiff relies on s.24(1) of the Charter.
¶5	School Boards violated the plaintiff's s.15(1) Charter rights. Specifically, they engaged in hiring and recruitment practices and operated or were applied so as to discriminate against him over many years (over three decades), and recently in the hiring processes put in place by the School Boards to fill the position of Director General advertised May 16, 2012 and Director of Human Resources advertised September 2013, on the basis of his race, national origin, colour, age or qualifications.
¶6	School Boards engaged in hiring and recruitment practices using the Release so as to discriminate against him and to deny him the right to pursue his livelihood.
¶7	As a matter of law that he has a right to bring a s.24(1) Charter claim for a s.15(1) or s.6(2) Charter violation, notwithstanding any process commenced under the ***Human Rights Act***.
¶8	School Boards have repeatedly and systemically denied him without cause equal protection and equal benefit of the law, because of their discriminatory hiring practices and policies as a result of which he has suffered injurious consequences.
¶9	School Boards conduct and manner in which they treated him constitutes a breach of their constitutional obligations under s.15 not to discriminate against him.
¶34-50	Regarding specific claim against ELSB, the plaintiff pleads as specific facts: notwithstanding the Release, he was entitled to apply for positions; however, ELSB maintained its discriminatory hiring practices to exclude him; ELSB has given contradictory reasons for their treatment of him; he applied for the position and submitted his resume on September 9, 2013; ELSB did not screen him in, despite his better qualifications, and then filled the position with an unqualified candidate. They used the position description or qualifications against his interests; he was better qualified than the successful applicant, basis stated: in conducting itself in this manner ELSB breached its constitutional obligation protected under ss.15(1) and 6(2) of the Charter which prohibit discrimination of the type alleged by the plaintiff.

Regarding the specific claim against the FLSB as to the position of Director General the plaintiff pleads as specific facts at ¶51-62:

¶51	May 16, 2013 FLSB initiated the staffing of the position for the Director of Human Resources position and advertised the position;
¶52	the qualifications for the position described;
¶53	plaintiff applied for the position, and was qualified for the positions;
¶55	on the basis of the Release, FLSB neither acknowledged his application for employment nor invited him for any of the interviews it conducted to fill the position;
¶56	the settlement represented by the Release was the sole basis advanced by FLSB for not considering him. The plaintiff interpreted this as asserting a right to discriminate against him with impunity;
¶57	in conducting itself in this manner, FLSB wilfully misrepresented the Release and discriminated against the plaintiff by denying him both the opportunity to compete for the position and his constitutional right to gain a livelihood in the province;
¶58	the Release does not permit the School Board to contract out of human rights protections or violations, or to discriminate against the plaintiff on the basis that he gave away his rights not to be discriminated against;
¶60	ELSB engaged in and continues to be engaged in discriminatory acts and hiring practices against the plaintiff;
¶62	the School Boards' treatment of him was wilful conduct that denied him equal treatment and equal benefits under the law contrary to s.24(1) of the Charter.

[34] The mandated generous view on review of this pleading advises that the motion to strike out the plaintiff's Charter claim should be denied. Viewed in the context of ***Eldridge***, it is not plain and obvious, assuming the facts pleaded to be true, that the statement of claim discloses no reasonable cause of action. The alternate language *"reasonable prospect of success"* is only considered in that regard, i.e. whether a known or reasonable cause of action is disclosed, and sufficient facts are pleaded to plead a case; it is not a permit to expand the reach of Rule 21.01(1)(b) to measure chance of success of a claim beyond satisfying the reasonable cause of

action threshold.

[35] Acknowledging the plaintiff's claim is somewhat unorthodox in style and is repetitive, upon adopting the ***Eldridge***-mandated view that executive or administrative action counts, the nature of the plaintiff's claim can be discerned and tested for reasonable cause of action quite readily. I do not view this as a situation where one has to scour through a lengthy statement of claim to ascertain which details sprinkled throughout might apply. The claim is complicated by claims of discrimination against separate School Boards for separate hiring processes being contained in one proceeding. However, Ayangma should be permitted some latitude in that regard. The claim makes clear his motivation is to bring the systemic discrimination he alleges occurred over 30 years at the hands of both defendants into the proof of his claims for the specific acts of discrimination occasioned by each School Board in 2012 and 2013. In that regard, Rule 6 encourages a consolidated proceeding where claims have a question of law, fact or relief claimed in common.

[36] I do not subscribe to the respondents' submission made during the appeal hearing, which after acknowledging that administrative action as discussed in ***Eldridge*** can be the source of a Charter breach, would still deny the plaintiff's right to assert a s.15(1) claim because he is not claiming discrimination as part of a particular group. As ***Eldridge*** advises (at ¶54), s.15(1) serves two distinct but related purposes. An individual can bring a claim for a violation of his equality rights. It is not necessary to show membership in a historically disadvantaged group in order to establish a s.15(1) violation, although the fact that a law draws a distinction on such a ground is an important *indicium* of discrimination. Section 15(1) commences *"Every individual,"* which includes Mr. Ayangma. Taking a broad and purposive view of s.15(1), as the Supreme Court advises, an individual can claim discrimination based on unequal treatment resulting from a prohibited ground.

- *Parallel proceedings*

[37] The issue of parallel proceedings in the HRC and the Supreme Court is canvassed by Mitchell J.A. in the companion opinion. I agree with his opinion.

Conclusion

[38] I would allow the appeal in part. I would set aside the order that struck out the plaintiff's statement of claim without leave to amend and the associated order for costs. In my opinion, the defendants have not shown that the plaintiff's claim does not disclose a reasonable cause of action for his s.15(1) Charter violation claim. I would uphold the motion judge's decisions that the statement of claim does not disclose a reasonable cause of action based on breach of the applicable collective

agreement, breach of duty of honest performance, and breach of Charter s.6(2) mobility rights.

[39] It may be a challenging task to extricate words from the statement of claim that are confined to the three ancillary claims that are struck out. I think the most expeditious approach is to move forward without striking any particular language but with the understanding that the three claims for breach of the applicable collective agreement, breach of duty of honest performance, and breach of Charter s.6(2) mobility rights are struck out and not to be pursued. If specific language was to be struck out, a light hand would need to be employed, so as not to preclude the plaintiff from referring to those various matters in the trial. We cannot presume at this early stage how the parties will choose to marshal and prove their respective cases at trial.

[40] As to costs, I discern the plaintiff's s.15(1) Charter breach claim for discrimination is his main claim. That claim, which was struck out on the motion, is now reinstated. Accordingly, the costs order on the motion should be vacated. That leaves the parties with divided success on the motion and on the appeal; however, with the thrust of the plaintiff's claim intact. Accordingly, I would grant the plaintiff his costs on the motion and the appeal, as a self-represented litigant, on a partial indemnity basis, to be fixed by this court. As requested by counsel and Mr. Ayangma, the parties have 30 days to resolve the amount of costs and report the results of their successful negotiation to this court. Absent agreement, the parties have a further 30 days to file and exchange brief submissions on the amount of costs.

Chief Justice David H. Jenkins

MITCHELL J.A.:

[41] I agree with the disposition of this appeal for the reasons set out by Jenkins C.J. However, in obiter dicta the motions judge raised an issue with which, I believe, this court must deal. For the reasons that follow, in my opnion, in the future a complainant may not carry proceedings under both the ***Human Rights Act*** and the Supreme Court of Prince Edward on the same or substantially the same facts.

[42] My opinion on this issue should not impact on Ayangma's current civil suit as Ayangma proceeded in good faith following the direction of this court in a 2000 decision with the general concurrence of the Human Rights Commission and both School Boards.

[43] The motions judge observed that prior to filing his civil suit against the School Boards based on s.15 of the Charter, Ayangma filed human rights complaints based on the same or substantially the same facts. The parties relied on ***Ayangma v. Eastern School Board,*** 2000 PESCAD 12, as authority that allows an individual or class of individuals to pursue redress in two different fora on the same or substantially the same facts. The motions judge questioned whether or not the recent Supreme Court of Canada case in ***R. v. Conway***, 2010 SCC 22, on what constitutes a court of competent jurisdiction under s.24(1) of the Charter changed the law in this regard.

[44] The motions judge wrote at (2018 PESC 43) para.86:

> Although it is my understanding that the plaintiff limited himself to non-Charter remedies in front of the Human Rights Commission, it appears that the claims in both venues are based on the same facts and in essence are substantially the same claim. The plaintiff took the position based on a PEICA decision of 2000 that this is the appropriate procedure to follow. In light of the ***Conway*** decision I am doubtful that is the case and raised the issue as it appears to be unnecessary for an administrative tribunal and a court to plow the same well-tilled ground.

[45] In light of that, in preparing for this appeal the court requested the parties be prepared to deal with the following two questions:

(1) Is ***Ayangma v. Eastern School Board***, 2000 PESCAD 12, still good law in light of subsequent Supreme Court of Canada cases such as ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 S.C.C. 54; ***R. v. Conway***, 2010 SCC 22; and ***Doré v. Barreau du Québec***, 2012 SCC 12?

(2) Do these cases bring the doctrine *abuse of process* into play?

[46] The Human Rights Commission were invited to apply for intervenor status. They did so and were granted intervenor status as a friend of the court. Their submissions were most helpful.

[47] In my view the answer to question one is no and the answer to question two is yes.

[48] In paragraph 63 of the statement of claim **Ayangma** states that he relies on *"section 1, 15(1) and 24(1) of the Charter dealing with any discriminatory act under the Charter and as well, on the Court of Appeals previous directions in* ***Ayangma v. Eastern School Board****, 2000 PESCAD 12, at para.11*" (hereinafter "***Ayangma 2000***").

[49] Ayangma claims *"damages pursuant to s.24(1) of the Charter including general, special and punitive damages and restitutio in integrum (para.1), "special damages and post-judgment interest"*, and costs (para.12).

[50] His damage claim arises from alleged *"abusive, illegal and discriminatory conduct preventing him from earning a livelihood"* (para.1), *"discriminatory hiring practices and policies"* (para.1.1.2), *"constructively retiring him"* (para.1.1.2), and *"discriminatory hiring practices"* (para.9), all of which are related to race, colour, national origin and/or age (para.1.2.5.1). His claim is, in pith and substance, a claim under s.6(1) of the ***Human Rights Act***, R.S.P.E.I. 1988, Cap. H-12 (***HRA)***; that is, he believes the School Board refused to employ him or consider him for employment based on prohibited grounds.

Ayangma 2000

[51] At paragraph 45 of his factum Ayangma states his present claims *"are not different from claims previously made against the same respondents in 1998 which resulted in the decision of this court"* in ***Ayangma 2000***.

[52] In that case, Ayangma had filed a complaint with the Human Rights Commission ("HRC") alleging discrimination in relation to his attempts to obtain employment and, at the same time, commenced an action in Supreme Court seeking s.24(1) Charter relief on the same facts. The Eastern School Board argued that the matter before the HRC foreclosed any action in the Supreme Court based on the Charter. The Court of Appeal held that the HRC and Human Rights Panels ("HRP") were not courts of competent jurisdiction and could not provide Charter relief. Therefore, a litigant in this province may simultaneously carry a human rights complaint and an action in the Supreme Court for Charter relief on the same facts.

The Court ruled only that the action in the Supreme Court should not proceed to trial until the human rights complaint had been dealt with pursuant to the ***Human Rights Act***, R.S.P.E.I. 1988, Cap. H-12 (*"**HRA**"* or *"**Act**"*).

[53] While conceding that generally the principles which are applied in cases of discrimination based complaints under the ***HRA*** are applicable in dealing with the question of discrimination under the Charter, the Court nonetheless found that the HRC/HRPs are not courts of competent jurisdiction. The Court's analysis focussed on whether or not the Legislature intended the HRC/HRP to have authority and expertise to deal with Charter issues and Charter remedies. The court acknowledged the test set out in ***R. v. Mills***, [1986] 1 S.C.R. 863, that to be a court of competent jurisdiction a tribunal must have jurisdiction over the parties, the dispute and the remedy.

[54] At paragraph 8 the Court wrote:

> ... it is clear from the HRA that in this case neither the HRC nor an HRP have a mandate that extends to Charter claims.

[55] At paragraph 9:

> ... There is nothing anywhere in the HRA which explicitly or implicitly gives an HRP any authority to deal with a Charter violation claim. ... there is no basis to support a conclusion that an HRP has the expertise or authority to determine a question of law involving the Charter. ...

[56] Finally, also in paragraph 9:

> It is apparent from the HRA that the Legislature did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere (complaints regarding contravention of the HRA) because s.28.3 allows for the referral to the court.

[57] In coming to this conclusion that the HRP was not a court of competent jurisdiction, the Court allowed that the powers of the HRC/HRP were considerable but not as broad as s.24(1) of the Charter. For example, the Court held at para.10 that it is *"at least doubtful"* that the remedial scheme available under the ***HRA*** would be adequate to provide a s.24(1) Charter remedy as, for example, the ***HRA*** does not *"provide for damages for violation of Charter rights per se, punitive or exemplary damages, or for damages for mental anguish, humiliation, affront to dignity, or emotional injury which so often attend unlawful discrimination."*

[58] The Court also stated that ***HRA*** limits compensatory awards to one year and furthermore that based on the law as it was in 2000, claims for Charter remedies are not subject to provincial limitation legislation.

Position of the parties and intervenor

[59] The respondent Boards' position is that ***Ayangma 2000*** is still good law. They argue that although the law has evolved over the past 19 years, the litmus test is the same; that is, did the Legislature implicitly or explicitly grant the tribunal the power to deal with questions of law. They argue s.28.3 remains in the ***HRA*** and *"this section expressly removes the jurisdiction to answer questions of law from a human rights panel"* (para.20, Respondents' supplementary factum). In oral argument the Board changed its tune somewhat by acknowledging that HRC/HRP does have jurisdiction to answer questions of law but only questions within its home statute. They argue that s.28.3 leads to the conclusion the Legislature intended to exclude Charter questions from the jurisdiction of the HRC/HRP.

[60] Ayangma agrees with this and argues that the ***Mills*** test still stands and that a court of competent jurisdiction must have jurisdiction over the parties, the dispute and the Charter remedy. Relying on ***Ayangma 2000*** and ***Perera v. Canada*** (1998) 225 N.R. 162 (FCA), Ayangma says HRPs cannot grant Charter remedies and therefore are not courts of competent jurisdictions.

[61] The position of the HRC is that ***Ayangma 2000*** must be reconsidered in light of the Supreme Court of Canada decisions in ***Martin*** and ***Conway***. They submit that HRPs do have the ability to decide questions of law and that stripping them of the ability to decide any question of law arising in the course of proceedings would defeat the very purpose of having a specialized tribunal to deal with cases involving discrimination under the ***HRA***.

[62] Notwithstanding the statement by the court in ***Ayangma 2000*** at para.10 that the ***HRA*** doesn't provide for damages for mental anguish, humiliation and affront to human dignity, human rights panels have been granting awards for injured feelings (***Burge v. Prince Edward Island (Liquor Control Commission) Board of Inquiry***, February 19, 1993), hurt feelings, loss of dignity, taking into account the nature and duration of the harassment, and psychological impact (***McGill v. Atlantic Turbines***, January 1997), for many years prior to ***Ayangma 2000***, and continue to do so, (hurt and humiliation ***MacKinnon v. Inn on the Hill***, February 2nd, 2012). In ***Eastern School Board v. Montigny and Ayangma***, 2007 PESCTD 18, the Supreme Court of Prince Edward Island upheld an HRP decision to award $55,000. damages for lost income and interest plus an additional award of $6,000. for hurt feelings and humiliation.

[63] However, the HRC also states that because the available remedies under the ***HRA*** may offer inadequate relief in a given circumstance, ***Ayangma 2000*** is correct in

finding multiple proceedings in separate venues on similar facts may be permissible and in the best interests of justice.

Evolution of the law

[64] Much has changed in the past 19 years. The ***HRA*** in this province has been amended by repealing a complicated compensation formula (s.28.4(2), (3), (4) and (5)), although a Panel still may not compensate a person for wages or income loss or expenses incurred prior to one year before the date of the discriminatory act upon which the person's complaint is based (s.28.6).

[65] The law relied upon by the court in ***Ayangma 2000*** to find that claims for Charter remedies are not subject to provincial limitation legislation has changed as well. The Supreme Court of Canada has made it clear that personal claims for constitutional relief, such as the case at Bar, are subject to provincial limitation periods (***Ravndahl v. Saskatchewan***, [2009] 1 S.C.R. 181) although claims for a declaration of constitutional invalidity under s.52 of the Charter are not constrained by limitation periods.

[66] More importantly, the Supreme Court of Canada has gradually expanded the approach to the scope of the Charter in its relationship with administrative tribunals during this time frame (***Conway***, at para.23).

[67] The evolution can be seen in a nutshell by way of the following passage authored by McLachlin J. (as she then was) in dissent in ***Cooper v. Canada (Human Rights Commission)***, [1996] 3 S.C.R. 854, which is now quoted with approval by the majority in ***Martin***, at para.29, and ***Conway***, at para.77:

> ... Every tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the Charter does not change the matter. The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. ...

[68] The test and the factors to consider are no longer the same as they were in 2000. In ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC 54 (***Martin***), the rules concerning the jurisdiction of administrative tribunals to apply the Charter were re-appraised and restated (para.3). Seven years later in ***R. v. Conway***, [2010] 1 S.C.R. 765, the Supreme Court of Canada traced the evolution of

the caselaw over the past 25 years as to what constitutes a court of competent jurisdiction and then refined or merged the lines of authority.

Martin

[69] The Supreme Court of Canada began its analysis of the jurisdiction of administrative tribunals to apply the Charter by referencing what it referred to as the policies adopted in previous case law. These policies provide the framework in which the court considers the relationship between the Charter and the administrative tribunal and specifically whether or not the administrative tribunal is a court of competent jurisdiction. The first policy is the principle of constitutional supremacy. That is, courts cannot apply unconstitutional laws and neither can administrative tribunals.

[70] In para.29, the court discussed the practical corollary to the rule of constitutional supremacy as being *"the idea that Canadians should be entitled to assert the rights and freedoms that the Canadian constitution guarantees them in the most accessible forum available without the need for parallel proceedings before the court."* The court also says this accessibility concern is particularly pressing given that many administrative tribunals have exclusive jurisdiction over disputes relating to their enabling legislation.

[71] The second policy referred to is that Charter disputes require a thorough understanding of the legislative scheme being challenged as well as the practical constraints it faces and the consequences of proposed constitutional remedies. In Charter cases which arise in a regulatory context the ability of the decision maker to analyze competing policy concerns is critical and the informed view of the decision maker, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is of invaluable assistance to a reviewing court (***Martin***, at para.30).

[72] Finally, the third policy is that administrative tribunal decisions based on the Charter are subject to judicial review on a correctness standard. Administrative tribunals have no authority to make declarations of invalidity and their decisions are not binding on anyone. Therefore, allowing administrative tribunals to decide Charter issues does not undermine the role of the courts as final arbitrators of constitutionality in Canada (***Martin***, at para.31).

[73] It is within this framework that the court in ***Martin*** set the test and the factors which a court must consider to ascertain whether or not a tribunal is a court of competent jurisdiction.

[74] Since administrative tribunals are creatures of Parliament and Legislatures,

their jurisdiction to decide questions of law must be found in their enabling legislation. The critical question is whether the empowering legislation explicitly or implicitly grants the tribunal the jurisdiction to interpret or decide any question of law (***Martin***, para.36, emphasis in original). If so, then the tribunal will be presumed to have the concomitant jurisdiction to interpret and decide that question in light of the Charter unless the Legislature has removed that power from the tribunal. In other words, the power to decide a question of law is the power to decide by applying only valid and constitutional laws (***Martin***, para.36).

[75] In cases where the empowering legislation contains an expressed grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. The test to be applied when the jurisdiction is implied is set out at paras.41 and 48 of the ***Martin*** case.

[76] At para.48 the court states as follows:

> ... Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the Charter. (4) The party alleging that the tribunal lacks jurisdiction to apply the Charter may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the Charter; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the Charter (or a category of questions that would include the Charter, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.

[77] In applying the law in ***Martin*** the court found there was, amongst other things, an implicit (as well as explicit) grant of authority to the workers compensation appeal tribunal to decide questions of law. The court stated at para.52 that there could be no doubt the power to decide questions of law arising under the Act was necessary in order for the appeals tribunal to effectively fulfill its mandate. A conclusion to the contrary would contradict the Legislature's intent to create a comprehensive scheme for resolving workers compensation disputes and ultimately barring access to the courts in cases covered by the Act. The Supreme Court emphasized that the appeals

tribunal is fully adjudicative in nature, establishes its own rules, could consider all relevant evidence, records oral evidence for future reference and has the powers, privileges and immunities of a commissioner under the ***Public Inquiries Act*** of Nova Scotia. The Supreme Court of Canada also recognized that non-lawyers sitting on specialized tribunals can make important contributions to the Charter (para.53).

Conway

[78] In ***R. v. Conway***, [2010] 1 S.C.R. 765, the Supreme Court of Canada once again reviewed the evolution of the law concerning the jurisdiction of administrative tribunals to apply the Charter over the previous 25 years. Abella J. stated that the jurisprudential evolution has resulted in the courts acceptance not only of the proposition that expert tribunals should play a primary role in the determination of Charter issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion they must comply with the Charter (***Conway***, para.21).

[79] She concluded that administrative tribunals with the power to decide questions of law and from whom constitutional jurisdiction has not been clearly withdrawn have the authority to resolve constitutional questions that are linked to matters properly before them; and secondly, they must act consistently with the Charter and its values when exercising their statutory functions. She commented that it is unhelpful to subject every tribunal from which Charter remedy is sought to an inquiry asking whether it is *"competent"* to grant a particular remedy within the meaning of s.24(1) (***Conway***, para.78).

[80] The court stated that over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their Charter rights in the most accessible forum available without the need for bifurcated proceedings between superior courts and administrative tribunals. A denial of early access to remedies is a denial of an appropriate and just remedy. A scheme that favours bifurcating claims is inconsistent with the well-established principle that administrative tribunals decide all matters, including constitutional questions, whose essential factual character falls within the tribunals specialized statutory jurisdiction (***Conway***, para.79).

[81] Finally, ***Conway*** moved away from the necessity that a court of competent jurisdiction must have the ability to find a specific Charter remedy. In para. 81, the court stated:

> Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s.24(1), the proper initial inquiry is whether the tribunal can grant Charter remedies generally.

[82] And at paragraph 85:

> The question for the court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appear to have anticipated would fit within the statutory scheme governing the administrative tribunal.

Application in this case

[83] In my view ***Ayangma 2000*** must be revisited and reassessed in light of the new test and factors enunciated in ***Martin*** and ***Conway***. As there is no explicit grant of jurisdiction in the ***HRA*** to decide questions of law, the proper question is whether or not the HRC/HRP is an administrative tribunal with the power to decide questions of law and from whom constitutional jurisdiction has not been clearly withdrawn. If so, they have the authority to resolve constitutional questions that are linked to matters properly before them. The proper question is whether or not the Legislature has implicitly given the HRC/HRP jurisdiction to decide any question of law (***Martin***, paras.36, 41, 48; ***Conway***, para.78).

[84] Applying the factors set out in ***Martin*** and ***Conway*** then, I note that HRPs are adjudicative in nature. A HRP has authority to receive evidence in any manner it deems appropriate and is not bound by the rules of law respecting evidence in civil cases (s.28.2(2) ***HRA***). Members of an HRP have the power of a commissioner under the ***Public Inquiries Act*** (s.26(5)). These powers include the authority to issue subpoenas compelling any person to appear as a witness before the panel and to produce any relevant documents. Members of an HRP have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases in this province (***Public Inquiries Act***, ss.3 and 4).

[85] Recently in ***King v. Government of P.E.I.***, 2018 PECA 3, this court dealt with a judicial review of an HRP decision. At para.39 this court stated:

> ... However, the Panel decision also addressed larger questions that engage important questions of law of general importance to the legal system and are beyond the particular expertise of the Panel – including discrimination prohibited; discrimination defined; disabilities defined; comparator analysis; elements of a prima facie case of discrimination; legal content of reasonable explanation. Regarding those kinds of questions of law, Mowat points to the applicable standard of review being correctness. ...

[86] In ***Cairns v. Prince Edward Island (Human Rights Commission)***, 2017 PECA 16, at para.24, this court wrote:

> ... The Human Rights Commission is an institution of long standing in this province with expertise in matters involving human rights law...

[87] I agree with counsel for the HRC who stated that stripping HRPs of the ability to decide any question of law arising in the course of proceedings would defeat the very purpose of having a specialized tribunal to deal with cases involving discrimination. Put another way, the power to decide questions of law arising under the ***HRA*** is necessary in order for the HRC/HRP to effectively fulfill its mandate (***Martin***, para.52).

[88] In applying the factors set out in ***Martin***, there is no doubt in my mind that HRC and HRPs have the jurisdiction to deal with questions of law arising in proceedings properly before the HRC.

Has the presumption been rebutted?

[89] Having concluded that the HRC/HRPs have power to decide questions of law, they are presumed to have the concomitant jurisdiction to deal with Charter issues that arise within their statutory scheme. The next question then is whether or not the presumption is rebutted. A party may rebut the presumption by pointing to an explicit withdrawal of authority to consider the Charter or by convincing the court that *"an examination of the statutory scheme clearly leads to the conclusion that the Legislature intended to exclude the Charter from the scope of questions of law to be addressed by the tribunal"* (***Martin***, para.48). As there is no explicit withdrawal of the authority to consider the Charter in this case, one must conduct an examination of the statutory scheme to ascertain whether or not one is clearly lead to the conclusion that the Legislature intended to exclude the Charter from the scope of questions of law to be addressed by the tribunal.

[90] I begin by looking at the ***HRA*** as a whole. The starting point is its preamble. The preamble is five paragraphs long and refers to the inherent dignity and the equal and inalienable rights of all members of the human family being the foundation of freedom, justice and peace in the world. It also makes reference to the fundamental principle that all persons are equal in dignity and human rights without regard to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income.

[91] The ***HRA*** enshrines this principle in s.1(d) which prohibits discrimination on the grounds enumerated in the preamble. It is fundamentally an anti-discrimination rights based statute.

[92] Subsection 1(2) of the ***HRA*** states that the HRA shall be *"deemed to prevail over all other laws in the province and such laws shall be read as being subject to"* the ***HRA.*** It is a quasi-constitutional statute (***New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan***, 2008 SCJ No. 46, at para.19).

[93] In ***Dallaire v. Les Chevaliers de Colomb***, 2011 H.R.T.O. 639, an Ontario Human Rights Tribunal stated at para.22:

> ... it is well-established that the Code [Ontario Human Rights Code] and the Charter share common objectives and should be interpreted in a congruent manner. ...

[94] In ***Ayangma v. The French School Board***, 2002 PESCAD 5, this court was dealing with a human rights complaint that alleged the School Board discriminated against the complainant in its hiring practice. At para.34, this court adopted the definition of discrimination set out in ***Andrews v. The Law Society of British Columbia***, [1989] 56 D.L.R. (4th) 1 (SCC). The ***Andrews*** case was a claim made under s.15 of the Charter. Thus the definition of discrimination under the ***HRA*** and under the Charter is one and the same.

[95] The ***HRA*** sets up a HRC to administer and enforce the ***HRA***. Complaints may be made to the HRC within one year after the alleged contravention of the ***Act***. The complaints are investigated by the Executive Director who has certain powers to demand production of documents and, subject to court order, of entry into a place used as a dwelling home. The Commission then is to try to effect a settlement, and if a settlement cannot be effected and the complaint has merit, the complaint will be dealt with by an HRP.

[96] Hearings of the panel are generally public. Evidence given before an HRP is not bound by the rules respecting evidence in civil cases. Under s.28.1 the HRC has carriage of proceedings before HRPs except where a decision has been made under s.25(3) by the Chair. This is important as it means a complainant does not have to retain legal counsel to have a complaint adjudicated.

[97] HRPs have all the powers of a commissioner under the ***Public Inquiries Act,*** R.S.P.E.I. 1988, P-31 (s.26(5)). Powers of an HRP are as outlined in s.28.4 and are as follows:

> **28.4 Powers of Panel**
>
> (1) A Human Rights Panel
>
> (a) shall, if it finds that a complaint is without merit, order that

the complaint be dismissed;

(a.1) may allow the complainant to withdraw a complaint after some evidence has been presented at a Panel hearing; and

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in future from committing the same or any similar contravention;

(iii) to make available to the complainant or other person dealt with contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;

(iv) to compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention.

...

Costs

(6) A Human Rights Panel may make any order as to costs that it considers appropriate.

[98] The panel has the power to reconsider any matter if there is new evidence that was not available or for good reason it was not presented before the panel in the first instance. An order made by an HRP may be filed with the Registrar of the court and is enforceable in the same manner as an order of the Supreme Court (s.28.7). The ***HRA*** is not ordinary legislation. It is quasi-constitutional as it deals with the rights of Canadian citizens.

[99] In my view the ***Act*** shows the Legislature's clear intent to create a comprehensive scheme for resolving human rights complaints. In ***Conway*** at para.21

the Supreme Court of Canada stated:

> The jurisprudential evolution has resulted in this court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of Charter issues falling within their specialized jurisdiction, but also that in exercising in their statutory discretion they must comply with the Charter.

[100] Ayangma and the School Board argue that s.28.3 of the ***HRA*** must be read so as to exclude Charter questions from the jurisdiction of an HRC/HRP. That section reads as follows:

> A human rights panel may, at any stage of the proceedings, refer a stated case under the Rules of Court to the Supreme Court trial division, on any question of law arising in the course of the proceedings, and may adjourn the proceedings until the decision is rendered on the stated case.

[101] Section 28.3 is permissive, not mandatory. Counsel for the HRC could find no record of any case where an HRP has had resort to s.28.3. In my view this section does not withdraw, let alone clearly withdraw (***Conway***, para.78) the jurisdiction of an HRP to decide Charter issues.

[102] Taking into account the statutory scheme of the ***HRA*** to provide a comprehensive scheme for dealing with issues of human rights in the Province in an prompt, efficient inexpensive manner, the specialized expertise of the HRC/HRP, the adjudicative function of an HRP and the quasi-constitutional status of the ***HRA***, I conclude that the jurisdiction to deal with Charter issues that arise within a human rights complaint has not been removed.

Remedy

[103] Having found that HRC/HRP has jurisdiction to decide questions of law and that their jurisdiction to deal with Charter issues that arise in the context of a human rights complaint has not been removed, the next question that arises is Charter remedies.

[104] The Human Rights Commission states in their factum at para.16: *"Because the available remedies under the Act may offer inadequate relief in a given circumstance, the P.E.I.H.R.C. submits that Ayangma 2000 is correct in finding that multiple proceedings in separate venues on significantly similar facts may be permissible in the best interests of justice."*

[105] Ayangma and the School Board argue that because the ***HRA*** does not appear to grant an HRP authority to award punitive damages which Ayangma claims, it fails

the ***Mills*** test: that is, it is not a court of competent jurisdiction because it doesn't have jurisdiction over the specific remedy.

[106] That would have been a cogent argument in 2000. However, in my view, ***Conway*** changed the law so that the question is not the specific remedy claimed; rather, it is the kind of remedy and whether a tribunal can provide an effective vindicatory remedy.

[107] At paragraph 22 of ***Conway*** the court states:

> All of these developments serve to cement the direct relationship between the Charter, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant Charter remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if Charter jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant Charter remedies in relation to Charter issues arising in the course of carrying out its statutory mandate ... [Emphasis added]

[108] In 1984 Paul Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon. He was thereafter detained in mental health facilities across Ontario. He had a statutory right under the ***Criminal Code*** to an annual review before the Ontario Review Board. Prior to his annual review one year, he sent notice of constitutional questions to the Ontario Review Board, the Attorney Generals of Ontario and Canada, and the Canadian Association of Mental Health alleging various Charter breaches including breaches of ss.7 and 15. The remedies he sought under s.24(1) of the Charter included: an absolute discharge and an order directing the Canadian Association of Mental Health to provide him with access to psychotherapy treatment amongst other things.

[109] The question before the Supreme Court of Canada was whether the Ontario Review Board *"is authorized to provide certain remedies to Conway under s.24(1) of the Charter"* (***Conway***, para.83).

[110] The Supreme Court of Canada found the Ontario Review Board did not have the authority to grant an absolute discharge in this case, nor did it have the authority to provide Conway with a psychotherapy treatment. The Ontario Review Board was therefore precluded from granting the particular Charter remedies sought by Conway (***Conway***, para.97-101).

[111] That, however, did not end the matter. The court then looked at the scope and nature of the Ontario Review Board's statutory mandate and functions and stated at para.103:

> Remedies granted to redress Charter wrongs are intended to meaningfully vindicate a claimant' rights and freedoms ... Yet it is not the case that effective vindicatory remedies for harm flowing for unconstitutional conduct are available only through separate and distinct Charter applications. ... Charter rights can be effectively vindicated through the exercise of statutory powers and processes. [My emphasis.]

[112] In ***Chaudry (Re)***, 2015 ONCA 317, and ***Starz (Re)***, 2015 ONCA 318, the Ontario Court of Appeal applied ***Conway*** to two cases before two different panels of the Ontario Review Board. Both cases involved claims for breaches of the Charter. In ***Chaudry***, the panel found a breach and awarded the applicant costs which was the remedy the applicant sought under s.24(1) of the Charter. In ***Starz***, the applicant alleged a breach of s.7 and claimed the Charter remedies of declaratory relief as well as damages and costs. The ***Starz*** review board were concerned that they were ill-suited to deal with the questions of damages and costs. The Ontario Court of Appeal stated at para.99 and 100 as follows:

> [99] It is apparent from the Board reasons that the panel of the Board that heard this case shares these concerns. It concluded that: (1) the Board is ill-suited to deal with questions of damages and costs; and (2) such determinations are not appropriate to the Board's functions and powers.
>
> [100] I agree.

[113] The fact that the Ontario Review Board could not grant the specific remedies requested did not, however, mean that they were not a court of competent jurisdiction nor did it mean they could not provide an effective Charter remedy.

[114] The Court of Appeal continued at para.112:

> Having concluded that the Board does not have the power to grant declaratory relief, damages or costs, it is important to harken to the comments of Abella J., at para. 103 of ***Conway***: Charter rights can often be effectively vindicated through the exercise of statutory powers and processes.

[115] At paragraph 115 the Ontario Court of Appeal found that the Ontario Review Board's power to make orders provided it with an effective and flexible remedy to redress the Charter breach.

[116] In the case at bar the proper question is not whether the HRC/HRP has the power to award punitive damages as claimed, but whether the scope and mandate of the ***HRA*** gives it the power to provide an effective and vindicatory remedy. In ***Starz*** the court found that the Ontario Review Board's statutory powers provided it with a *"robust arsenal"* of remedies although not the precise remedies sought by the applicant.

[117] In this case Ayangma seeks *"general, special and punitive damages and restitutio in integrum"* (para.1 statement of claim). A human rights panel has broad powers under s.28.4 (see para.57 herein). It has the power to award damages in the form of lost income as well as lost expenses (s.28.4(1)(iv)). Section 28.4(1)(v) is a *restitutio in integram* provision as it provides the panel with the power to take any action it considers proper to place a complainant in the place he would have been but for the contravention. An HRP has the power to make available to the complainant the rights or opportunities or privileges that he was denied contrary to the ***HRA*** (28.4(1)(iii). That would mean, in a proper case, the job improperly denied the complainant could be granted to the complainant and, as well, in a proper case an order to reinstate the person to a job from which he was wrongfully terminated can be made by an HRP. Under 28.4(6) an HRP has the authority to *"make any order as to costs it considers appropriate"*.

[118] Finally, in my view the HRC's interpretation of s.28 to allow it to award monies for mental anguish, humiliation, affront to dignity or emotional injury, as they have been doing for the past 30 years, is sound.

[119] In any event it seems to me that the HRC/HRP has a robust arsenal of remedies sufficient to provide an effective, vindicatory remedy to redress a Charter breach.

[120] In my view when all the matters are taken into account including the test and factors set forth by the Supreme Court of Canada in the ***Martin*** and ***Conway*** cases, the conclusion is clear that the HRC/HRPs in this province are courts of competent jurisdiction to decide Charter issues which arise when the essential factual characteristics fall within the tribunal's specialized statutory jurisdiction as is the case here. A scheme that favors bifurcating claims is inconsistent with the now well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunals specialized statutory jurisdiction (***Conway***, at para.79).

[121] To paraphrase the Supreme Court of Canada in ***Martin*** and ***Conway***, there are sound reasons and good policy for so finding. As McLachlin J., as she then was, stated in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929, quoted with approval in ***Conway*** at para.28:

> [W]hile the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their Charter rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court.

[122] This conclusion accords as well with the direction the Supreme Court of Canada in ***Hryniak v. Mauldin***, 2014 SCC 7, where the court stated that ensuring access to justice is the greatest challenge to the rule of law in Canada today. Allowing a human rights tribunal to deal with Charter issues that arise in the context of a human rights complaint promotes better access to justice as human rights hearings are intended to be a cheaper, faster and more expeditious than court hearings.

Doctrine of Abuse of Process

[123] The doctrine of abuse of process engages the inherent powers of a court to prevent the misuse of its procedures in a way that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute (***Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79***, 2003 SCC 63, at para.37).

[124] One of the policy grounds for the doctrine of abuse of process is that no one should be vexed twice for the same cause (***Toronto (City)***, para.38).

[125] At paragraph 51 of ***Toronto (City)***, the Supreme Court of Canada wrote:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[126] This case is, in my view, a clear example of a situation where the courts,

henceforth, should invoke the doctrine of abuse of process. There is no need to put the parties through two different proceedings. There is no need to put the witnesses through two different proceedings. The respondents should not be vexed twice for the same action. Should the matter proceed to an HRP and a civil action as well, not only will judicial resources be wasted and costs doubled but there is the possibility of inconsistent verdicts.

[127] Consider the following realistic hypothetical. An HRP hears four or five days of evidence. The panel concludes, perhaps based on credibility of a key witness, and following the definition of discrimination set out in ***Andrews v. The Law Society of British Columbia, supra*** and adopted by ***Ayangma v. French School Board, supra***, there is no breach of the ***HRA***. The matter goes to judicial review before Judge A. Judge A must show deference to the panel's determination on credibility. Judge A upholds the decision of the HRP. The matter then is appealed to the Court of Appeal who likewise must show deference to findings of credibility. The Court of Appeal upholds the HRP.

[128] The matter then proceeds before Judge A in a civil action. Over the same number of days, the same witnesses give the same evidence and the same lawyers make the same arguments. Judge A however, has a differing view of the credibility of the key witness. Judge A comes to the conclusion, based on the same definition of discrimination, that there is discrimination and a breach of the Charter. Judge A's decision is appealed to the Court of Appeal who shows deference to his determination on credibility (which is different from the HRP's).

[129] The result would be two polar opposite decisions based on the same definition of discrimination on the same evidence, same witnesses, same arguments, the same judge and the same Court of Appeal. That, in my view, would impugn the integrity of the adjudicative process and diminish the authority and credibility of the judicial system.

Conclusion

[130] While this decision does not impact the current civil suit Ayangma has before the courts, in the future Charter issues which arise in the course of a human rights proceeding must be decided by the HRC/HRP.

[131] This is because the ***HRA*** creates a specialized tribunal to hear claims for discrimination in, amongst other things, employment. The ***HRA*** does not contain express or specific language to oust the jurisdiction of s.96 courts which are courts of general jurisdiction for hearing of all cases. Still a superior court should decline to hear such a claim out of respect for the Legislature's policy choice to have all

discrimination complaints heard by an HRC. This accords with the policy objective of effective access to justice and avoidance of duplication or abuse of process.

[132] It would be an abuse of process to run current proceedings in two different fora. To be clear, the power of an HRC/HRP is limited by its constating statute and it therefore does not have the power to hear stand-alone Charter issues. The HRC/HRP only has the power to deal with Charter issues in cases where the essential factual character falls within the HRC/HRP's specialized statutory jurisdiction which is complaints properly made under the ***HRA.***

Justice John K. Mitchell

MURPHY J.A.:

[133] I agree with the reasons of Chief Justice Jenkins and Justice Mitchell.

Justice Michele M. Murphy

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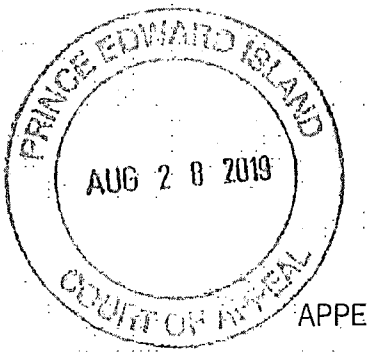
Court File No. S1-CA-1408

PRINCE EDWARD ISLAND COURT OF APPEAL

BEFORE: Chief Justice David H. Jenkins
The Hon. Michele M. Murphy
The Hon. John K. Mitchell



BETWEEN:

NOËL AYANGMA

APPELLANT

AND

THE FRENCH LANGUAGE SCHOOL BOARD
(a.k.a. La Commission Scolaire de Langue Francaise)
and THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENTS

AND

THE PRINCE EDWARD ISLAND HUMAN RIGHTS COMMISSION

INTERVENOR

ORDER

WHEREAS the Plaintiff filed a Statement of Claim on July 21, 2015.

AND WHEREAS by decision dated March 30, 2016, the Supreme Court of Prince Edward Island, on a motion by the Defendants to strike the claim, struck out the Statement of Claim;

AND WHEREAS by decision dated September 29, 2017, the Prince Edward Island Court of Appeal, on an appeal by the Plaintiff, sent the matter back to the Supreme Court of Prince Edward Island to be reheard;

AND WHEREAS the Plaintiff filed an Amended Statement of Claim on January 8, 2018;

AND WHEREAS the Defendants filed a motion on March 16, 2018, seeking to strike the Amended Statement of Claim pursuant to Rule 21.01 (the "Motion");

AND WHEREAS by decision dated November 16, 2018, Justice James W. Gormley of the Supreme Court of Prince Edward Island struck out the Statement of Claim without leave to amend;

AND WHEREAS the Appellant filed a Notice of Appeal on or about December 19, 2018, appealing the Order of Justice James W. Gormley, dated November 22, 2018 (the "Appeal");

AND WHEREAS the appeal was heard on June 24, 2019;

AND UPON reading the motion record and written submissions of the parties;

AND UPON hearing the submissions of the Appellant, the submissions of counsel on behalf of the Respondents French Language School Board and English Language School Board, and the submissions of counsel on behalf of the Intervenor Prince Edward Island Human Rights Commission;

THIS COURT ORDERS that:

1. The Appellant's appeal is allowed in part;

2. The Appellant's appeal of the Order of Justice James W. Gormley which struck the Appellant's claim alleging a breach of section 15 of the *Charter of Rights and Freedoms* is hereby allowed;

3. The Appellant's appeal of the Order of Justice James W. Gormley which struck the Appellant's claim alleging a breach of the Collective Agreement is hereby dismissed for the reasons provided in the written decision dated July 31, 2019, and shall not be pursued;

4. The Appellant's appeal of the Order of Justice James W. Gormley which struck the Appellant's claim alleging a breach of a breach of duty of honest performance is hereby dismissed for the reasons provided in the written decision dated July 31, 2019, and shall not be pursued;

5. The Appellant's appeal of the Order of Justice James W. Gormley which struck the Appellant's claim alleging a breach of section 6(2) of the *Charter of Rights and Freedoms* is hereby dismissed for the reasons provided in the written decision dated July 31, 2019, and shall not be pursued;

6. The Appellant is entitled to proceed with his claim via the Amended Statement of Claim with the understanding that the three claims for breach of the relevant collective agreement, breach of the duty of honest performance, and breach of s. 6(2) of the *Charter* are struck out and not to be pursued;

7. The Costs order on the Motion shall be and is hereby vacated;

8. The Appellant is entitled to his costs on the Motion and the Appeal, as a self-represented litigant on a partial indemnity basis.

9. If the parties are unable to agree on costs within 30 days of the written decision, they shall be provided an additional 30 days to make written submissions on costs following which a decision on costs shall be rendered by this court.

ISSUED at the City of Charlottetown, Queens County, Prince Edward Island, this 28 day of August, 2019.

Deputy Registrar

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Ayangma v. FLSB and ELSB

Court File No. S1-CA-1408

PRINCE EDWARD ISLAND
COURT OF APPEAL

Proceedings commenced at
Charlottetown, PE

ORDER

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PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

HUMAN RIGHTS ACT

PLEASE NOTE

This document, prepared by the ***Legislative Counsel Office***, is an office consolidation of this Act, current to August 20, 2016. It is intended for information and reference purposes only.

This document is ***not*** the official version of the Act. The Act and the amendments as printed under the authority of the Queen's Printer for the province should be consulted to determine the authoritative statement of the law.

For more information concerning the history of this Act, please see the ***Table of Public Acts*** on the Prince Edward Island Government web site (www.princeedwardisland.ca).

If you find any errors or omissions in this consolidation, please contact:

Legislative Counsel Office
Tel: (902) 368-4292
Email: legislation@gov.pe.ca

HUMAN RIGHTS ACT

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HUMAN RIGHTS ACT
CHAPTER H-12

PREAMBLE

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is recognized in Prince Edward Island as a fundamental principle that all persons are equal in dignity and human rights without regard to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income;

AND WHEREAS in 1968 *An Act Respecting Human Rights* was passed by the legislature of this province in response to the Universal Declaration of Human Rights passed by the General Assembly of the United Nations;

AND WHEREAS the principles contained in *An Act Respecting Human Rights* require amplification;

AND WHEREAS it is deemed desirable to provide for the people of the province a Human Rights Commission to which complaints relating to discrimination may be made: *2013,c.15,s.1.*

1. Definitions

(1) In this Act

(a) "**business, professional or trade association**" includes an organization of persons which by an enactment, agreement or custom has power to admit, suspend, expel or direct persons in relation to any business or trade or in the practice of any occupation or calling;

(a.1) "**Chairperson**" means the Chairperson of the Human Rights Commission except where the context otherwise requires;

(a.2) "**child**" includes an adopted child;

(b) "**commercial unit**" means any building or other structure or part thereof that is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property, or any space that is used or occupied or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building or other structure or a part thereof;

(c) "**Commission**" means the Prince Edward Island Human Rights Commission;

(c.1) "**disability**" means a previous or existing disability, infirmity, malformation or disfigurement, whether of a physical, mental or intellectual nature, that is caused by injury, birth defect or illness, and includes but is not limited to epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on an assist animal, wheelchair or other remedial device;

(d) "**discrimination**" means discrimination in relation to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals;

(e) "**employees' organization**" includes an organization of employees formed for purposes that include the regulation of relations between employees and employers;

(f) "**employer**" includes a person who contracts with a person for services to be performed by that person or wholly or partly by another person;

(g) "**employers' organization**" includes an organization of employers formed for purposes that include the regulation of relations between employers and employees;

(h) "**employment agency**" includes a person who undertakes with or without payment to procure employees for employers and a person who undertakes with or without payment to procure employment for persons;

(h.1) "**Executive Director**" means the person selected to the position of Executive Director of the Commission and includes that person's delegate;

(h.11) "**family status**" means the status of being in a parent and child relationship;

(h.2) "**marital status**" means the status of being married, single, widowed, divorced, separated, or living with a person in a conjugal relationship outside marriage;

(i) "**Minister**" means the member of the Executive Council charged with the administration of this Act by the Lieutenant Governor in Council;

(i.1) "**parent**" includes an adoptive parent;

(j) "**payment**" means remuneration in any form;

(k) "**person**" includes employer, employers' organization, employees' organization, business, professional or trade association, whether acting directly or indirectly, alone or with another, or by the interposition of another;

(l) repealed by *2012,c.19,s.1;*

(m) "**political belief**" means belief in the tenets of a political party that is at the relevant time registered under section 24 of the *Election Act* R.S.P.E.I. 1988, Cap. E-1 as evidenced by

(i) membership of or contribution to that party, or

(ii) open and active participation in the affairs of that party.

Construction of Act

(2) This Act shall be deemed to prevail over all other laws of this province and such laws shall be read as being subject to this Act.

Onus

(3) For the purposes of this Act the onus of establishing an allegation of discrimination or action on a discriminatory basis in relation to political belief is upon the person making the allegation. *1975,c.72,s.1; 1980,c.26,s.1; 1985,c.23,s.1; 1989(2nd),c.3,s.1; 1997(2nd),c.65,s.1; 1998,c.92,s.1; 2008.c.18,s.2; 2008,c.8,s.13; 2012,c.19,s.1,2; 2013,c.15,s.1.*

PART I — DISCRIMINATION PROHIBITED

2. Discrimination in accommodation prohibited

(1) No person shall discriminate

(a) against any individual or class of individuals with respect to enjoyment of accommodation, services and facilities to which members of the public have access; or

(b) with respect to the manner in which accommodations, services and facilities, to which members of the public have access, are provided to any individual or class of individuals.

Application

(2) Subsection (1) does not prevent the denial or refusal of accommodation, services or facilities to a person on the basis of age if the accommodation, services or facilities are not available to that person by virtue of any enactment in force in the province. *1975,c.72,s.2; 1984,c.23,s.1.*

3. Denial of occupancy rights prohibited

(1) No person shall

(a) deny to any individual or class of individuals, on a discriminatory basis, occupancy of any commercial unit or self-contained dwelling unit or accommodation in a housing unit that is used to provide rental accommodation; or

(b) discriminate against any individual or class of individuals with respect to any term or condition of occupancy of any commercial unit or self-contained dwelling unit, or accommodation in a housing unit that is used to provide rental accommodation.

Application of section

(2) This section does not apply to the barring of any person because of the sex of such person

(a) from accommodation in a housing unit where the housing unit is in a structure having two or more housing units;

(b) from a self-contained dwelling unit, where the dwelling unit is in a structure having two or more self-contained dwelling units,

where occupancy of all the housing units or dwelling units, except that of the owner or the agent of the owner, is restricted to individuals of the same sex. *1975,c.72,s.3.*

4. Discrimination in property sales prohibited

No person who offers to sell property or any interest in property shall

(a) refuse an offer to purchase the property or interest made by an individual or class of individuals on a discriminatory basis; or

(b) discriminate against any individual or class of individuals with respect to any term or condition of sale of any property or interest. *1975,c.72,s.4.*

5. Restrictive covenants void

Where in an instrument transferring an interest in real property a covenant or condition restricts the sale, ownership, occupation, or use of the property on a discriminatory basis, the covenant or condition is void. *1975,c.72,s.5.*

6. Discrimination in employment prohibited

(1) No person shall refuse to employ or to continue to employ any individual

(a) on a discriminatory basis, including discrimination in any term or condition of employment; or

(b) because the individual has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of the individual.

Employment agencies

(2) No employment agency shall accept an inquiry in connection with employment from any employer or prospective employee that directly or indirectly expresses any limitation, specification or preference or invites information that is discriminatory and no employment agency shall discriminate against any individual.

Application for employment forms

(3) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any inquiry in connection with employment that directly or indirectly expresses any limitation, specification or preference or invites information that is discriminatory.

Application of section

(4) This section does not apply to

(a) a refusal, limitation, specification or preference based on a genuine occupational qualification;

(b) employment where disability is a reasonable disqualification;

(c) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin as the case may be, if age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income is a reasonable occupational qualification. *1975,c.72,s.6; 1985,c.23,s.2; 1987,c.6,s.8; 1998,c.92,s.2; 2008,c.18,s.3; 2012,c.19,s.2; 2013,c.15,s.1.*

7. Discrimination in pay prohibited

(1) No employer or person acting on behalf of an employer shall discriminate between his employees by paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work, the performance of which requires equal education, skill, experience, effort, and responsibility and which is performed under similar working conditions, except where the payments are made pursuant to

(a) a seniority system;

(b) a merit system; or

(c) a system that measures earnings by quantity or quality of production or performance,

but where the systems referred to in clauses (a) to (c) are based on discrimination, the exemptions do not apply.

Reduction of pay prohibited, where

(2) No employer or person acting on his behalf shall reduce the rate of pay of an employee in order to comply with subsection (1).

Causing an employer to pay in contravention of ss.(1)

(3) No business, professional or trade association, employees' or employers' organization, or employees, as the case may be, or its agents, shall cause or attempt to cause an employer to pay to his employees rates of pay that are in contravention of subsection (1).

Remedies of employee

(4) Where an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled, subject to subsection (5),

(a) to recover from the employer by way of action in Supreme Court the difference between the amount paid and the amount to which the employee was entitled, together with costs;

(b) to enforcement of all other rights and remedies against the employer which the employee would have been entitled to had the employer not failed to comply with this section,

but

(c) proceedings under clause (a) or (b) shall be commenced within twelve months from the date upon which the cause of action arose and not afterwards;

(d) the proceedings under clauses (a) and (b) apply only to wages of an employee during the twelve month period immediately preceding the termination of the employee's services or the commencement of the proceedings, whichever occurs first;

(e) the proceedings under clause (a) or (b) may not be commenced or proceeded with where the employee had made a complaint on the prescribed form to the Commission in respect of the contravention of this section; and

(f) no complaint by an employee in respect to a contravention shall be acted upon by the Commission where proceedings have been commenced by the employee under this section.

Idem

(5) An employee is not entitled to the recovery and enforcement referred to in subsection (1) if an appeal or grievance procedure is provided for the employee under the *Civil Service Act* R.S.P.E.I. 1988, Cap. C-8 the *Education Act* R.S.P.E.I. 1988, Cap. E-.02 or the *Labour Act* R.S.P.E.I. 1988, Cap. L-1 or where the employee is a party to a proceeding before an arbitration board constituted under the *Arbitration Act* R.S.P.E.I. 1988, Cap. A-16 and the arbitration board has jurisdiction to adjudicate on the question of rates of pay. *1975,c.72,s.7; 2016,c.6,s.122.*

8. Employees' organizations

No employees' organization shall exclude any individual from full membership or expel or suspend any of its members on a discriminatory basis or discriminate against any individual in regard to his employment by an employer. *1975,c.72,s.8.*

9. Professional business or trade association membership

No business, professional or trade association shall exclude any individual from full membership or expel or suspend any of its members on a discriminatory basis. *1975,c.72,s.9.*

10. Person or agency carrying out public functions

(1) No person or agency carrying out a public function, including fire protection or hospital services, through the use in whole or in part of volunteers, shall exclude, expel or limit any volunteer applicant on a discriminatory basis.

Religious and non-profit organizations excepted

(2) This section does not apply to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be. *1975,c.72,s.10.*

11. Application to insurance and retirement plans

The provisions of this Act relating to discrimination in relation to age or disability do not affect the operation of any genuine retirement or pension plan or any genuine group or employee insurance plan. *1975,c.72,s.11; 1980,c.26,s.2; 1985,c.23,s.3; 2008,c.18,s.4; 2012,c.19,s.2.*

12. Discrimination in advertising prohibited

(1) No person shall publish, display or broadcast, or permit to be published, displayed or broadcasted on lands or premises, or in a newspaper or through a radio or television broadcasting station or by means of any other medium, any notice, sign, symbol, implement or other representation indicating discrimination or an intention to discriminate against any person or class of persons.

Free expression of opinion

(2) Nothing in this section shall be deemed to interfere with the free expression of opinion upon any subject in speech or in writing. *1975,c.72,s.12.*

13. Discrimination because of association

No person shall discriminate against an individual or a class of individuals in any manner prescribed by this Act because of the age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any person with whom the individual or the class of individuals associates. *1975,c.72,s.13; 1980,c.26,s.3; 1985,c.23,s.3; 1989(2nd),c.3,s.2; 2008,c.18,s.5; 2012,c.19,s.2; 2013,c.15,s.1.*

14. Exceptions to Act

(1) Sections 2 to 13 do not apply

(a) to the display of a notice, sign, symbol, emblem, or other representation displayed to identify facilities customarily used by one sex;

(b) to display or publication by or on behalf of an organization that

(i) is composed exclusively or primarily of persons having the same political or religious beliefs, nationality, ancestry, or place of origin, and

(ii) is operated as a non-profit organization, of a notice, sign, symbol, emblem, or other representation indicating a purpose or membership qualification of the organization;

(c) to philanthropic, fraternal or service groups, associations or organizations, to the extent that they discriminate on the basis of sex in their qualifications for membership;

(d) to a refusal, limitation, specification, or preference based on a genuine qualification; or

(e) to trusts, deeds, contracts, agreements or other instruments entered into before this Act comes into force.

Complainant, onus of proof

(2) The onus of proving that a qualification is a genuine qualification is on the employer or other person asserting that the qualification is a genuine qualification. *1975,c.72,s.14.*

15. Protection of repudiation

No person shall evict, discharge, suspend, expel or otherwise discriminate against any person because he has made a complaint or given evidence or assisted in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act. *1975,c.72,s.15.*

15.1 Social assistance benefits

Nothing in this Act prevents the Government of Prince Edward Island or an agency of the Crown, from requiring that persons be in receipt of, or eligible for, social assistance benefits in order to qualify for access to accommodations, services, programs, or facilities directed at assisting persons in receipt of, or eligible for, social assistance benefits. *1998,c.92,s.3; 2002,c.29,s.22; 2005,c.39,s.12.*

PART II — HUMAN RIGHTS COMMISSION

16. Human Rights Commission, established

(1) The Prince Edward Island Human Rights Commission is hereby established; the Commission is a corporation.

Composition

(2) The Legislative Assembly, on the recommendation of the Standing Committee on Social Development, shall

(a) appoint not fewer than three and not more than nine members to the Commission; and

(b) designate one of the members as Chairperson of the Commission.

Chair appointed in absence of Chairperson

(2.1) Where the Chairperson is not a member of a Human Rights Panel appointed pursuant to this Act, the Chairperson shall designate one member of the Human Rights Panel to act as Chair for the purposes of carrying out the duties of the Human Rights Panel.

Inability of Chairperson to act

(2.2) Where the Chairperson of the Commission is unable to act for any reason, the Chairperson may designate another member of the Commission to act for the Chairperson in respect of any particular matter before the Commission.

Powers of appointee

(2.3) A member of the Commission designated under subsection (2.2) shall have all the powers and perform all the duties of the Chairperson of the Commission.

Term of office

(3) Each Commissioner

(a) shall hold office for a term not exceeding three years, as prescribed in the Commissioner's appointment; and

(b) is eligible for *re*-appointment.

Remuneration and reimbursement

(4) Each Commissioner who is not a member of the civil service shall be paid such remuneration as the Lieutenant Governor in Council determines.

Vacancies, filling

(5) Whenever a Commissioner ceases to hold office, the Lieutenant Governor in Council may appoint a person to fill the vacancy. *1975,c.72,s.16; 1997(2nd),c.65,s.2; 2003,c.9,s.1; 2008,c.18,s.6.*

17. Commission responsible to Minister

The Commission is responsible to the Minister for the administration of this Act. *1975,c.72,s.17.*

18. Powers and duties of Commission

The Commission shall

(a) administer and enforce this Act;

(b) develop a program of public information and education in the field of human rights to forward the principle that every person is free and equal in dignity and rights without regard to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income;

(c) advise the government on suggestions, recommendations and requests made by private organizations and individuals;

(d) report as required by the Minister on the business and activities of the Commission;

(e) consider, investigate or administer any matter or activity referred to the Commission by the Lieutenant Governor in Council or the Minister. *1975,c.72,s.18; 1980,c.26,s.4; 1985,c.23,s.3; 1989(2nd), c.3,s.2; 2008,c.18,s.7; 2012,c.19,s.2; 2013,c.15,s.1.*

19. Staff

(1) The Commission may appoint and employ such officers and employees as are required for the proper conduct of its business and may determine their functions, conditions of employment and remuneration.

Application of Civil Service Act

(2) The *Civil Service Act* does not apply to the appointment or employment of any person pursuant to subsection (1). *1985,c.23,s.4.*

20. Approved programs

The Commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act. *1975,c.72,s.19.*

21. Commission budget

(1) The Commission shall present a yearly budget to the Minister estimating the expenditure of the Commission on the various programs and activities.

Expenses, payment

(2) All costs, charges and expenses incurred by the Commission in administering this Act shall be paid out of money appropriated by the Legislature therefor. *1975,c.72,s.20.*

PART III — ADMINISTRATION

22. Who may make complaint

(1) Any person, except the Commission or an employee of the Commission, who has reasonable grounds for believing that a person has contravened this Act may make a complaint to the Commission.

Consent of alleged victim

(1.1) Where the person making the complaint pursuant to subsection (1) is not the person in respect of whom this Act is alleged to have been contravened, the Executive Director may refuse to accept the complaint unless the person in respect of whom the Act is alleged to have been contravened consents, in writing, to the filing of the complaint, and the complainant has filed a copy of that written consent with the Commission.

Complaint within one year

(2) A complaint made pursuant to subsection (1) shall

(a) be in writing in a form acceptable to the Commission; and

(b) be made within one year after the alleged contravention of the Act occurred.

Executive Director investigates

(3) The Executive Director shall investigate and attempt to effect settlement of the complaint.

If complaint without merit

(4) Notwithstanding subsection (3), the Executive Director may, at any time,

(a) dismiss a complaint if the Executive Director considers that the complaint is without merit;

(b) discontinue further action on the complaint if, in the opinion of the Executive Director, the complainant has refused to accept a proposed settlement that is fair and reasonable;

(c) discontinue further action on the complaint if it could be dealt with more appropriately by an alternate method of resolution under any other Act, or if grievance or other review procedures have not been exhausted; or

(d) report to the Chairperson of the Commission that the parties are unable to settle the complaint.

Decision respecting dismissal

(5) The Executive Director shall forthwith serve notice of a decision under subsection (4) upon the complainant and the person against whom the complaint was made. *1997(2nd),c.65,s.3; 2012,c.19,s.3.*

22.1 Annual Report

(1) The Commission shall make an annual report to the Minister in such form and at such time as the Minister may direct.

Submission of annual report to the Legislative Assembly

(2) The Minister shall lay a copy of the annual report before the Legislative Assembly within fifteen days after it is submitted to him or her or, if the Legislative Assembly is not then sitting, within fifteen days of the opening of the next session of the Legislative Assembly. *2008,c.18,s.8*

23. Powers of investigation

(1) For the purposes of an investigation under section 22, the Executive Director may do any or all of the following:

(a) subject to subsection (2), enter any place at any reasonable time to examine it;

(b) make inquiries orally or in writing of any person who has or may have information relevant to the subject-matter of the investigation;

(c) demand the production for examination of records and documents, including electronic records and documents, that are or may be relevant to the subject-matter of the investigation;

(d) on giving a receipt for them, remove any of the things referred to in clause (c) for the purpose of making copies of or extracts from them,

and all information obtained pursuant to this subsection shall be kept in confidence, except as required for the purposes of this Act.

Entry for investigation

(2) The Executive Director may enter and examine a room or place actually used as a dwelling only if

(a) the owner or person in possession of it consents to the entry and examination; or

(b) the entry and examination is authorized by a judge under section 24. *1997(2nd),c.65,s.3.*

24. Court order for entry

(1) Where a judge is satisfied on the Executive Director's evidence under oath that there are reasonable grounds for the Executive Director to exercise a power under section 23 and that

(a) in the case of a room or place actually used as a dwelling, the Executive Director cannot obtain the consent under clause 23(2)(a), or, having obtained the consent, the Executive Director has been obstructed or interfered with in conducting the investigation;

(b) the Executive Director has been refused entry to a place other than a dwelling;

(c) a person refuses or fails to answer inquiries under clause 23(1)(b); or

(d) a person upon whom a demand is made under clause 23(1)(c) refuses or fails to comply with the demand or to permit the removal of a thing under clause 23(1)(d);

the judge may make any order that the judge considers necessary to enable the Executive Director to exercise the powers set out in subsection 23(1).

Application may be ex parte

(2) An application under subsection (1) may be made with or without notice to the parties to the complaint.

Items to be returned in 48 hours

(3) If the Executive Director removes anything referred to in clause 23(1)(c), the Executive Director may make copies of or extracts from the thing that was removed and shall return it to the place from which it was removed within 48 hours after removing it. *1997(2nd),c.65,s.3.*

25. Review of dismissal of complaint

(1) A complainant may, not later than 30 days after receiving notice of the dismissal of a complaint or of a discontinuance pursuant to subsection 22(4), by notice in writing to the Commission request a review of the Executive Director's decision by the Chairperson of the Commission.

Notice to person complained against

(2) The Commission shall serve a copy of the request for review upon the person against whom the complaint was made.

Chairperson's power of review

(3) The Chairperson of the Commission shall

(a) review the Executive Director's decision and decide whether

(i) the complaint should have been dismissed; or

(ii) the proposed settlement was fair and reasonable

as the case may be; and

(b) forthwith serve notice of the Chairperson's decision upon the complainant and on the person against whom the complaint was made.

Decision final and binding

(4) A decision of the Chairperson under subsection 25(3) is final and binding upon the parties. *1997(2nd),c.65,s.3.*

26. Complaints to be dealt with by Panel

(1) The Chairperson shall appoint a Human Rights Panel to deal with a complaint in the following circumstances:

(a) where the Chairperson receives a report from the Executive Director that the parties are unable to settle the complaint; or

(b) where the Chairperson decides under subsection 25(3) that the complaint should not have been dismissed or that the proposed settlement was not fair and reasonable.

Composition of Panel

(2) A Human Rights Panel shall, unless special circumstances warrant the appointment of additional members, consist of one member of the Commission.

Chairperson may sit on Human Rights Panel

(3) Subject to subsection (4), the Chairperson may sit on a Human Rights Panel either as a single member or with other members.

Chairperson ineligible, when

(4) Where the Chairperson has conducted a review under section 25 in respect of a complaint, the Chairperson is not eligible to sit on the Human Rights Panel dealing with that complaint.

Powers under Public Inquiries Act

(5) A Human Rights Panel and each member has all the powers of a commissioner under the *Public Inquiries Act* R.S.P.E.I. 1988, Cap. P-31.

Decision of majority

(6) If a Human Rights Panel consists of more than one person, the decision of the majority is the decision of the Panel. *1997(2nd),c.65,s.3.*

27. Parties

The following persons are parties to a proceeding before a Human Rights Panel:

(a) the Executive Director;

(b) the complainant;

(c) any person named in the complaint who is alleged to have been dealt with in a manner contrary to this Act;

(d) any person named in the complaint who is alleged to have contravened this Act;

(e) any other person specified by the Human Rights Panel, on a notice given by the Panel, and after the prospective party has been given the opportunity to be heard by the Panel if the person objects to being made a party. *1997(2nd),c.65,s.3.*

28. Minister's order

Repealed by 1997(2nd),c.65,s.3.

28.1 Carriage of the proceeding

The Executive Director has carriage of the proceeding before a Human Rights Panel, except where the Chairperson of the Commission has made a decision under subsection 25(3), and in such a case the complainant has carriage of the proceeding. *1997(2nd),c.65,s.4.*

28.2 Right to counsel

(1) The parties to a proceeding before a Human Rights Panel are entitled to appear and be represented by counsel at a hearing held by the Panel.

Evidence

(2) Evidence may be given before a Human Rights Panel in any manner that the Panel considers appropriate, and the Panel is not bound by the rules of law respecting evidence in civil proceedings.

Proceeding where person absent

(3) A Human Rights Panel, on proof of service of notice of a hearing on the person against whom the complaint was made, may proceed with the hearing in the absence of that person and decide on the matter being heard in the same manner as though the person was in attendance.

Hearing public, except

(4) A hearing before a Human Rights Panel shall be open to the public unless, on the application of any party, the Human Rights Panel decides that it would be advisable to hold the hearing in private

(a) because of the confidential nature of the matter to be heard; or

(b) because of the potential adverse effect on any of the parties, other than the person against whom the complaint was made. *1997(2nd),c.65,s.4.*

28.3 Stated case

A Human Rights Panel may, at any stage of the proceedings, refer a stated case under the rules of court to the Supreme Court, on any question of law arising in the course of the proceedings, and may adjourn the proceedings until the decision is rendered on the stated case. *1997(2nd),c.65,s.4; 2008,c.20,s.72(42).*

28.4 Powers of Panel

(1) A Human Rights Panel

(a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed;

(a.1) may allow the complainant to withdraw a complaint after some evidence has been presented at a Panel hearing; and

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in future from committing the same or any similar contravention;

(iii) to make available to the complainant or other person dealt with contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;

(iv) to compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention.

Compensation formula

(2) Repealed by *2008,c.18,s9.*

Application of subsection (2)

(3) Repealed by *2008,c.18,s9.*

Contract for service

(4) Repealed by *2008,c.18,s9.*

Compensation comprehensive and exhaustive

(5) Repealed by *2008,c.18,s9.*

Costs

(6) A Human Rights Panel may make any order as to costs that it considers appropriate.

Decision served on parties

(7) A Human Rights Panel shall serve a copy of its decision, including the findings of fact upon which the decision was based and the reasons for the decision, on the parties. *1997(2nd),c.65,s.4; 2008,c.18,s.9.*

28.5 New evidence

(1) If there is new evidence available that was not available or that for good reason was not presented before the Human Rights Panel in the first instance, the Panel may, on the application of any party or on its own motion, reconsider any matter considered by it.

Same powers on reconsideration

(2) For the purposes of a reconsideration pursuant to subsection (1), the Human Rights Panel has all of the same powers and duties as it had on the initial hearing.

Not later than 30 days

(3) Reconsideration of a matter pursuant to subsection (1) shall be commenced not later than 30 days after the Panel's decision in the first instance. *1997(2nd),c.65,s.4.*

28.6 Settlement not more than one year prior to discriminatory act

Subject to subsection 28.4(2), no settlement effected pursuant to this Act and no order made by a Human Rights Panel may compensate a person for wages or income lost or expenses incurred prior to one year before the date of the discriminatory act on which the person's complaint is based. *1997(2nd),c.65,s.4.*

28.7 Order filed in court

An order made by a Human Rights Panel may be filed with the Registrar of the Court of Appeal and the Supreme Court in the appropriate division, and upon being so entered it is enforceable in the same manner as an order of the Supreme Court. *1997(2nd),c.65,s.4; 2008,c.20,s.72(42).*

28.8 Decision final and binding

A decision of a Human Rights Panel is final and binding upon the parties. *1997(2nd),c.65,s.4.*

29. Offences and penalties

Every person who does anything prohibited by this Act or who refuses or neglects to comply with any order made under this Act is guilty of an offence and is liable on summary conviction

(a) if an individual, to a fine of not less than $100 and not exceeding $500; and

(b) if a person other than an individual, to a fine of not less than $200 and not exceeding $2,000. *1975,c.72,s.28; 1994,c.58,s.6.*

30. Defect in form or procedure

(1) No proceeding under this Act shall be deemed invalid by reason of any defect in form or any technical irregularity.

Evidence required for conviction

(2) In any prosecution under this Act it shall be sufficient for conviction if a reasonable preponderance of evidence supports a charge that the accused has done anything prohibited by this Act or has refused or neglected to comply with an order made under this Act. *1975,c.72,s.29.*

31. Organizations deemed corporations

A prosecution for an offence under this Act may be brought against an employers' organization, employees' organization, business, professional or trade association in the name of the organization or association, and for the purpose of any prosecution these shall be deemed to be corporations and any act or thing done or omitted by an officer or agent within the scope of his authority to act on behalf of the organization or association shall be deemed to be an act or thing done or omitted by the organization or association. *1975,c.72,s.30.*

32. Order enjoining person from continuing offence

(1) Where a person has been convicted of an offence under this Act, the Minister may apply to a judge of the Supreme Court for an order enjoining the person from continuing the offence.

Jurisdiction of court

(2) The judge in his discretion may make such order and the order may be enforced in the same manner as any other order or judgment of the Supreme Court. *1975,c.72,s.31.*

33. Promotion of Act

(1) The Lieutenant Governor in Council may undertake or cause to be undertaken such inquiries and other measures as appear advisable or desirable to promote the purposes of this Act.

Regulations

(2) The Commission may, with the approval of the Lieutenant Governor in Council, make regulations respecting any matter necessary or desirable for the attainment of the objects and purposes of this Act, and without limiting the generality thereof, may

(a) prescribe forms;

(b) prescribe and enumerate qualifications that for the purposes of this Act are genuine qualifications having the effect under section 14 of exempting certain practices or activities from the prohibitions against discrimination;

(c) identify and approve specific or general job descriptions or classifications for which a genuine qualification exists;

(d) make regulations respecting practice and procedure before a Human Rights Panel. *1975,c.72,s.32 1997(2nd),c.65,s.5.*

34. Crown bound

This Act binds the Crown in right of Prince Edward Island and every servant and agent of the Crown. *1975,c.72,s.33.*

No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF PRINCE EDWARD ISLAND)

BETWEEN:

NOEL AYANGMA

APPLICANT

and

THE FRENCH LANGUAGE SCHOOL BOARD

RESPONDENT

THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENT

MEMORANDUM OF FACT AND LAW

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TO: **THE REGISTRAR OF THE SUPREME COURT OF CANADA**

AND TO: KAREN A. CAMPBELL, QC
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PART-I
OVERVIEW AND STATEMENT OF FACTS

(i) Overview

[1] The Applicant is black in colour, and immigrated from Cameroon, Africa to Canada and Prince Edward Island in 1987. He is qualified as a teacher in P.E.I. and has qualifications in business administration and experience in school administration.

[2] In his statement of Claim the Applicant claimed that both Respondent School Boards discriminated against him based on colour, systemically over many years from 1998 onward, and specifically in May-August 2012 regarding hiring competitions – for the position of FLSB Director General in August 2012, and for the position of ELSB Director of Human Resources in September 2013.

[3] The Applicant's primary claim is for discrimination against him in violation of his s.15(1) *Charter* rights, regarding which he claims both systemic discrimination and discrimination in the specific employment competitions. He sought remedy pursuant to s.24(1) of the *Charter.*

[4] Prior to commencing his action against the Respondent School Boards, the Applicant also filed a complaint with the Human Rights Commission ("HRC") alleging discrimination in relation to his attempts to obtain employment relief pursuant to s.28.3 of the ***Human Rights Act*** based on the same set of fact facts. The Respondent School Boards argued that the matter before the HRC foreclosed any action in the Supreme Court based on the *Charter.*

[5] In previous proceedings involving the same parties and the same issue, the Court of Appeal unanimously held that the HRC and Human Rights Panels ("HRP") were not courts of competent jurisdiction and could not provide *Charter* relief sought by the Applicant. ***See Ayangma 200 supra.*** This decision, which was based on the Federal Court's decision, which was in turn upheld by the Federal Court of Appeal. (See ***Perera supra),*** was that a litigant in this province and as well as those pursuing their claims under the federal jurisdiction may simultaneously carry a human rights complaint and an action in Court for *Charter* relief on the same set of facts and that it was not an abuse of process to do so because there was a human rights process and a Charter process and that both processes were available to the claimants who had the right the pursue them at the same time he so choose. .

[6] While in that case, the PEI Court of Appeal ruled only that the action in the Supreme Court should not proceed to trial until the human rights complaint had been dealt with pursuant to the ***HRA***, the Federal Court ruled pursuant to the ***CHRA*** that there was a human right process and a Charter process that both proceeding can be carried out at the same time and that there was no abuse of process.

[7] While conceding in both ***Ayangma*** and ***Perera*** supra, that generally, the principles which are applied in cases of discrimination based complaints under the HRA are applicable in dealing with the question of discrimination under the Charter, the Court nonetheless found that the HRC/HRPs are not courts of competent jurisdiction. The Court's analysis focused on whether or not the Legislature intended the HRC/HRP to have authority and expertise to deal with Charter issues, but also to the power grant Charter remedies. That Court then went on and acknowledged the test set out in ***R. v. Mills1,*** 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, which teaches that to be a court of competent jurisdiction a tribunal must have jurisdiction over the parties, the dispute and the remedy. The Court of Appeal therefore went on and ruled at paragraphs 8 and 9:

> Para.8 ... it is clear from the HRA that in this case neither the HRC nor an HRP have a mandate that extends to Charter claims.
>
> Para.9 .... There is nothing anywhere in the HRA which explicitly or implicitly gives an HRP any authority to deal with a Charter violation claim. ... there is no basis to support a conclusion that an HRP has the expertise or authority to determine a question of law involving the Charter. ...
>
> It is apparent from the HRA that the Legislature did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere (complaints regarding contravention of the HRA) because s.28.3 allows for the referral to the court.

[8] Therefore in coming to this conclusion that the HRP was not a court of competent jurisdiction, the Court ruled that though the powers of the HRC/HRP were considerable, but they were not as broad as those permitted pursuant to s.24(1) of the Charter. For example, the Court held at para.10 that it is "at least doubtful" that the remedial scheme available under the HRA would be adequate to provide a s.24(1) Charter remedy as, for example, the HRA does not "provide for damages for violation of Charter rights per se, punitive or exemplary damages, or for damages for mental anguish, humiliation, affront to dignity, or emotional injury which so often attend unlawful discrimination."

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1 ***R. v. Mills,*** 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863

[9] The Court also clearly concluded that HRA limits compensatory awards to one year. It also ruled based on the law as it was in 2000, which law and not changed in 19 years, that claims for *Charter* remedies were not subject to provincial limitation legislation.

(ii) Specific Statement of Facts:

[10] On February 28, 2019, in preparing for the appeal under consideration, the Court of Appeal wrote to the *parties* ***(See Documet#1 Court of Appeal's letter dated February 28 referred to in the within Application for leave to Appeal)*** and asked them to be prepared to answer two (2) jurisdictional questions. In addition, the Court also took the liberty to extend the same request to the Human Rights Commission as it believed that the answers to the two jurisdictional questions below may have impacted the Commission's jurisdiction:

1. Is ***Ayangma v. Eastern School Board2***, 2000 PESCAD 12, still good law I light of sequent Supreme Court of Canada Cases such as ***Nova Scotia (Workers' Compensation Board) v. Martin and Lasseur3***, 200 SCC 54; **R. v. Conway4**, 2010 SCC 22; and ***Doré v. Bureau du Québec5***, 2012 SCC 12?

2. Do these cases bring the doctrine of abuse of process into play?

Positions taken by the parties and Commission (Intervener)

(a) Position taken by the Applicant:

[11] At the hearing of the appeal, the Applicant argued that the ***Mills*** test was still the applicable test Which test stood for the proposition that to be a court of competent jurisdiction, a tribunal must have not only the jurisdiction over the parties and the dispute, but also and more importantly also remedy sought. ***(See Document #2 Applicant's Factum referred to in the within Application for leave to Appeal).*** Also relying on ***Ayangma 2000 supra, Perera 1997*** and ***Perera v. Canada (1998) supra***, as did the PEI Court of Appeal in 2000, the Applicant also argued that both the Commission and the HRPs cannot grant *Charter* remedies and is therefore are not courts of competent jurisdiction under s.24(1).

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2 ***Ayangma v. Eastern School Board***, 2000 PESCAD 12
3 ***Nova Scotia (Workers' Compensation Board) v. Martin and Lasseur***, 200 SCC 54
4 ***R. v. Conway, 2010 SCC 22***

(b) Position of the Respondent School Boards: 116

[12] At the hearing of the appeal under consideration, the Respondent School Boards took the position that *Ayangma 2000* was still good law. They argue that although the law may have evolved over the past 19 years, the litmus test was the same and concluded that if the Legislature had neither implicitly nor explicitly grant the HRP, the power to deal with questions of law, it follows that it did not do so for the award of Charter remedies and this, even if it had the power to deal with *Charter* issues.

[13] The Commission therefore concluded that because s.28.3 expressly removes any jurisdiction to answer questions of law from a human rights panel" (para.20, Respondents' Supplementary Factum). *(See Documet#3 referred to in the within Application for leave to Appeal),* the HRC/HRP was still not a court of competent jurisdiction and as such ***Ayangma 2000*** was still good law forthe purpose of s.24(1) of the *Charter*.

(c) Position of the Commission (Intervener)

[14] Though recognizing ***Ayangma*** 2000, which decision unanimously held para.10 the HRP was not a court of competent jurisdiction because the HRA doesn't provide for damages for mental anguish, humiliation and affront to human dignity, punitive and exemplary damages...,it also concluded that the HRP was not a court of competent jurisdiction under s.24(1) of the *Charter.*

[15] While the PEI Human Rights Commission took the position that ***Ayangma 2000*** must be reconsidered in light of the Supreme Court of Canada decisions in ***Martin*** and ***Conway*** and had suggested that if does have the ability to decide questions of law and that *stripping them of the ability to decide any question of law arising in the course of proceedings would defeat the very purpose of having a specialized tribunal to deal with cases involving discrimination under the HRA,* it nonetheless concluded that the remedial scheme under the HRA was insufficient to fully vindicate a claimant alleging discrimination pursuant to s.15(1) and seeking remedy pursuant to s.24(1) of the *Charter. (See Document #4 - Commission's Factum referred to in the within Application).*

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5 ***Doré v. Bureau du Québec,*** 2017, 2012 SCC 12

[16] Notwithstanding, taken by the PEI Human Rights Commission, the latter nonetheless concluded that because it could not grant the type of remedies sought by the Applicant pursuant to s.24(1) of the *Charter*, as those afforded under the HRA may be inadequate relief in given circumstances. Consequently, the Commission consequently that filing multiple proceedings in separate venues on similar facts may be permissible and in the best interests of justice and consequently, *Ayangma 2000* is still a good law.

[17] Interestingly, notwithstanding the position taken by the parties and as well as the intervener Commission, recognizing that *Ayangma 2000*, and its conclusion that ***Ayangma 2000*** is still good law, the Court nonetheless went ahead, reversed the decision that it made 19 years ago, even though none of the facts present in 2000 from which the previous decision was based on had changed. The mere fact that the specific remedial compensatory scheme available under the HRA had not changed since 2000, is clear indication that the HRP may still not compensate a claimant for wages or income loss or expenses incurred prior and beyond the one-year limitation (future loss of income) as the Charter would.

[18] Though, the decision of the PEI Court of Appeal which is the subject matter of the within Application for Leave to appeal does not really impact the Applicant's ability to pursue his *Charter* claim before the Court, but it clearly does raise an important issue of national importance requiring the intervention of this Honourable Court.

[19] The Applicant submits that the decision under consideration, if permitted to stand would not only impact on the jurisdiction of the Prince Edward Human Rights Commission and its Human Rights Panel and grant them jurisdiction to deal with *Charter* issues but also to grant remedies pursuant to s.24(1) of the *Charter*. The decision under consideration may impact the jurisdiction of PEI Human Rights Commission, but also those of other provincial and federal Human Rights Commissions and Tribunals. including the Canadian Human Rights Commission. pursuant to their respective provincial and federal ***Human Rights Act*** and thereby undermine the supremacy of the *Charter* and subject it to provincial legislation, including their limitation periods period of one year and as well as to their limited compensatory scheme. This issue so raised has been drafted in the following two questions of law

Question-1: Whether *Ayangma v. Eastern School Board*, 2000 PESCAD 12, still law good law in light of sequent Supreme Court of Canada Cases: *Nova Scotia (Workers' Compensation Board) v. Martin and Lasseur*, 2003 SCC 54; *R. v. Conway*, 2010 SCC 22; and *Doré v. Bureau du Québec*, 2012 SCC 12 and whether running current proceedings alleging discrimination in two different fora does bring the doctrine of abuse of process into play?

Question-2: Did the Court of Appeal err in law and committed a jurisdictional error when it concluded that it would be an abuse of process to run current proceedings in two different fora (at paras.130-132 of the reasons for judgment?

[20] The Applicant submits the mere fact that the decision of the Supreme Court of Canada in ***Ravndahl v. Saskatchewan6,*** 2009 SCC 7 (CanLII), [2009] 1 S.C.R. 181) holds that the limitation period for some Charter claims are subject to the limitation period does not mean that the remedial scheme available pursuant s.24(1) of *Charter* is also subject to the compensation scheme available under the HRA and in particular s.283 of the HRA.

[21] The Applicant further submits that to interpret ***Ravndahl supra*** as granting Human Rights Commissions and Tribunals jurisdiction to deal and/or grant specific s.24(1) remedies which are clearly not in the arsenal of the compensatory scheme available pursuant to the provincial and Canadian Human Rights Legislations, would not only tantamount to undermining the law and thus the supremacy of the *Charter* and but also, to ignore the limitations contained in various provincial and federal Human Rights legislations

> Question-1: Whether *Ayangma v. Eastern School Board*, 2000 PESCAD 12, still law good law in light of sequent Supreme Court of Canada Cases: *Nova Scotia (Workers' Compensation Board) v. Martin and Lasseur*, 2003 SCC 54; *R. v. Conway*, 2010 SCC 22; and *Doré v. Bureau du Québec*, 2012 SCC 12 and whether running current proceedings alleging discrimination in two different fora does bring the doctrine of abuse of process into play?

[22] The Applicant relying on ***Ayangma 2000***, reiterates the same position he previously took before the Court of Appeal and resubmits that because the HRC/HRP cannot grant him, or for that matter, any claimant claiming remedies pursuant to s.24(1) of the *Charter*, they are not courts of competent jurisdiction for the purpose of s.24(1) of the *Charter* as such, **running concurrent proceedings alleging discrimination in two different fora would not bring the doctrine of abuse of process into play.**

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6 ***Ravndahl v. Saskatchewan,*** 2009 SCC 7 (CanLII), [2009] 1 S.C.R. 181)

[23] The Applicant submits this was clearly echoed by both the Respondent School Boards and the Human Rights itself who appeared before the Court as an intervener. ***(See Document#2-Applicant Supplemental Submissions)***. It is clear from submissions of all parties involved in the proceeding under consideration by this Honourable Court, including the Commission itself, that the subsequent decisions of the Supreme Court of Canada, referred to above did not alter the principles set in ***Ayangma v. Eastern School Board***, 2000 PESCAD 12 (CanLII) and ***Perera v. Canada*** [1997] F.C.J. N] to trigger the necessity of revisiting ***Ayangma*** 2000 which decision was based on ***Perera***, 1997.

[24] While it is true that some specialized administrative tribunals may have the power or the jurisdiction pursuant to their enabling statute to decide questions of law arising from constitutional dispute between parties and may grant some reliefs available pursuant to s.24(1) of the *Charter*, the enabling statutes of the provincial and/ or federal Human Rights Commissions do not have grant them jurisdiction to either deal and/or grant all remedies available pursuant to s.24(1) of the *Charter*. This is a clear indication that the power to do so were clearly withdrawn from their respective statutes.

[25] The Applicant submits that because the statutory provisions set out in various provincial and federal ***Human Rights Acts*** and in particular, s.28.3 of the ***PEIHRA***, are not sufficient to permit the granting of remedies pursuant to s.24(1) of the *Charter* would lead to the conclusion that the Legislature had clearly not intended to exclude the compensatory scheme available pursuant to s.24(1) of *Charter* from the scope to be addressed by any human rights panels or tribunals in Canada. It follows that though the HRP does have a robust arsenal of remedies within the ***Human Rights Act***, to compensate those claiming discrimination pursuant to the ***HRA***, it is clear as previously held by the PEI Court of Appeal, in ***Ayangma 2000***, this arsenal of remedies would be clearly insufficient to provide an effective and vindicatory remedy to redress any s.15(1) *Charter* breach. It therefore follows that as far as this specific section of the ***PEIHRA*** remains unchanged, ***Ayangma 2000*** is still good law.

[26] The Applicant submits that contrary to the Court of Appeal's recent suggestion at para.68 of its reasons, for judgement, the test and the factors to be considered are still the same as they were in 1998 and 2000, despite the teachings of the subsequent cases of this Court in ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC 54 (CanLII) (Martin), ***R. v. Conway***, 2010 SCC 22 (CanLII), [2010] 1 S.C.R. 765.

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[27] As Courts have previously stated with approval, the ***Charter*** is the supreme law of the country. Section 24(1) of the *Charter* allows for a broader remedy than any provincial ***HRA***s in Canada, including the ***Canadian Human Rights Act***, R.S.C. 1985, c. H-6. As such, the problem with the recent decision of the Court of Appeal, reversing its previous decision, is that it does create the same kind of problem it purported to have corrected in *Ayangma 2000* when it found that it *"downgrades the rank of the Charter to supplemental secondary human rights legislation to be called upon only as a last resort"*..

[28] Contrary to the Court of Appeal's suggestion, which echoed counsel for the Human Rights Commission's submission on this specific aspect, does not deal with the main issue here as the issue is not about ***"stripping HRPs of the ability to decide any question of law arising in the course of proceedings would defeat the very purpose of having a specialized tribunal to deal with cases involving discrimination" or about "the power to decide questions of law arising under the HRA is necessary in order for the HRC/HRP to effectively fulfill its mandate (Martin, para.52)"***, but rather whether the remedies available under the *Charter* are equally available pursuant the *HRA*? . Unfortunately, this important question had already been previously answered by the PEI Court in *Ayangma 2000* at paras7-8 of the reasons for judgment where the Court unanimously stated the following:

> [7] Where I do agree with the appellant is in respect of his contention the motion judge erred in dismissing the appellant's actions in so far as they were based on s-s.15(1) and s-s.24(1) of the *Charter*. In so doing, the motion judge purported to follow the decision of the British Columbia Court of Appeal in ***Moore v. British Columbia***7, (1988) 1988 CanLII 184 (BC CA), 50 D.L.R. (4th) 29 (B.C.C.A.) at pp. 41-42. In that case Macfarlane J.A. held a finding that s-s.8(1) of the ***Human Rights Act***, S.B.C. 1984, c. 22 [which is equivalent to s-s.6(1) of the HRA of this province] had been breached would in essence be the same as a declaration that rights under s-s.15(1) of the ***Charter*** had been violated. He also found the appellant could obtain through the British Columbia ***Human Rights Act*** all the appropriate relief which would be granted under s-s.24(1) of the ***Charter***. He therefore upheld the lower court's decision striking the appellant's ***Charter*** action as unnecessary on the ground the ***British Columbia Human Rights Act, supra,***

7 ***Moore v. British Columbia***, (1988) 1988 CanLII 184 (BC CA), 50 D.L.R. (4th) 29 (B.C.C.A.) at pp. 41-42.

provided the appellant with an effective remedial source for dealing with her complaint and held, on the basis of views expressed by the Ontario Court of Appeal in ***McKinney v. Board of Governors of University of Guelph***, 1987 CanLII 179 (ON CA), 46 D.L.R. (4th) 193 (O.C.A.) at pp. 208-9, she should first pursue relief through that avenue. The problem with ***Moore, supra***, is that it downgrades the rank of the ***Charter*** to supplemental secondary human rights legislation to be called upon only as a last resort. The ***Moore, supra***, approach was rejected by Cullen J. of the trial division of the Federal Court of Canada in ***Perera v. Canada8***, [1997] F.C.J. No. 199. Cullen J. noted that the ***Charter*** was the supreme law of the country, that s.24 allows for a broader remedy than the ***Canadian Human Rights Act***, R.S.C. 1985, c. H-6, and took the position that the defendant in that case could not use human rights legislation as a shield against a ***Charter*** action. The Federal Court of Appeal in ***Perera v. Canada9 (C.A.)***, [1998] 3 F.C.J. 381 dismissed an appeal from the ruling of Cullen J. on this issue...In my view, the motion judge was wrong to apply the ***Moore*** approach to this case for three reasons: (1) it diminishes the status of the ***Charter***; (2) it deprives the appellant of the right conferred on him by s-s.24(1) of the ***Charter*** to seek a remedy from a "court of competent jurisdiction" for the violation of his s.15 rights; (3) it limits the appellant to the remedies that a Human Rights Panel can award under the ***HRA*** and assumes they are an adequate means to protect and enforce his constitutional rights and to redress the harm done to him by their violation.

[8] .... A statutory tribunal may be a court of competent jurisdiction within the meaning of s-s.24(1) if its constituent statute gives it power over the subject matter, the parties, and the remedy... As well she found the standard for a "court of competent jurisdiction" adopted by the Supreme Court in ***R. v. Mills***, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, was met because the arbitrator had jurisdiction over the parties and the dispute and was empowered to grant the ***Charter*** remedies sought. In contrast to the statutory authority of the arbitrator in ***Weber, supra***, it is clear from the ***HRA*** that in this case neither the HRC nor an HRP have a mandate that extends to ***Charter*** claims.

8 ***Perera v. Canada***, [1997] F.C.J. No. 199

Conclusion:

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[29] The Applicant submits that, the mere fact that there is absolutely no indication that the law or the had changed since 2000 when *Ayangma* was decided, or more specifically no evidence that the compensatory scheme under any of the provincial and federal jurisdictions had changed since *Perera 1998 and Ayangma 2000*, as admitted by the Commission itself at para.33 of its submissions and p179 of the Application for Leave to Appeal, does clearly suggest that Commissions, Panels or Tribunals throughout Canada, do not have the required jurisdiction to the grant a claimant alleging discrimination pursuant to s.15 (1) of the *Charter*, all the remedies available pursuant to s.24(1) of the *Charter*, as such would not be courts of competent jurisdiction under s.24(1) of the *Charter.*

[30] It therefore follows that that the principles previously set by this Honourable Court in ***Mills*** supra and in ***Perera supra*** and ***Ayangma 2000 supra***, would still apply in 219 and as such must therefore be followed as the law of the land. Consequently, claimants should be permitted to run concurrent proceedings before different fora without any fear of bring the doctrine of abuse of process into play

Question-2: ***Did the Court of Appeal err in law and committed a jurisdictional error when it concluded that it would be an abuse of process to run current proceedings in two different fora:***

[31] At para.130-132, the Court of Appeal concluded that:

> [130] ...in the future Charter issues which arise in the course of a human rights proceeding must be decided by the HRC/HRP.
>
> [131] This is because the ***HRA*** creates a specialized tribunal to hear claims for discrimination in, amongst other things, employment. The ***HRA*** does not contain express or specific language to oust the jurisdiction of s.96 courts which are courts of general jurisdiction for hearing of all cases. Still a superior court should decline to hear such a claim out of respect for the Legislature's policy choice to have all discrimination complaints heard by an HRC. This accords with the policy objective of effective access to justice and avoidance of duplication or abuse of process.
>
> [132] It would be an abuse of process to run current proceedings in two different fora. To be clear, the power of an HRC/HRP is limited by its constating statute and it therefore does not have the power to hear stand-alone Charter issues. The HRC/HRP only has the power to deal with Charter issues in cases where the essential factual character falls within the HRC/HRP's specialized statutory jurisdiction which is complaints properly made under the ***HRA.***

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9 ***Perera v. Canada (C.A.)***, [1998] 3 F.C.J. 381

[32] The Applicant submits that having concluded that the HRC/HRPs have power to decide questions of law and to grant the remedies available pursuant to s.24(1) of the *Charter*, and thereby reversing both itself and the Federal Court of Appeal in ***Perera supra***, the Court of Appeal committed the type of jurisdictional error that would require the intervention of this Honourable Court as it is clear that this decision moves the state of law backward rather than forward.

[33] Previous examinations by both the Federal Court, affirmed by the Federal Court of Appeal found that the statutory compensatory scheme under the ***CHRA*** (***Perera supra***, 1997-1998) followed by the Court of Appeal whose decision is under consideration -see ***Ayangma 2000 supra***, not only found that the statutory compensation schemes were insufficient to vindicate pursuant to s.24(1) claimants alleging discrimination pursuant to s.15(1) of the Charter and consequently, HRPs or any other Tribunals, including the Canadian Human Tribunal, were not court of competent jurisdiction pursuant to s.24(1) of the *Charter*.

[34] The mere fact that ***Dallaire v. Les Chevaliers de Colomb10,*** 2011 HRTO 639 (CanLII), 2011 H.R.T.O. 639, which the PEI Court of Appeal referred to in its judgment, to suggest that "***it is well-established that the Code [Ontario Human Rights Code] and the Charter share common objectives and should be interpreted in a congruent manner. ...***" was not sufficient to trigger revisiting ***Ayangma 2000***, nor did this statement change the previous statement previous statement of both the Federal Court , the Federal Court of Appeal in ***Perera supra*** and as well as the PEI Court of Appeal in ***Ayangma 2000*** when it held that:

> [...] Any relief awarded the appellant under that legislation would be one of the circumstances the court would have to consider in determining an appropriate and just remedy under 24(1) in the event the Charter claim succeeds

[35] This statement is extremely relevant and important as it clearly reinforces the fact that Human Rights Panels or Tribunals throughout Canada, lacked jurisdiction to grant s.24(1) Charter remedies and as are not courts of competent jurisdiction under s.24(1) of the Charter.

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10 ***Dallaire v. Les Chevaliers de Colomb,*** 2011 HRTO 639 (CanLII), 2011 H.R.T.O. 639

[36] The Applicant submits that in any event, the statement referred to above that it clearly distinguished the compensation scheme available under the ***HRA*** and the scheme available under s.24(1) of the *Charter*. Furthermore, the Applicant submits that the principle enunciated in ***Dallaire supra*** is not a knew principle of law as similar principle had previously been recognized by the PEI Court of Appeal itself in ***Ayangma 2000 at para. 9*** where the Court stated:

> Generally, the principles which have been applied in cases of discrimination based complaints under the HRA are applicable in dealing with questions of discrimination under s.15(1) of the *Charter*.

[37] The Applicant submits that the Court of Appeal erred in law and committed a substantive jurisdictional error when it suggested that it was an abuse of process when it suggested the following at para.132 of its reasons for judgment:

> [132] It would be an abuse of process to run current proceedings in two different fora. To be clear, the power of an HRC/HRP is limited by its constating statute and it therefore does not have the power to hear stand-alone Charter issues. The HRC/HRP only has the power to deal with Charter issues in cases where the essential factual character falls within the HRC/HRP's specialized statutory jurisdiction which is complaints properly made under the *HRA*.

[38] The Applicant submits that not only the Court of Appeal's finding regarding the doctrine of abuse of process is ill versed, but it reflects the same error committed by the British Columbia Court of Appeal in ***Moore*** supra which finding the Federal Court, the Federal Court of Appeal and as well as the PEI Court of Appeal had previously in ***Perera supra***, affirmed by the Federal Court of Appeal, when Justice Cullen of the Federal Court clearly stated the following at para.

> In light of the pivotal importance of *Andrews* in Charter cases such as the one at Bar, *Moore* is simply bad law in this day and age. *Moore* is inconsistent with the supremacy of the Charter.

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There is nothing in the federal human rights legislation that precludes a separate Charter action. There is a human rights process and a Charter process. Both are available to the Plaintiffs, and both processes can even be availed of at the same time, if the Plaintiffs so choose. The within action is not statutorily ousted by the *Canadian Human Rights Act*.

The Plaintiffs' action is founded in the supreme law of the country, the Charter. The broad remedial power enshrined in section 24 of the Charter allows for a broader remedy than that provided in the *Canadian Human Rights Act*. The within action is neither frivolous and vexatious nor an abuse of process warranting Rule 419 intervention, because the Plaintiffs do have a right to bring an action before this Court under the Charter. This right exists notwithstanding the jurisdiction of the Canadian Human Rights Commission to hear human rights complaints. The Respondent cannot use human rights legislation as a shield to Charter action.

Conclusion:

[39] It therefore follows that the PEI Court of Appeal not only erred in law of law in revisiting ***Ayangma 2000,*** but it also committed a substantive jurisdictional error requiring the intervention of this Honourable Court, which founding purported to be expanding the Commissions and Human Rights Panels or Tribunals' jurisdictions not only to deal with *Charter* issues, but more importantly to grant claimants all appropriate remedies available pursuant to s.24(1) of the *Charter* which remedies can only be granted by courts of competent jurisdiction and in so doing, elevated s.28.3 of the HRA to s.24(1) of the *Charter* and thereby undermining the supremacy of the *Charter.*

Overall Conclusions:

[40] The Applicant submits that because his action is founded in the supreme law of the country, the *Charter*, and because the broad remedial power enshrined in section 24 of the *Charter* which allows for a broader remedy than not only that provided specifically in section 28.3 of ***PEI Human Rights*** by also under any other provincial Human Rights legislation, including under the *Canadian Human Rights Act*, he must be able to receive the type of remedies available pursuant to s.24(1) of the *Charter* and not being limited to those available under the HRA, which the Courts have held:

> Any relief awarded the appellant under that legislation would be one of the circumstances the court would have to consider in determining an appropriate and just remedy under 24(1) in the event the Charter claim succeeds

[41] As held in ***Perera supra*** and affirmed by the Federal Court of Appeal and the PEI Court of Appeal itself, claimants wherever they are in Canada, do have a right to bring an action before the Court under the *Charter* notwithstanding the jurisdiction of any Human Rights Commissions, including the Canadian Human Rights Commission to hear human rights complaints **and both processes can even be availed of at the same time, if the complainants so choose and it is not abuse of the process to do so.**

[42] The Applicant submits that as the Courts have previously held (***Perera and Ayangma 2000***) Respondents and for that matter any alleged discriminators cannot use human rights legislation as a shield to *Charter* action or deny complainants the appropriate remedies available pursuant to s.24(1) of the *Charter* on the basis that these remedies are available pursuant to the HRA as to do so would not only tantamount to ignoring the supremacy of the Charter of remedial schedule enshrined in s.24(1) of the Charter, but it also it downgrades the rank of the ***Charter*** to supplemental secondary human rights legislation to be called upon only as a last resort".

[43] The Applicant submits that in basing its decision in what it had suggested to be "an evolution of the law" , the PEI Court of Appeal has clearly moved backward as it is clear that its new decision under consideration is a return to the past, as it purports to be reviving a decision of the British Columbia Court of Appeal (***Moore v. British Columbia***, (1988) 1988 CanLII 184 (BC CA), 50 D.L.R. (4th) 29 (B.C.C.A.) at pp. 41-42 which decision the Federal Court and the Federal Court of Appeal adopted by the PEI Court of Appeal had all previously held was bad law.

[44] The Appellant submits that the finding of the PEI Court of Appeal in its more recent decision on the issue of appropriate remedy is similar if not identical to what Macfarlane J.A. held in ***Moore*** when he not only found that s-s.8(1) of the ***Human Rights Act***, S.B.C. 1984, c. 22 [which is equivalent to s-s.6(1) of the HRA of this province] had been breached would in essence be the same as a declaration that rights under s-s.15(1) of the ***Charter*** had been violated, but also that a complainant could obtain through the British Columbia ***Human Rights Act*** all the appropriate relief which would be granted under s-s.24(1) of the ***Charter***. The Applicant submits that this is not contrary to the common law principle and the evolution of the law *per se.*

[45] The Applicant submits that it would astonishing to suggest as did the PEI Court of Appeal that a law *(Moore supra)* can be declared bad law *(Perera* 1997 affirmed by the Federal Court of Appeal in 1998 (*Perera* supra) and as well as by the PEI Court of Appeal in 2000 *(Ayangma 2000 supra*) and at the same time re-declared the same law good law. To do so would not only be to ignore the law and the fact that the common law must evolve and not move backward. In light of the pivotal importance of *Andrews* in *Charter* cases such as the one at bar, the decision under consideration is simply bad law in this day and age as it is inconsistent with the supremacy of the *Charter*.

[46] The Applicant submits that if leave is not granted and the decision under consideration stands, it would not only clearly defeat the purpose of full vindication enshrined pursuant to s.24(1) of the *Charter*, but would push claimants to pursue their claims only in Court rather that before the Human Rights Commission for several reasons including, (a) avoiding the statutory limitation period of 1 year imposed under HRA proceedings by as opposed to 2-6 years depending of the provincial jurisdiction for *Charter* claims and as well as (b) avoid proceeding with less rigorous processes (c) avoid embarking on processes with inadequate compensation scheme, with the consequences of creating a chaos and substantial delays because Courts are bombarded with a series of discrimination cases which might have normally been dealt with pursuant to HRA. The Applicant submits this was clearly not what the Legislators may have intended when they enacted provincial and federal Human Rights Legislations.

[47] The Applicant submits that the uniqueness of this case and the national importance of the issue raised, and the fact that it impacts not only the jurisdiction of PEI Commission, but also that of all other Commissions including the Canadian Human Rights Commission, and the fact that it does move the state of law in Canada backward, rather than forward, transforming a declared bad law into good instead of the other way round, this Court must intervene and grant the Applicant leave to appeal.

PART-IV
SUBMISSION ON COSTS

[48] The Applicant seeks costs against both Respondents.

PART-V
REMEDY SOUGHT

[49] Due to the national importance of this case and the facts that it may impacts the jurisdiction of other provincial and federal Human Rights Acts or Codes, and may therefore include the involvement of all provincial and federal Human Rights Commissions as interveners, and the fact that if permitted to stand if may put the administration of justice into disruptive and/or create a chaos and substantive delay in the delivery of justice, leave to appeal the specific portion of the Court of Appeal decision which found that the Commission and the Panel appointed under the Act, were courts of competent jurisdiction which pursuant to s.24(1) of the *Charter* and that it would be an abuse of process to run current proceeding alleging discrimination pursuant to the HRA and pursuant to s.15(1) of the *Charter.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of September 2019.

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PART-VI
AUTHORITIES

1. *R. v. Mills,* 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863
2. *Ayangma v. Eastern School Board, 2000 PESCAD 12*
3. *Nova Scotia (Workers' Compensation Board) v. Martin and Lasseur, 200 SCC 54*
4. *R. v. Conway, 2010 SCC 22*
5. *Doré v. Bureau du Québec*, 2017, 2012 SCC 12
6. *Ravndahl v. Saskatchewan, 2009 SCC 7 (CanLII), [2009] 1 S.C.R. 181)*
7. *Moore v. British Columbia*, (1988) 1988 CanLII 184 (BC CA), at pp. 41-42
8. *Perera v. Canada*, [1997] F.C.J. No. 199
9. *Perera v. Canada (C.A.)*, [1998] 3 F.C.J. 381
10. *Dallaire v. Les Chevaliers de Colomb,* 2011 HRTO 639 (CanLII), 2011 H.R.T.O. 639

LIST OF RELEVANT DOCUMENTS RELIED UPON 131

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The Honourable
Justice John K. Mitchell

Prince Edward Island
Court of Appeal

Sir Louis Henry Davies
Law Courts

February 28, 2019

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Re: S1-CA-1408 Ayangma v. Prince Edward Island French Language School Board and English Language School Board

In preparing for this appeal we note that the appellant relies on ***Ayangma v. Eastern School Board***, 2000 PESCAD 12 which held that a Human Rights Tribunal did not have the power to deal with **Charter** claims as a Human Rights Panel does not constitute a court of competent jurisdiction within the meaning of the phrase as used in s.24(1) of the **Charter** (see para.9).

Based on this case a person could, on the same set of facts, take an action in Supreme Court for a **Charter** remedy and bring the same complaint before a Human Rights Tribunal for remedy under that ***Human Rights Act.***

In preparing for the appeal please be prepared to deal with the following two questions:

1. Is ***Ayangma v. Eastern School Board***, 2000 PESCAD 12, still good law in light of subsequent Supreme Court of Canada Cases such as ***Nova Scotia (Workers' Compensation Board) v. Martin and Laseur***, 2003 SCC 54; ***R. v. Conway***, 2010 SCC 22; and ***Doré v. Barreau de Québec***, 2012 SCC 12?

2. Do these cases bring the doctrine of abuse of process into play?

As Mr. Ayangma has already filed his factum, he is at liberty to file a supplementary factum dealing with these questions should he so desire.

Because these questions may impact the Human Rights Commission, I have taken the liberty of copying this letter to the Human Rights Commission.

Yours truly,

John K. Mitchell

cc Brenda J. Picard, Q.C., Director, P.E.I. Human Rights Commission, P.O. Box 2000, Charlottetown, PE C1A 7N8

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S1-CA-1408

THE COURT OF APPEAL OF
THE PROVINCE OF PRINCE EDWARD ISLAND

BETWEEN:

NOËL AYANGMA

APPELLANT

AND

FRENCH LANGUAGE SCHOOL BOARD
&
ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENTS

APPELLANT'S SUPPLEMENTARY FACTUM

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BACKGROUND 134

[1] This matter has been set it down for hearing on June 25, 2019 with a possibility of starting on June 24, 2019.

[2] On February 28, 2019, in preparing for the hearing of this appeal, this Court noting that the Appellant had relied on this Court's previous decision on ***Ayangma v. Eastern School Board*** PESCAD 12, to ground his appeal.

[3] It is to be noted that in ***Ayangma*** supra, this Court adopted the legal principles enunciated in ***Perera***, a Federal Court decision which was affirmed by the Federal Court of Appeal.

[4] In that case, this Court unanimously held that a Human Rights Panel (HRP) did not have the power to deal with ***Charter*** claims. According to this Court, a Human Rights Panel which the equivalent of the Canadian Human Rights Tribunal in the Federal sphere, does not constitute a court of competent jurisdiction, within the meaning of the phrase used in s.24(1) of the Charter (see ***Ayangma*** supra at para.9).

[5] Therefore follows, accordingly to both ***Ayangma*** and ***Perera*** supra, a person could, bring a complaint before a Human Rights Tribunal for remedy under the ***Human Rights Act***, and on the same set of facts, take an action in Court for a ***Charter*** remedy under s.24(1).

[6] In the decision under consideration the Motions judge found at para.86 of his reasons that "In light of the *Conway* decision, I am doubtful that is the case and raise the issue as it appears to be unnecessary for an administrative tribunal and a court to plow the same well tilled ground.

[7] Based on the Motions judge's finding and in light of the Supreme of Canada decision in ***Conway*** supra, this Court therefore advised the parties to be prepared to deal with the following two questions at the hearing of the appeal and permitted the filing of a Supplementary Factum:

1. Is ***Ayangma v. Eastern School Board*** PESCAD 12, still good law in light of subsequent Supreme Court of Canada Cases such as ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC54; ***R. v. Conway***, 2010 SCC22; and ***Doré v. Barreau du Québec*** SCC 12?

2. Do these cases bring the doctrine of abuse of process into play?

[8] The Appellant respectfully submits that the first question should be answered in the positive while the second one should be answered in the negative.

[9] The Appellant notes that not only none of the decisions referred to above at para.6 refer to either ***Ayangma*** supra, or ***Perera supra*** relied upon by this Court in setting aside the Motions judge's decision in 2000, but also that only ***Conway*** supra deals with a s.24(1) of the *Charter* remedy even though the type of remedies sought are not the same as those sought in ***Ayangma*** supra,

[10] The Appellant submits that the real issue here should not be whether the PEI Human Right Panel and other tribunals or boards, including those referred to in ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC54; ***R. v. Conway***, 2010 SCC22; and ***Doré v. Barreau du Québec*** SCC 12 are courts of competent jurisdiction to entertain Charter claims alleging s.15(1) breach, but rather whether as constituted, they are competent to grant all the type of remedies available under s.24(1) of the ***Charter***, and/or provide claimants with type of remedy or remedies he or she is seeking under s.24(1) of the ***Charter***.

[11] With due respect, the Appellant submits that not only this question has already previously been fully canvassed by this court, but it has also already been conclusively determined in ***Ayangma*** *supra* at paras.8-10 of the decision where this Court referring to ***Nelles*** stated:

> [8] ...A statutory tribunal may be a court of competent jurisdiction within the meaning of s-s.24(1) if its constituent statute gives it power over the subject matter, the parties, and the remedy. In ***Weber v. Ontario Hydro*** (1995), 1995 CanLII 108 (SCC), 125 D.L.R. (4th) 583 the Supreme Court of Canada, by reference to the provisions of the ***Ontario Labour Relations Act***, R.S.O. 1990, c. L.2 and the relevant collective agreement, held that a grievance arbitrator was a "court of competent jurisdiction" for the purposes of making an award of damages for violations of the ***Charter***. McLachlin J. writing for the majority noted that mandatory arbitration clauses such as s.45(1) of the ***Ontario Labour Relations Act*** generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising either expressly or inferentially from the collective agreement. She also found that the collective agreement in that case envisioned the arbitrator having exclusive jurisdiction over all aspects of the particular dispute involved including the ***Charter*** claims. As well

she found the standard for a "court of competent jurisdiction" adopted by the Supreme Court in ***R. v. Mills***, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, was met because the arbitrator had jurisdiction over the parties and the dispute and was empowered to grant the ***Charter*** remedies sought. In contrast to the statutory authority of the arbitrator in ***Weber, supra***, it is clear from the ***HRA*** that in this case neither the HRC nor an HRP have a mandate that extends to ***Charter*** claims.

[9] The ***HRA*** only authorizes complaints to the HRC that are based on contraventions of the ***HRA*** itself. Subsection 22(1) provides as follows:

> 22(1) Any person, except the Commission or an employee of the Commission, who has reasonable grounds for believing that a person has contravened ***this Act*** may make a complaint to the Commission. [Emphasis added.]

Subsection 22(2)(b) provides a further restriction in that the complaint must be filed within one year of the occurrence giving rise to it. Although the executive director and the chair of the HRC also exercise limited adjudicative roles in regard to complaints, that is primarily the function of an HRP appointed under s.26 of the ***HRA***. There is nothing anywhere in the ***HRA*** which explicitly or implicitly gives an HRP any authority to deal with a ***Charter*** violation claim. To do so, it would have to be able to address the issue of discrimination in the context of s.15 of the ***Charter***. Generally, the principles which have been applied in cases of discrimination based complaints under the ***HRA*** are applicable in dealing with questions of discrimination under s.15(1) of the ***Charter***. However, in spite of what was said by Macfarlane J.A. in ***Moore, supra***, there are certain legal differences between the two that have to be considered. McIntyre J. lists some of those differences in ***Andrews, supra***, at pp. 18-19. An HRP does not have the capacity to deal with those differences. It is apparent from the ***HRA*** the Legislature did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere (complaints regarding contraventions of the ***HRA***) because s.28.3 allows for their referral to the court. Obviously then, there is no basis to support a conclusion that an HRP has the expertise or authority to determine questions of law involving the ***Charter***. In short, an

HRP does not constitute "a court of competent jurisdiction" within the meaning of that phrase as used in s-s.24(1) of the *Charter* as interpreted by the Supreme Court of Canada in such cases as, ***Mills, Supra, Mooring v. Canada (National Parole Board)***, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and ***Weber, supra***.

[10] The HRC, its executive director, or its chairperson have no remedial powers. Remedial authority under the *HRA* rests with the HRP. Its powers are set forth in s-s.28.4(1)(b), s-s.28.4(6), and s.28.6 as follows:

28.4(1) A Human Rights Panel ...

(b) subject to subsection (2), may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(I) to cease the contravention complained of;

(ii) to refrain in future from committing the same or any similar contravention;

(iii) to make available to the complainant or other person dealt with contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;

(iv) to compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention.

[12] What is important from the above quotes is the fact that the HRP's remedial authority under the *HRA* set forth in s-s.28.4(1)(b), s-s.28.4(6), and s.28.6 is limited and insufficient. Because of this, they do not rise to the remedial powers that a court of competent jurisdiction may have under s.24(1) of the ***Charter***.

[13] The Appellant submits that neither ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC54 nor ***R. v. Conway***, 2010 SCC22; or ***Doré v. Barreau du Québec*** SCC 12 stands from the proposition that all administrative tribunals, including the PEI Human Rights Panel, are now courts of competent jurisdiction within the meaning of s.24(1) of the ***Charter***.

[14] As the Supreme Court of Canada as suggested in ***Mills, Mooring v. Canada (National Parole Board)***, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and ***Weber***, which suggestion had been followed by both by the Federal courts in **Perera in 1997**, and by this Court in ***Ayangma*** in 2000, as well as by other courts of the countries, the determination of whether an administrative body is a court of competent jurisdiction within the meaning of s.24(1) of the Charter clearly require an analysis.

[15] The same an analysis is still relevant until today as same was conducted in the Supreme of Canada's decisions ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC54; ***R. v. Conway***, 2010 SCC22; or ***Doré v. Barreau du Québec*** SCC 12.

[16] The Appellant submits because the HRA as constituted in 2000 has not changed, nor its remedial power under s.28.4(1) of the Act, the analysis previously conducted by this Court in order to determine that the HRP as constituted was not a court of competent jurisdiction is still relevant today and must stand,

[17] It therefore follows that to now hold or suggest that the PEI HRP, has overnight become a court of competent jurisdiction in light of the Supreme of Canada's decisions ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur***, 2003 SCC54; ***R. v. Conway***, 2010 SCC22; or ***Doré v. Barreau du Québec*** SCC 12, will run counter both the legislative intent and this Court's clear and unambiguous finding that:

> In short, an HRP does not constitute "a court of competent jurisdiction" within the meaning of that phrase as used in s-s.24(1) of the *Charter* as interpreted by the Supreme Court of Canada in such cases as, ***Mills, Supra, Mooring v. Canada (National Parole Board),*** 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and ***Weber, supra.***

[18] Furthermore, there is also no suggestion from the decisions of the Supreme Court of Canada referred to above that they may have altered in any shape or form this Court's unanimous, unambiguous and determinative findings of law that:

> It is apparent from the *HRA* the Legislature did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere (complaints regarding contraventions of the *HRA*) because s.28.3 allows for their referral to the court.

> ...it is at least doubtful the remedial scheme available under the *HRA* would be adequate to provide a remedy a court of competent jurisdiction under s-s.24(1) would consider appropriate and just in the circumstances. For example, the *HRA* does not provide for: damages for violation of *Charter* rights ***per se***, punitive or exemplary damages, or for damages for mental anguish, humiliation, affront to dignity or emotional injury which so often attend unlawful discrimination. The *HRA* also limits compensatory awards to one year. The Ontario Court of Appeal, in ***Prete v. Ontario***, (1993), 1993 CanLII 3386 (ON CA), 86 C.C.C. (3d) 442, leave to appeal to S.C.C. denied (1994), 87 C.C.C. (3d) vi (note) (S.C.C.), held that claims for *Charter* remedies were not subject to provincial immunity or limitation legislation.

[19] Finally, the Appellant at para. 85, of the Conway case, the Supreme Court clearly once against suggested the law to be followed he stated that whether a tribunal has the jurisdiction to grant particular remedies under s. 24(1) of the *Charter* including the type of remedies sought by the Appellant depends on the statutory scheme that governs the tribunal and the scope and nature of the Board's statutory mandate and function.

[20] The Appellant therefore respectfully submits that because neither the HRA nor the law in the jurisdiction to grant a remedy under has changed since **Ayangma** supra, and/or from what constitutes a court of competent jurisdiction within the meaning of that phrase as used in s-s.24(1) of the ***Charter*** as interpreted by the Supreme Court of Canada in such cases as, ***Mills, Supra, Mooring v. Canada (National Parole Board)***, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and ***Weber***, it is clear ***Ayangma*** supra is still good law and must therefore be followed in the case at bar.

[21] There is no doubt based on this Court's previous analysis and conclusion in ***Ayangma*** supra that the HRP's remedial powers under s.28.4(1), thus considerable, were lacking and not so broad as that provided for under s-s.24(1) of the ***Charter*** to fully vindicate or redress violations of his s.15 rights allegedly going back over many years.

[22] This finding would also be consistent with this Court's conclusion in ***Ayangma*** supra at para.11 of its reasons reproduced below for ease of reference, which finding not only suggested why the remedial power under the ***HRA*** was limited and insufficient, but also why it failed to rise to the level of the remedial power enshrined under s.24(1) of the Charter:

> Any relief awarded the appellant under that legislation would be one of the circumstances the court would have to consider in determining an appropriate and just remedy under 24(1) in the event the *Charter* claim
> succeeds. Subsection 24(1) damages ought to be reduced by the amount of any compensation awarded to the appellant under the *HRA* in respect of the same conduct by the respondents as gives rise to the claim for damages under the *Charter*.

The Effect of R. v. Conway 2010 SCC 22; Nova Scotia (Workers Compensation Board) v. Martin and Laseur, 2003 SCC54; and Doré v. Barreau du Québec SCC 12

1. *Is Ayangma v. Eastern School Board PESCAD 12, still good law in light of subsequent Supreme Court of Canada Cases such as Nova Scotia (Workers Compensation Board) v. Martin and Laseur, 2003 SCC54; R. v. Conway, 2010 SCC22; and Doré v. Barreau du Québec SCC 12?*

[23] Now turning to the effect of these decisions if any, the Appellant submits that thus all these cases are instructive, only ***R. v Conway***[1], 2010 SCC 22 (Canlii) would be more appropriate to respond to the questions posed by this Court as this case not only deals with the jurisdiction of an administrative to entertain Charter claims under s.15(1) of the Charter, but also to grant the remedy under s.24(1).

[24] With due respect, and contrary to the Motions judge's suggestion at para.86 of his reason, ***Conway*** supra does not stand from the proposition that all tribunals or panels appointed under the Act would be a court of competent jurisdiction within the meaning of s.24(1) of the ***Charter***, nor does it specifically run counter this Court's decision in ***Ayangma*** supra or the Federal Courts decision, in ***Perera v. Canada***[2], ***[1997]*** F.C.J. No. 199 and ***Perera v. Canada***[3] ***(CA) [1998]***, 3 F.C.J 381 9 (FCA).

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[1] ***R. v Conway***, 2010 SCC 22 (Canlii).
[2] ***Perera v. Canada, [1997]*** F.C.J. No. 199
[3] ***Perera v. Canada (CA) [1998]***, 3 F.C.J 381 9 (FCA)

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[25] Contrary to Motions judge's suggestion, it is clear that he not only misconstrued ***Conway***, but he failed to conduct the analysis required under the law as did this Court in ***Ayangma supra*** at para.8-11 and the Supreme Court of Canada in ***Conway*** (see para.85).

[256 It is also clear from reading Conway supra, that it clearly reinforces ***Ayangma*** supra, but it is consistent with the legal principles previously set by the Supreme Court of Cana in ***Mills, Supra, Mooring supra***. More recently, in ***Starz (Re)***, 2015 ONCA 318 , the Ontario Court of Appeal, relying in Conway, followed the same legal principles when it stated at paras.43-44, the following:

> [43] The Board also concluded that it did not have the jurisdiction to grant the requested *Charter* relief, namely, a declaration that Mr. Starz's rights had been violated, an order for damages against CAMH or the Crown, and a costs order.
>
> [44] In reaching this conclusion, the Board relied on *Conway*, at para. 85, in which the Supreme Court stated that whether a tribunal has the jurisdiction to grant particular remedies under s. 24(1) of the *Charter* depends on the statutory scheme that governs the tribunal and the scope and nature of the Board's statutory mandate and function.

[27] Unlike ***Ayangma*** supra, the Motions judge did not conduct the first inquiry conducted by this Court in ***Ayangma*** supra, which inquiry must be conducted by any court faced with the issue of determining whether the statutory body whose authority is under attack is a court of competent jurisdiction within the meaning of s. 24(1).

[28] The Appellant submits it is now trite law that answering the question as whether an administrative tribunal is court of competent jurisdiction does not only depend on whether the Board is authorized to decide questions of law, or to entertain ***Charter*** claims pursuant to s.24(1), but to answer this important question would mostly depends on the statutory scheme that governs the tribunal and the scope and nature of its statutory mandate and function and must be based on whether the statutory tribunal has the jurisdiction to grant the particular remedy or remedies sought by the claimants under s. 24(1) of the *Charter*

[29] The Appellant submits that because unlike the HRA from which ***Ayangma*** supra was based on, the *Code* relied upon by the Court in ***Conway*** supra, clearly authorizes appellate courts to overturn a review board's disposition if it was based on a wrong decision on a question of law, this statutory language would indicative of the Board's authority to decide questions of law.

[30] The Appellant submits that given this proposition, and since Parliament has not excluded the *Charter* from the HRP's mandate as previously held by this Court, it follows that either the PEI Human Rights Commission and/or its HRP appointed under the ***Act***, is a court of competent jurisdiction for the purpose of granting remedies under s. 24(1) of the *Charter*.

[31] The Appellant submits that if "Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, at para. 55; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (CanLII), [2010] 1 S.C.R. 44, at para. 30)", this vindication cannot be achieved under the present remedial power afforded under the ***HRA***.

[32] It therefore follows that even if it could be said that the board, in ***Conway*** supra, could determine question of law as per its mandate, this was determinative of the issue before the Courts. According to the Supreme Court of Canada, the next question which was the same question dealt with by this Court in ***Ayangma***, supra, was whether the remedies sought are the kinds of remedies which would fit within the Board's statutory scheme.

[33] According to the Courts, including the Supreme Court of Canada such analysis requires consideration of the scope and nature of the Board's statutory mandate and functions. The Appellant submits this is exactly the type of analysis done by this Court in ***Ayangma*** supra.

[34] Further according to the analysis of PEI HRP's remedial powers, this Court concluded that, while it may well be unlike ***Ayangma*** supra, that the substance of Conway's complaint could be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values, if so, resort to s. 24(1) of the *Charter*, this did not add to the Board's incapacity to provide an appropriate redress. This also exactly what this Court has also determined in ***Ayangma*** supra. This was consistent with the preaching in Mills

[35] In ***Mills***, the Supreme Court of Canada decided that relief is available under s. 24(1) of the *Charter* if the "court" from which relief is sought has jurisdiction over the parties, the subject matter and the remedy sought. Since 1986, the *Mills* test has been consistently applied to determine whether courts and tribunals acting under specific statutory schemes are courts of competent jurisdiction to grant particular remedies under s. 24(1).

[36] Again according to the case law, while the review of *Mills'* progeny gives rise to three observations and set out a three-pronged definition of "court of competent jurisdiction", the first two steps "jurisdiction over the parties" and "jurisdiction over the subject matter" remain undefined for the purposes of the test.

[37] It therefore follows that the inquiry, has almost always and must always turned on whether the court or tribunal had jurisdiction to award the *particular* remedy sought under s. 24(1). This was clearly the basis of the determination of this Court in ***Ayangma*** supra and ***Conway*** supra.

[38] In other words, according to the Supreme Court of Canada, the inquiry would be less into whether the adjudicative body is institutionally a court of competent jurisdiction, and more into whether it is a court of competent jurisdiction *for the purposes of granting a particular remedy.*

[39] In ***Conway supra***, while the Supreme Court of Canada determined at para.84 that board was a court of competent jurisdiction, based on its statutory powers, it also clearly found at para.101 that it lacked the power to grant the remedy sought by Mr. Conway which was an absolute discharge despite its conclusion that he is a significant threat to public safety, and that to provide him with this particular remedy sought, would be a clear contradiction of Parliament's intent.

[40] Finally conclude, and in any event, the Supreme Court of Canada not only concluded that "Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies sought Mr. Conway", it went on and set the following important principles of law at paras.81-83 and 85:

> [81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.
>
> [82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to This Case

[83] The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. ..

[84] ...

[85] The question for the Court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board's statutory mandate and functions

[41] While the Respondent has suggested in its Factum that the reference to Conway supra at para.86 was made in arbiter and the Motions judge could have arrived at the same conclusion in any event is clearly without merit.

Conclusion on the first question:

[42] It therefore follows, given the statutory scheme of the PEI Human Commission and the HRP' remedial powers and its constitutional considerations, as determined by this Court in ***Ayangma*** supra, it is clear that not only it is not a court of competent jurisdiction within the meaning of s.24(1) of the *Charter*, it cannot grant also grant the remedies sought by the Appellant.

[43] The Appellant respectfully submits that for this Court to hold otherwise considering that neither the Act nor the HRP's remedial statutory powers had changed, since 2000, will not only run counter this Court's previous determinations and decision, but it would be a clear contradiction of Parliament's intent as previously determined by this Court in ***Ayangma*** supra.

[44] It therefore follows that since neither ***Ayangma*** nor ***Perera supra***, has been overturned by either this Court or the Supreme Court of Canada, one would argue that these decisions are still good law that ***Ayangma v. Eastern School Board*** PESCAD 12, is still good law despite subsequent Supreme Court of Canada Cases such as ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur,*** 2003 SCC54; **R. v. Conway**, 2010 SCC22; and ***Doré v. Barreau du Québec*** SCC 12?

2. ***Do the following cases of Supreme of Canada: Nova Scotia (Workers Compensation Board) v. Martin and Laseur,*** 2003 SCC54; **R. v. Conway**, 2010 SCC22; and ***Doré v. Barreau du Québec*** SCC 12 ***bring the doctrine of abuse of process into play on the facts and circumstances of this case?***

[45] The Appellant submits that in light of the argument made on the first issue or question, the Supreme Court of Canada cases "***Nova Scotia (Workers Compensation Board) v. Martin and Laseur,*** 2003 SCC54; **R. v. Conway**, 2010 SCC22; and ***Doré v. Barreau du Québec*** SCC 12 do not bring the doctrine of abuse of process into play for three factual/legal reasons.

[46] First of all, as a matter of fact and law, the Appellant proceeded in the manner he did based on this Court's unanimous decision in ***Ayangma*** supra which decision relying of the Federal Court of Canada's decision in ***Perera*** supra:

(i) ruled that a person could, bring a complaint before a Human Rights Tribunal for remedy under the ***Human Rights Act***, and on the same set of facts, take an action in Supreme Court for a ***Charter*** remedy under s.24(1) of the ***Charter***;

(ii) ruled against the conduct of parallel proceeding and ruled that the Appellant's Charter "actions should not proceed to trial until the complaints the appellant has already filed with the HRC relating to the same matters have been dealt with according to the ***HRA***".

(iii) ruled that "Any relief awarded the appellant under that legislation would be one of the circumstances the court would have to consider in determining an appropriate and just remedy under 24(1) in the event the ***Charter*** claim succeeds.

(iv) suggested that " Subsection 24(1) damages ought to be reduced by the amount of any compensation awarded to the appellant under the ***HRA*** in respect of the same conduct by the respondents as gives rise to the claim for damages under the ***Charter***."

[47] Second, as matter of pure law, and as determined by the Federal Court in ***Perera*** supra, with the approval of both the Federal Court of Appeal and this Court, dealing with the same issue,

(i) "There is nothing in the federal human rights legislation that precludes a separate Charter action. There is a human rights process and a Charter process. Both are available to the Plaintiffs, and both processes can even be availed of at the same time, if the Plaintiffs so choose. The within action is not statutorily ousted by the *Canadian Human Rights Act*"

(ii) "The Plaintiffs' action is founded in the supreme law of the country, the Charter. The broad remedial power enshrined in section 24 of the Charter allows for a broader remedy than that provided in the *Canadian Human Rights Act*."

(iii) **"The within action is neither frivolous and vexatious nor an abuse of process warranting Rule 419 intervention, because the Plaintiffs do have a right to bring an action before this Court under the Charter"**

(iv) **This right exists notwithstanding the jurisdiction of the Canadian Human Rights Commission to hear human rights complaints. The Respondent cannot use human rights legislation as a shield to Charter action.**

[48] Third, and in any events, the Appellant having followed this Court's previous rulings in not pleading a Charter breach before the Commission, and having avoided a parallel proceeding, should not be left based on the Motions judge's ruling which relied on ***Conway***, without any forum to have his matter heard as acknowledged by the Motions judge's himself, in his reasons at para.86

> [86] Although it is my understanding that the Plaintiff limited himself to non-*Charter* remedies in front of the Human Rights Commission, it appears that the claims in both venues are based on the same facts and in essence are substantively the same claim. The Plaintiff took the position based on the PEICA decision of 2000 that this is the appropriate procedure to follow. In light of the *Conway* decision, I am doubtful that is the case and raise the issue as it appears to be unnecessary for an administrative tribunal and a court to plow the same well tilled ground.

Conclusion on the second question:

[49] The Appellant respectfully submits that as a matter of law that the within action cannot and do not give rise to either a vexatious proceeding or an abuse of process.

[50] It therefore follows based on all of the aforementioned that the Supreme Court of Canada cases" ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur,*** 2003 SCC54; **R. v. Conway**, 2010 SCC22; and ***Doré v. Barreau du Québec*** SCC 12 do not bring the doctrine of abuse of process into play.

Overall Conclusion:

[51] In conclusion, not only Ayamga supra is still good law and must be followed, but neither ***Nova Scotia (Workers Compensation Board) v. Martin and Laseur,*** 2003 SCC54; **R. v. Conway**, 2010 SCC22; or ***Doré v. Barreau du Québec*** SCC 12 do bring the doctrine of abuse of process into play.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March 2019.

NOEL AYANGMA, Appellant

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Court File No. S1-CA-1408

PRINCE EDWARD ISLAND COURT OF APPEAL

BETWEEN:

NOËL AYANGMA

APPELLANT

AND

THE FRENCH LANGUAGE SCHOOL BOARD
(a.k.a. La Commission Scolaire de Langue Francaise)

RESPONDENT

AND

THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENT

RESPONDENTS' SUPPLEMENTARY FACTUM
Filed on behalf of The French Language School Board and The English Language School Board

BACKGROUND

1. This factum responds to a letter from Justice John K. Mitchell dated February 28, 2019, advising the parties to be prepared at the hearing of this matter to deal with two particular questions regarding the jurisdiction of a Prince Edward Island Human Rights Panel to adjudicate *Charter* claims.

2. Justice Mitchell's letter notes that the Appellant's submissions rely on *Ayangma v. Eastern School Board,* 2000 PESCAD 12 ("*Ayangma 2000*"), which held that a Human Rights Panel does not have the power to deal with *Charter* claims because a Human Rights Panel does not constitute a court of competent jurisdiction within the meaning of section 24(1) of the *Charter*.

3. Based on *Ayangma 2000*, a person could, on the same set of facts, take an action in Supreme Court for a *Charter* remedy and bring the same complaint before a Human Rights Panel for remedy under the *Human Rights Act*.

ISSUES

4. Based on the above, this Court has identified two questions for consideration:

Issue 1: Is *Ayangma v. Eastern School Board,* 2000 PESCAD 12, still good law in light of subsequent Supreme Court of Canada cases such as *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *R v. Conway*, 2010 SCC 22; and *Doré v. Barreau de Québec*, 2012 SCC 12?

Issue 2: Do these cases bring the doctrine of abuse of process into play?

Issue 1: Is *Ayangma v. Eastern School Board,* 2000 PESCAD 12, still good law in light of subsequent Supreme Court of Canada cases such as *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *R v. Conway*, 2010 SCC 22; and *Doré v. Barreau de Québec*, 2012 SCC 12?

5. The Respondents submit that *Ayangma 2000* remains good law despite the three Supreme Court of Canada decisions noted above.

6. In *Ayangma 2000*, this court concluded that it was clear from a review of the *Human Rights Act* that neither the Human Rights Commission nor a Human Rights Panel had a mandate which extended to *Charter* claims, as there was nothing anywhere in the *Human Rights Act* which explicitly or implicitly gave a Panel any authority to deal with a *Charter* violation claim. The decision concludes:

> *It is apparent from the HRA the Legislature did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere (complaints regarding contraventions of the HRA) because s.28.3 allows for their referral to the court. Obviously then, there is no basis to support a conclusion that an HRP has the expertise or authority to determine questions of law involving the Charter.* ***In short, an HRP does not constitute "a court of competent jurisdiction" within the meaning of that phrase as used in s-s.24(1) of the Charter*** *as interpreted by the Supreme Court of Canada in such cases as, Mills, Supra, Mooring v. Canada (National Parole Board), 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and Weber, supra.* [Emphasis added]
>
> *Ayangma v. Eastern School Board*, 2000 PESCAD 12, at para 9 ("*Ayangma 2000*")

7. Since the judgment in *Ayangma 2000* was released on April 5, 2000, the Supreme Court of Canada, in a series of decisions, has commented on and reshaped the test

for determining whether an administrative tribunal is a "court of competent jurisdiction" under section 24(1) of the *Charter*.

8. Section 24(1) of the *Charter* allows for an individual to apply to a court of competent jurisdiction to obtain a remedy, that is appropriate and just in the circumstances, for an infringement of *Charter* guarantees:

> *24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*
>
> Canadian Charter of Rights and Freedoms, at s. 24(1)

9. In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, the Supreme Court of Canada, considered whether the Nova Scotia Workers' Compensation Appeals Tribunal ("WCAT") had the jurisdiction to consider the constitutional validity of challenged provisions of Nova Scotia's *Workers' Compensation Act*. The impugned provisions allegedly infringed section 15 of the *Charter* by preventing chronic pain sufferers from obtaining workers' compensation benefits.

> Nova Scotia (Workers' Compensation Board) v. Martin, 2003 SCC 54, at para 2 ("*Martin*")

10. In finding that WCAT did have the authority to refuse to apply benefits provisions of Nova Scotia's Act on *Charter* grounds, the Supreme Court of Canada reappraised the relevant case law to provide a single set of rules for the jurisdiction of administrative tribunals to consider *Charter* challenges to a legislative provision.

> Martin, *supra*, at para 2

11. In doing so, the SCC restated and summarized the approach to determining whether an administrative tribunal has the jurisdiction to subject legislative provisions to *Charter* scrutiny. That restatement is paraphrased below as follows:

- Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.

- Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

Martin, supra, at para 48

12. Several years later in *R v. Conway*, 2010 SCC 22, the Supreme Court of Canada again refined and simplified the test for determining whether an administrative tribunal can grant *Charter* remedies generally.

13. In *R v. Conway*, Abella J. commented that in the evolution of the *Charter's* relationship with administrative tribunals, the first wave of relevant cases started in 1986 with *Mills v. The Queen*, [1986] 1 SCR 863 (SCC). In *Mills* it was decided that a court or administrative tribunal was a "court of competent jurisdiction" under section 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought.

R v. Conway, 2010 SCC 22, at para 22

14. Abella J. continued in *R v. Conway* to trace through the development of jurisprudence which served to "cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals." *R v. Conway* ultimately concluded as follows:

> *In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant Charter remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if Charter jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant Charter remedies in relation to Charter issues arising in the course of carrying out its statutory mandate (Cuddy Chicks trilogy; Martin). A tribunal which has the jurisdiction to grant Charter remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the Mills cases).*

R v. Conway, supra, at para 22

15. The conclusion of the SCC in *R v. Conway* was cited again by Abella J. in *Doré v. Barreau de Québec*, 2012 SCC 12, wherein she said that administrative tribunals with the

power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.

Doré v. Barreau de Québec, 2012 SCC 12, at para 30

16. In looking at the comments and conclusions of the Supreme Court of Canada in these cases, it is clear that the test for determining whether an administrative tribunal is a "court of competent jurisdiction" has shifted from a remedy-by-remedy inquiry to one that attributes *Charter* jurisdiction to tribunals on an institutional basis.

17. This jurisdiction flows from an inquiry which begins with whether or not the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law.

18. The Respondents submit that in the present case, consistent with the findings of this court in *Ayangma 2000*, despite the reshaping and simplifying of the test to determine whether a tribunal is a "court of competent jurisdiction", a Prince Edward Island Human Rights Panel still does not have jurisdiction to answer questions of law.

Ayangma 2000, supra, at para 9

19. First, the *Human Rights Act* does not contain any provision which explicitly confers a power on the Executive Director, Chairperson, or Human Rights Panel to decide questions of law.

20. Instead, section 28.3 of PEI's *Human Rights Act* states the following:

> *28.3 Stated case*
> *A Human Rights Panel may, at any stage of the proceedings, refer a stated case under the rules of court to the Supreme Court, on any question of law arising in the course of the proceedings, and may adjourn the proceedings until the decision is rendered on the stated case.*

Human Rights Act, RSPEI 1988, H-12 at s. 28.3

21. The Respondents submit that this section expressly removes the jurisdiction to answer questions of law from a Human Rights Panel.

22. In *Martin, supra*, Gonthier J. stated the following (para 42):

> *The question to be asked is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended*

> *to exclude the Charter, or more broadly, a category of questions of law encompassing the Charter, from the scope of the questions of law to be addressed by the tribunal. For instance, an express conferral of jurisdiction to another administrative body to consider Charter issues or certain complex questions of law deemed too difficult or time-consuming for the initial decision maker, along with a procedure allowing such issues to be efficiently redirected to such body, could give rise to a clear implication that the initial decision maker was not intended to decide constitutional questions.*
>
> *Martin, supra,* at para 42

23. The above passage relates to the inquiry into whether the statute at issue has expressly removed a tribunal's jurisdiction to address *Charter* questions (as opposed to general questions of law); however, the Respondents nevertheless submit that these comments are applicable to the consideration as to whether section 28.3 of the *Human Rights Act* expressly removes the power from the Human Rights Panel to answer questions of law and instead confers that power on the Supreme Court.

24. In our submission, section 28.3 gives rise to the clear implication that the Human Rights Panel was not intended to be the initial decision-maker of questions of law.

25. Comparing the choice of language and provisions used in the *Human Rights Act* to those used in the *Island Regulatory and Appeals Commission Act,* RSPEI 1988, I-11, and the *Workers Compensation Act*, RSPEI 1988, W-7.1, is instructive.

26. The *Island Regulatory and Appeals Commission Act* includes the following provisions:

> *13. Appeal*
> *(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *[...]*
>
> *14. Stated case to the Supreme Court by Commission*
> *(1) The Commission may, of its own motion or upon the application of any party and upon such security being given as the Commission may direct, state a case in writing for the opinion of the Court of Appeal upon any question which in the opinion of the Commission is a question of law.*
>
> *Island Regulatory and Appeals Commission Act,* RSPEI 1988, I-11, at ss. 13(1) and 14(1)

27. Similarly, the *Workers Compensation Act* provides:

> *56.2 Appeal on question of law*
> *(1) Subject to subsection (2), a person directly affected by a final decision of the Appeal Tribunal may appeal the decision to the Court of Appeal on a question of law or jurisdiction.*
>
> *[...]*
>
> *32(4) The Board may of its own motion state a case in writing for the opinion of the Court of Appeal upon any question which in the opinion of the Board is a question of law.*
>
> Workers Compensation Act, RSPEI 1988, W-7.1, at ss. 56.2(1) and 32(4)

28. While both of the above Acts each include provisions which permit the administrative tribunal to state a case to the Court of Appeal to answer a question of law, both Acts also include a provision which permits an appeal from a decision of the tribunal on a question of law.

29. Both of these provisions imply that the Island Regulatory and Appeals Commission and the Workers' Compensation Board have the power/jurisdiction to answer questions of law in the first instance. In *Martin, supra,* with respect to the Nova Scotia *Workers' Compensation Act*, Gonthier J. commented: " *... s. 256(1) allows for an appeal from the Appeals Tribunal to the Nova Scotia Court of Appeal "on any question of law", which suggests that the Appeals Tribunal may deal initially with such questions.*"

> Martin, supra, at para 49

30. A similar provision is missing from the *Human Rights Act*. Instead, that Act provides that a decision of the Panel is final and binding upon the parties. Therefore, there is no implication that the Human Rights Panel can answer questions of law in the first instance.

31. Based on the above, the Respondents repeat this court's finding in *Ayangma 2000:*

> *It is apparent from the HRA the Legislature did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere (complaints regarding contraventions of the HRA) because s.28.3 allows for their referral to the court.*
>
> Ayangma 2000, supra, at para 9

32. Section 28.3 of the *Human Rights Act* has not been amended to provide the Panel with the power to answer questions of law either since this court's finding in *Ayangma 2000*, or in light of the Supreme Court of Canada decisions discussed above.

33. The initial inquiry when a *Charter* remedy is sought from an administrative tribunal begins with whether the tribunal has jurisdiction to decide questions of law. Therefore, because, in our submission, a Human Rights Panel does not have such jurisdiction, we submit that *Ayangma 2000* remains good law.

Issue 2: Do these cases bring the doctrine of abuse of process into play?

34. The Respondents submit that in the present case, the doctrine of abuse of process is not brought into play. This is because, as outlined above, the Respondents submit that the Human Rights Panel does not have the power to address *Charter* claims and remedies. As such, the Human Rights Commission and the Supreme Court (and now Court of Appeal) are exercising different functions and jurisdictions in the present matter.

35. In *Toronto (City) V. CUPEI, Local 79*, 2003 SCC 63, the Supreme Court of Canada described the doctrine of abuse of process as one which engages the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute.

Toronto (City) V. CUPEI, Local 79, 2003 SCC 63, at para 37

36. It is clear that the doctrine of abuse of process is concerned with maintaining the integrity of the judicial process by, for example, preventing the same issue from being litigated in multiple forums.

37. In the present case the Appellant has concurrent proceedings before this court which are both borne out of the same fact scenario, but have proceeded in two separate forums – one through the Supreme Court, and the other through the Human Rights Commission, both of which seek different remedies.

38. The Respondents submit that because the Prince Edward Island Human Rights commission lacks the power and jurisdiction to adjudicate *Charter* claims and award *Charter* remedies, there is no abuse of process when the Appellant in this instance is also seeking *Charter* remedies before the Supreme Court.

39. The Appellant's human rights complaint is focussed on alleged breaches of the *Human Rights Act*, while the Appellant's statement of claim in the present matter is limited to alleged *Charter* infringements.

40. Further, as this court held in *Ayangma 2000*:

> *Any relief awarded the appellant under that legislation would be one of the circumstances the court would have to consider in determining an appropriate and just remedy under 24(1) in the event the Charter claim succeeds. Subsection 24(1) damages ought to be reduced by the amount of any compensation awarded to the appellant under the HRA in respect of the same conduct by the respondents as gives rise to the claim for damages under the Charter.*
>
> *Ayangma 2000, supra,* at para 11

41. Therefore, the process outlined by this court to run these proceedings concurrently has addressed the issue of possible double recovery or inconsistent remedies with respect to the relief which can be obtained by the Appellant, or any claimant pursuing both Human Rights and *Charter* claims and/or remedies.

42. As such, the Respondents submit that while the Appellant's claims arise from the same set of facts, the issues being litigated in the Supreme Court are different from the issues being advanced in the Human Rights forum, where a Human Rights Panel is not a "court of competent jurisdiction".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2019.

ORIGINAL SIGNED BY
JESSICA GILLIS

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Solicitors for the Respondents
French Language School Board and
English Language School Board

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Schedule A

List of Authorities

A. *Ayangma v. Eastern School Board*, 2000 PESCAD 12

B. *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54

C. *R v. Conway*, 2010 SCC 22

D. *Doré v. Barreau de Québec*, 2012 SCC 12

E. *Toronto (City) V. CUPEI, Local 79*, 2003 SCC 63

Schedule B

Text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the Appellant's factum:

***Canadian Charter of Rights and Freedoms*, at s. 24(1)**

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

***Human Rights Act*, RSPEI 1988, H-12 at s. 28.3**

> 28.3 Stated case
> A Human Rights Panel may, at any stage of the proceedings, refer a stated case under the rules of court to the Supreme Court, on any question of law arising in the course of the proceedings, and may adjourn the proceedings until the decision is rendered on the stated case.

***Island Regulatory and Appeals Commission Act*, RSPEI 1988, I-11, at ss. 13(1) and 14(1)**

> 13. Appeal
> (1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.
>
> [...]
>
> 14. Stated case to the Supreme Court by Commission
> (1) The Commission may, of its own motion or upon the application of any party and upon such security being given as the Commission may direct, state a case in writing for the opinion of the Court of Appeal upon any question which in the opinion of the Commission is a question of law.

***Workers Compensation Act*, RSPEI 1988, W-7.1, at ss. 56.2(1) and 32(4)**

56.2 Appeal on question of law
(1) Subject to subsection (2), a person directly affected by a final decision of the Appeal Tribunal may appeal the decision to the Court of Appeal on a question of law or jurisdiction.

[...]

32(4) The Board may of its own motion state a case in writing for the opinion of the Court of Appeal upon any question which in the opinion of the Board is a question of law.

PRINCE EDWARD ISLAND
COURT OF APPEAL

Proceedings commenced at
Charlottetown, PE

SUPPLEMENTARY FACTUM
on behalf of the Respondents
FLSB and ELSB

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Court File No. S1-CA-1408

SUPREME COURT OF PRINCE EDWARD ISLAND

BETWEEN:

NOËL AYANGMA

APPELLANT

AND

THE FRENCH LANGUAGE SCHOOL BOARD
(a.k.a. La Commission scholaire de langue francaise)

RESPONDENT

AND

THE ENGLISH LANGUANGE SCHOOL BOARD

RESPONDENT

AND

THE PRINCE EDWARD ISLAND HUMAN RIGHTS COMMISSION

(PROPOSED) INTERVENOR

INTERVENOR'S FACTUM
Filed on behalf of the Prince Edward Island Human Rights Commission

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PART I – BACKGROUND

1. The matter before this Honourable Court is an Appeal of the decision of the Honourable Justice James W. Gormley in *Ayangma v. FLSB and ELSB*, 2018 PESC 43 ("*Ayangma 2018*"), dated November 16, 2018.

2. In *Ayangma 2018*, Justice Gormley ordered that an Amended Statement of Claim filed by the Appellant Noël Ayangma ("Ayangma") against the Respondents, the French Language School Board and the English Language School Board ("the School Boards"), be struck without leave to amend pursuant to s. 21.01(1)(b) of the *Rules of Court*. In addition to his original Statement of Claim, Ayangma filed separate human rights complaints with the Prince Edward Island Human Rights Commission ("the PEI HRC") against the School Boards. The facts alleged by Ayangma against the School Boards in the human rights complaints were substantially the same as alleged as in Ayangma's civil action(s).

Ayangma v FLSB and ELSB, 2017 PECA 18 at paras. 8 to 10
Ayangma 2018 at paras. 80 to 82

3. In justifying his procedural choice to pursue relief in separate forums on essentially the same claim, Ayangma relies on this Court's decision in *Ayangma v. Eastern School Board*, 2000 PESCAD 12 ("*Ayangma 2000*"). *Ayangma 2000* concluded that the PEI HRC was not a court of competent jurisdiction within the meaning of that phrase as used in s. 24(1) of the *Charter of Rights and Freedoms* ("the *Charter*"). In his human rights complaints, Ayangma was seeking only non-*Charter* remedies, while his civil action claimed relief under the *Charter*.

Ayangma 2018 at para. 83
Ayangma 2000 at para. 9

4. Justice Gormley questioned whether the approach adopted in *Ayangma 2000* was the appropriate procedure to follow in light of more recent jurisprudence, notably the decision of the Supreme Court of Canada in *R. v. Conway*, [2010] SCC 22 ("*Conway*"). In his remarks on this point, Justice Gormley suggested "it appears to be unnecessary for an administrative tribunal and a court to plow the same well tilled ground."

Ayangma 2018 at paras. 84 to 86

5. On February 28, 2019, Justice John K. Mitchell of this Honourable Court wrote to the parties to this Appeal, copying the PEI HRC. Justice Mitchell noted that the holding from *Ayangma 2000* that a Human Rights Tribunal was not a court of competent jurisdiction within the meaning of the phrase as used in s. 24(1) of the *Charter* meant that a person could, on the same set of facts, take an action in the Supreme Court of PEI for a *Charter* remedy and bring the same complaint before a Human Rights Tribunal (Panel) for remedy under the *Human Rights Act*, R.S.P.E.I. 1988. C. H-12 ("the *Act*").

PART II – ISSUES

6. Based on *Ayangma 2000*, two issues have been identified by this Honourable Court:

ISSUE 1: Is *Ayangma v Eastern School*, 2000 PESCAD 12, still good law in light of subsequent Supreme Court of Canada cases such as *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *R. v. Conway*, 2010 SCC 22; and *Doré v. Barreau de Québec*, 2012 SCC 12?

ISSUE 2: Do these cases bring the doctrine of abuse of process into play?

ISSUE 1: Is *Ayangma v Eastern School*, 2000 PESCAD 12, still good law in light of subsequent Supreme Court of Canada cases such as *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *R. v. Conway*, 2010 SCC 22; and *Doré v. Barreau de Québec*, 2012 SCC 12?

7. In *Ayangma 2000*, the PEISCAD was considering whether to reinstate actions commenced by Ayangma claiming various forms of relief under the common law and the *Charter* based on alleged contraventions of both s. 6 of the *Act* (respecting discrimination in the area of employment) and s. 15 of the *Charter*. The motions judge had ruled that Ayangma's actions were foreclosed by the *Act*, or at least that the *Act* provided an effective remedy for all the conduct complained of in the statements of claim.

8. The PEISCAD allowed the appeal in part, reinstating Ayangma's *Charter* actions only. The Court upheld the motions judge's finding that the *Act* foreclosed a civil action based directly on a breach of the *Act* itself. However, Mitchell J.A. was unsatisfied that either the PEI HRC or a Human Rights Panel ("HRP") appointed under the *Act* constituted a "court of

competent jurisdiction" fully capable of adjudicating *Charter* claims and with a mandate to award the full gamut of *Charter* remedies. This finding was based on the jurisprudence of the day, which dictated that a tribunal was a court of competent jurisdiction where its governing statute granted it power over the subject matter, the parties, and the remedy.

Ayangma 2000 at para. 8

9. Next, the Court analyzed the jurisdiction of the PEI HRC and an HRP appointed under the *Act*. It held that only contraventions of the *Act* itself could be adjudicated by the PEI HRC, and that there was "nothing anywhere in the *[Act]* which explicitly or implicitly gives an HRP any authority to deal with a *Charter* violation claim". During this review of the subject matter that may properly come before an HRP, Mitchell J.A. suggested that it was "apparent from the *[Act]*" that the Legislature "did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere", because s. 28.3 of the *Act* permits an HRP to refer a stated case to the Supreme Court on any question of law arising at any point during its proceedings.

Ayangma 2000 at para. 9

10. Finally, the Court analyzed the remedial scheme of the *Act*. While noting that an HRP had considerable remedial powers, the Court found that its authority did not extend to all the potential remedies available to Ayangma under s. 24(1) of the *Charter*.

Ayangma 2000 at para. 10

11. The PEI HRC submits that *Ayangma 2000* must now be reconsidered, to the extent that its findings may be inconsistent with subsequent jurisprudence from the Supreme Court of Canada and the superior courts of Prince Edward Island. Specifically, the PEI HRC submits there are two findings from *Ayangma 2000* to revisit.

12. First, the determination of whether or not a Human Rights Panel (HRP) appointed under the *Act* is a "court of competent jurisdiction" in the *Charter* context should be reappraised, given that *Ayangma 2000* was decided prior to the Supreme Court of Canada decisions in *Martin*, *Conway*, and *Doré*. These cases reshaped the test for determining whether or not an administrative tribunal constitutes a "court of competent jurisdiction", and elaborated on the analysis of questions relating to the applicability of *Charter* remedies, and *Charter* values.

13. Because the Supreme Court has changed the test, this Honourable Court should, whenever given the opportunity in appropriate proceedings, conduct a new analysis to determine whether the PEI HRC – and specifically an HRP empaneled under the *Act* – constitutes a "court of competent jurisdiction" for the purposes of s. 24(1) of the *Charter*.

14. Second, Mitchell J.A.'s statement that the Legislature does not "rely" on an HRP to decide questions of law, even in respect of those matters clearly coming within its sphere is controversial. He bases his reasoning around s. 28.3 of the *Act*, which permits – but, the PEI HRC submits, does not *require* – an HRP to refer a stated case to the Supreme Court at any stage of the proceedings on any question of law arising in the course of the proceedings.

Ayangma 2000 at para. 9

15. Respectfully, the PEI HRC submits that the inference drawn by some parties to this Appeal from this statement in *Ayangma 2000* – that the *Act* does not permit an HRP to decide **any** questions of law – is incorrect, and has not been followed in the province of Prince Edward Island. The PEI HRC submits that such a finding would significantly impact the operations of the PEI HRC, and would raise an issue of general legal importance for the administration and adjudication of human rights complaints in the province. Stripping an HRP of the ability to decide any question of law arising in the course of its proceedings would defeat the very purpose of having a specialized tribunal to deal with cases involving discrimination under the *Act*. Additional submissions on this issue will follow in Part III.

16. Otherwise, the PEI HRC submits that *Ayangma 2000* is still good law. These include the Court's findings that the *Act* does not allow a complainant to bring a *Charter* violation "claim" (i.e. a civil action based on issues other than those covered by the *Act*) before the PEI HRC, and that the remedial powers of the *Act* are limited in scope. Because the available remedies under the *Act* may offer inadequate relief in a given circumstance, the PEI HRC submits that *Ayangma 2000* is correct in finding that multiple proceedings in separate venues on significantly similar facts may be permissible in the best interests of justice.

The *Martin* test

17. Subsequent to *Ayangma 2000*, the Supreme Court of Canada reappraised the case law concerning the jurisdiction of administrative tribunals.

18. Beginning with Gonthier J.'s 2003 decision in *Martin*, a new test was established to determine whether an administrative tribunal constituted a "court of competent jurisdiction" for the purposes of applying s. 24(1) of the *Charter*. Continuing in *Conway* and *Doré*, the SCC further developed the analysis surrounding the availability of *Charter* remedies before an administrative tribunal, and the framework to be applied in reviewing administrative decisions for compliance with *Charter* values. As the PEI HRC's interest in this Appeal is only concerned with the analysis performed under the *Martin* test, we do not intend to make detailed submissions on *Conway* or *Doré*.

19. In *Martin*, the Court created a general standard to provide a single set of rules concerning the jurisdiction of administrative tribunals to consider *Charter* challenges to a legislative provision. This approach built upon earlier guiding principles, including that jurisdiction must in every case "be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought", and that "an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid".

Martin at paras. 33-34

20. Under the *Martin* test, the first question to ask is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law, arising under a particular challenged provision.

Martin at paras. 36-37

21. The statutory authority to decide questions of law may be explicit or implicit. If the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. If there is no explicit grant, you must consider whether the legislature intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision.

> Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot

> override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate.

Martin at paras. 40-41

22. *Martin* also affirms that administrative bodies that have the power to decide questions of law may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard

Martin at para. 45

23. If a tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*.

Martin at paras. 41, 48

24. The PEI HRC submits that when the *Martin* analysis is undertaken with regards to the *Act* the test is successfully met up to this step. Specifically, the PEI HRC submits that there is implied jurisdiction within the *Act* sufficient to establish that an HRP can decide questions of law, and thus presumptively an HRP can decide *Charter* questions. More substantive discussion on this issue follows at Part III of this Intervenor's Factum.

25. Once established, the presumption of a tribunal's jurisdiction to determine the constitutional validity of a statutory provision may still be rebutted. The onus of doing so is with the party who alleges the tribunal in question lacks jurisdiction to apply the *Charter*. *Martin* sets out how this presumption may be rebutted:

> ... In general terms, the presumption may only be rebutted by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations. The question to be asked is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended to exclude the *Charter*, or more broadly, a category of questions of law encompassing the *Charter*, from the scope of the questions of law to be addressed by the tribunal. For instance, an express conferral of jurisdiction to another administrative body to consider *Charter* issues or certain complex questions of law deemed too difficult or time-consuming for the initial decision maker, along with a procedure allowing such issues to be efficiently redirected to such body,

could give rise to a clear implication that the initial decision maker was not intended to decide constitutional questions.

Martin at para. 42

26. As the PEI HRC is not participating in this Appeal as a party, and takes no position on the issues on this Appeal other than those arising from Justice Mitchell's letter, the PEI HRC declines to make submissions on whether the presumption that an HRP can decide *Charter* questions ought to be rebutted based upon the facts of the present case.

ISSUE 2: Do these cases bring the doctrine of abuse of process into play?

27. As was the case in *Ayangma 2000*, Ayangma is pursuing redress from the School Boards in separate forums based on essentially the same facts. In his human rights complaints, Ayangma seeks remedies under the *Act*, while in his civil action he seeks other remedies, including relief under the *Charter*.

28. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 ("*Toronto v. C.U.P.E.*"), the Supreme Court of Canada discussed the doctrine of abuse of process in the context of an attempt to relitigate issues within a labour arbitration that had been fully determined in the context of criminal proceedings. The doctrine of abuse of process allows the court to prevent the misuse of its procedure where allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

29. Overall, the doctrine of abuse of process focuses on the integrity of the adjudicative process:

> [51] ... Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> ...

> [53] The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, supra, at para. 51; *Franco*, supra, at para. 55).

Toronto v. C.U.P.E. at paras. 51 and 53

30. As the PEI HRC is not participating as a party to this appeal, we decline to make submissions on whether or not the doctrine of abuse of process applies to the facts on this particular Appeal. However, the PEI HRC submits that certain findings from *Ayangma 2000* remain good law in the wake of *Martin*, *Conway*, and *Doré*.

31. *Conway* sets out the test as to whether or not an administrative tribunal can award *Charter* remedies. The first question is whether the tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* – and *Charter* remedies – when resolving the matters properly before it.

Conway at para. 81

32. Once the jurisdiction threshold is met, the remaining inquiry is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme:

> Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function

Conway at para. 82

33. The PEI HRC submits that little has changed with respect to the remedial powers of an HRP since *Ayangma 2000*. An HRP has broad remedial powers to place a complainant back into the position they would have been but for a contravention of the *Act*, including the power to award costs. However, the *Act* still limits an HRP from awarding compensation for wages, or lost income, or expenses incurred prior to one year before the date of the discriminatory act on which a complaint is based. Likewise, no provisions have been added to the *Act* that would allow an HRP to make an award for punitive or exemplary damages.

Ayangma 2000 at para. 10

Act at s. 28.4(1)(b), s. 28.4(6), and s. 28.6

PART III – ADDITIONAL ISSUES

34. *Ayangma 2000* gives rises to another issue of importance to the PEI HRC, and of general concern to the administration and adjudication of human rights complaints in the province of Prince Edward Island.

ISSUE 3: Does a Human Rights Panel have jurisdiction to answer questions of law?

35. In their facta, the Respondents on this Appeal stated that the reasoning from *Ayangma 2000* establishes that an HRP does not have jurisdiction to answer questions of law. With respect, the PEI HRC submits that submission is incorrect.

36. The PEI HRC submits that an HRP is a court of competent jurisdiction to decide questions of law, where that question of law arises within the context of a complaint that is properly within the jurisdiction of the *Act*. Upon a full review of the *Act*, there is implicit authority that an HRP can make decisions on questions of law. Indeed, in order to effectively perform its adjudicative functions under the *Act*, the PEI HRC submits an HRP must be permitted to make findings on some questions of law.

37. If the PEI HRC is correct that an HRP is able to make findings on questions of law, we submit that the first step of the *Martin* test is met. If so, a rebuttable presumption exists that an HRP is a court of competent jurisdiction within the meaning of s. 24(1) of the *Charter*.

38. The decisions an HRP makes on questions of law are subject to judicial review, either on a correctness or reasonableness standard. To determine which standard of review applies, a Court applies the analytical framework initially set out in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 ("*Dunsmuir*"), and as shaped by more recent cases.

Overview of the *Act*

39. This Honourable Court conducted a statutory interpretation of the *Act* in the case of *P.E.I. Music v. Gov't. P.E.I. & HRC*, 2011 PECA 18 ("*P.E.I. Music*"). The Court highlighted various key principles of statutory interpretation. These included the direction from s. 9 of

the *Interpretation Act*, R.S.P.E.I. 1988, c. I-8 that statutes are to be construed as being remedial, and are to be given such fair, large and liberal construction and interpretation as best assures the attainment of its objects. In addition, the Court cited the cardinal principle that a legislative provision should be construed in a way that best furthers its object, and also that the whole *Act* is to be considered in the interpretation of a particular section. The provisions of an act should work together to give effect to a coherent plan.

P.E.I. Music at paras. 20-22

40. Fundamentally, the *Act* is an anti-discrimination statute. The *Act*'s Preamble is of value in explaining its purport and object. The Preamble notes, in part, that the purpose of the *Act* is to promote equality and dignity in human rights by prohibiting discrimination based on an enumerated list of protected grounds: age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income. These fifteen protected grounds are repeated in the *Act*'s definition of "discrimination" at s. 1(d).

Interpretation Act at s. 10

Act at Preamble and s. 1(d)

41. Part I of the *Act* (Sections 2 through 15.1) establishes the prohibitions against discrimination. The *Act* prohibits discrimination in a multitude of areas: accommodation, services and facilities to which members of the public have access (s. 2); occupancy rights (s. 3); property sales (s. 4); restrictive covenants attached to real property (s. 5); employment (s. 6); pay (s. 7); membership in employees' organizations (s. 8); membership in business, professional or trade associations (s. 9); volunteering (s. 10); and advertising (s. 12). Discrimination based on factors outside of the primary protected grounds is prohibited in limited circumstances: criminal conviction in the context of employment (s. 6); by association in relation to another individual having a protected characteristic (s. 13); and by means of repudiation for making a complaint, giving evidence, or assisting in a proceeding under the *Act* (s. 15).

42. Part II of the *Act* (Sections 16 through 21) establishes the PEI HRC. Section 18(a) fully bestows authority in the Commission for the administration and enforcement of the legislation.

43. Part III of the *Act* (the remaining provisions) deals with its administration. This Part includes provisions governing the complaint process under the *Act*, and establishing the HRP as the forum where complaints having merit are ultimately adjudicated. The Executive Director of the PEI HRC has an investigative function and is granted certain statutory powers thereunder, including the authority to dismiss a complaint as being without merit (s. 22(4)(a)).

44. Sections 26 through 28.8 of the *Act* govern the conduct of complaint proceedings before an HRP, including certain procedural provisions, rules regarding evidence, and setting out the powers of the HRP including what remedies an HRP may order. Section 28.8 is a privative clause, which, while not determinative of the Panel's powers, is a statutory direction from the legislature indicating that decisions of an HRP are entitled to deference.

Deciding questions of law

45. There is something the *Act* does not provide. It does not offer the PEI HRC, or an HRP, guidance as to exactly what will constitute discrimination in any given area. The general definition of "discrimination" provided at s. 1(d) of the *Act* is only a restatement of the protected grounds as set out in the *Act*'s Preamble. There are also no specific definitions or tests for discrimination within any sections of the statute that prohibit discrimination in a particular area.

Act at Preamble and s. 1(d)

46. Thus, the PEI HRC submits that every HRP must answer several key questions of law, namely: 1) "what is discrimination?" (alternately phrased as "discrimination defined"), and 2) "what are the elements of a *prima facie* case of discrimination".

47. The PEI HRC also submits that jurisprudence in Prince Edward Island supports the view that an HRP is permitted to decide questions of law, within the Commission's area of expertise of human rights law and discrimination, as well as on general legal matters outside that specialization. Since *Ayangma 2000*, this Honourable Court and the Supreme Court of Prince Edward Island have repeatedly recognized the Commission's authority to decide questions of law, though always subject to judicial review.

48. Recently, in King v. Govt. of P.E.I. et al, 2018 PECA 3 ("King"), Jenkins C.J.P.E.I. acknowledged that an HRP can address the questions of "discrimination defined" and "elements of a *prima facie* case of discrimination". The HRP in *King* decided these among multiple questions of general importance to the legal system it also addressed:

> [39] In *Mowat* the issue at hand was whether the human rights tribunal could award costs, and the Supreme Court found that deference should be accorded on that kind of home statute question. In the present case, I agree with the reviewing judge that reasonableness is the standard of review applicable to the exercise that she performed, which was mostly a fact-based review of the Panel decision. However, the Panel decision also addressed larger questions that engage important questions of law of general importance to the legal system and are beyond the particular expertise of the Panel – including discrimination prohibited; discrimination defined; disabilities defined; comparator analysis; elements of a *prima facie* case of discrimination; legal content of reasonable explanation. Regarding those kinds of questions of law, *Mowat* points to the applicable standard of review being correctness.

King at para 39

49. *King* also endorsed the standard of review analysis conducted by the judge on judicial review of an HRP's decision in Ayangma v. HRC & Canada Health Infoway, 2013 PESC 7 ("*Canada Health Infoway*"):

> [17] In a review on a correctness standard, the Court will show no deference to the adjudicative tribunal but rather will undertake its own analysis. If the Court disagrees with the tribunal's analysis the Court will substitute its opinion for that of the tribunal (*Dunsmuir*, para. 50).
>
> [18] Where the question is one of fact, discretion or policy, deference will usually automatically apply. The same standard applies to the review of questions where the legal and factual issues are intertwined and cannot be readily separated. Deference will usually result where the tribunal is interpreting its own statute or statutes closely connected to its function and with which it has a particular familiarity. Deference may also be warranted where the administrative tribunal has developed a particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, paras. 53 and 54).
>
> [19] The correctness standard applies to constitutional questions, questions of jurisdiction or *vires* and questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

Canada Health Infoway at paras. 17-19

50. The Courts of Prince Edward Island have recognized that the PEI HRC is "an institution of long standing in this province with expertise in matters involving human rights law". The recent Supreme Court of Canada case of *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 reminds us that the general approach to reviewing the decisions of human rights tribunals is that of deference, including with respect to the tribunal's execution of its task to interpret its home statute – meaning questions of law arising within the specialization of the tribunal – in a way that makes "legal and practical sense".

Cairns v. PEIHRC and Eastern School District, 2017 PECA 16 at para 24

Stewart v. Elk Valley Coal Corp. at para 20

51. Arguably, PEI jurisprudence has even extended the authority to decide questions of law to decisions made by the Executive Director of the PEI HRC at the investigative stage.

52. The PEI HRC is currently a party to a separate Appeal scheduled before this Honourable Court (S1-CA-1413). Ayangma and the English Language School Board are also parties to that Appeal. When that matter was heard on judicial review, all parties agreed that the Executive Director and Chairperson of the Commission made decisions on questions of law, including "elements of a *prima facie* case of discrimination".

53. While the parties have differing positions on the correctness of the decisions made by the Executive Director and Chairperson in S1-CA-1413, their jurisdiction to make those decisions was never challenged. Indeed, authority for the Executive Director's to decide that particular question of law, in the context of deciding whether to dismiss at complaint at the investigative stage, dates back to this Honourable Court's decision in *Ayangma v. The French School Board*, 2002 PESCAD 5 ("*Ayangma 2002*").

Ayangma 2002 at paras. 37-41

Act at s. 22(4)(a)

Additional "implied" authority within the *Act*

54. The PEI HRC submits that various other provisions within the *Act* may be read as creating an implication that an HRP can decide questions of law. A conclusion to the contrary would be inconsistent with a separate finding from *Ayangma 2000*: that civil actions based on

contraventions of the *Act* are precluded by the establishment of the PEI HRC and its HRP process as the scheme for resolving human rights complaints in the province.

55. Section 1(2) of the *Act* establishes that the *Act* prevails over all other laws in the province, and states that all such laws shall be read pursuant to the *Act*. By implication, the PEI HRC submits that an HRP may be called upon to "read" other laws within complaint proceedings under the *Act*, to consider how those laws apply to a given fact situation, and to assess any potential discrimination flowing therefrom.

Act at s. 1(2)

56. A subsequent section in the *Act* – s. 2(2) – supports this view that a multi-statute interpretive exercise may arise in complaint proceedings. Section 2(2) contemplates this by exempting age discrimination in the protected area of "accommodation, services or facilities", where a denial or refusal of service is due to an enactment in force in the province. By implication, the PEI HRC submits that some legal analysis of the enactment being challenged may be necessary by an HRP in order to apply this provision of the statute.

Act at s. 2(2)

57. Similar to the tribunal under examination in *Martin*, an HRP appointed under the *Act* is adjudicative in nature. An HRP has the authority to receive evidence in any manner it sees as appropriate, and it is not bound by the rules of law respecting evidence in civil proceedings (s. 28.2(2)). An HRP (and every member thereof) has the powers of a commissioner under the *Public Inquiries Act* (s. 26(5)). Those powers include the authority to issue a summons or subpoena compelling any person to appear as a witness before the HRP, or to provide any documents as directed by the HRP, and the ability to enforce the attendance of witnesses and to compel them to give evidence as is vested in any civil court.

Act at s. 26(5) and s. 28.2(2)

Public Inquiries Act, R.S.P.E.I 1988, c. P-31 at s. 3 and s. 4

58. The Commission does not agree with the Respondent School Boards in their analysis of s. 28.3 of the *Act*, which adopts the reasoning of Mitchell J.A. from *Ayangma 2000*. The *Act*'s provision on referring a stated case to the court is permissive, not mandatory. Section

28.3 does not "expressly confer" jurisdiction on any given question to the Court, it merely provides a mechanism whereby an HRP may elect to seek guidance from the Court. This section of the *Act* is nothing more than an acknowledgement that a specialized tribunal such as an HRP is not a Court with inherent jurisdiction to decide all questions of law.

Act at s. 28.3

59. The PEI HRC submits that inferring an HRP has no power to decide questions of law from the reasoning in *Ayangma 2000* would defeat the purpose of having a specialized tribunal to deal with complaints of discrimination under the *Act*. If an HRP was required to seek assistance from the Court every time a question of law arose at a hearing before it, efficient adjudication of complaints under the *Act* would be impossible. Prince Edward Island jurisprudence clearly shows that HRPs are permitted to answer questions of law; the matter for the Court to consider in relation to an HRP's decisions on question of law is whether to apply the correctness or reasonableness standard in judicial review proceedings. In all such instances the *Dunsmuir* approach, as shaped by subsequent jurisprudence, shall apply.

Conclusion

60. In consideration of all the foregoing, the PEI HRC submits that an HRP has implied statutory authority to decide questions of law in the course of adjudicating complaints under the *Act*. The PEI HRC further submits that Prince Edward Island jurisprudence since *Ayangma 2000* supports such a finding by this Honourable Court.

PART IV – RELIEF SOUGHT

61. The Commission leaves the disposition of all issues on this Appeal to the discretion of this Honourable Court.

62. The Commission does not seek costs in relation to this Appeal.

All of which is respectfully submitted this 17th day of June, 2019.

Original filed copy signed by Jonathan B. Greenan

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PEI Human Rights Commission

SCHEDULE A – LIST OF AUTHORITIES REFERENCED

Ayangma v. Eastern School Board, 2000 PESCAD 12

Ayangma v. The French School Board, 2002 PESCAD 5

Ayangma v. HRC & Canada Health Infoway, 2013 PESC 7

Ayangma v FLSB and ELSB, 2017 PECA 18

Ayangma v. FLSB and ELSB, 2018 PESC 43

Cairns v. PEIHRC and Eastern School District, 2017 PECA 16

Doré v. Barreau de Québec, 2012 SCC 12

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9

King v. Govt. of P.E.I. et al, 2018 PECA 3

Nova Scotia (Workers' Compensation Board) v. Martin, 2003 SCC 54

P.E.I. Music v. Gov't. P.E.I. & HRC, 2011 PECA 18

R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765

Stewart v. Elk Valley Coal Corp., 2017 SCC 30

SCHEDULE B – TEXT OF STATUTES INCLUDED IN THE INTERVENOR'S FACTUM

Human Rights Act[1], R.S.P.E.I. 1988, c. H-12

PREAMBLE

...

AND WHEREAS it is recognized in Prince Edward Island as a fundamental principle that all persons are equal in dignity and human rights without regard to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income;

...

AND WHEREAS it is deemed desirable to provide for the people of the province a Human Rights Commission to which complaints relating to discrimination may be made:

1. Definitions

(1) In this Act

> (d) **"discrimination"** means discrimination in relation to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals;

Construction of Act

1. (2) This Act shall be deemed to prevail over all other laws of this province and such laws shall be read as being subject to this Act.

Application

2. (2) Subsection (1) does not prevent the denial or refusal of accommodation, services or facilities to a person on the basis of age if the accommodation, services or facilities are not available to that person by virtue of any enactment in force in the province.

18. Powers and duties of Commission

The Commission shall

> (a) administer and enforce this Act

If complaint without merit

22. (4) Notwithstanding subsection (3), the Executive Director may, at any time, (a) dismiss a complaint if the Executive Director considers that the complaint is without merit

Powers under *Public Inquiries Act*

26. (5) A Human Rights Panel and each member has all the powers of a commissioner under the *Public Inquiries Act*, R.S.P.E.I. 1988, Cap. P-31.

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[1] While this Intervenor's Factum includes a general overview of the entire *Human Rights Act*, only those sections of the *Act* referenced within argument outside of that overview are reproduced in full in this Appendix B. The full *Act* is available via hyperlink.

Human Rights Act, R.S.P.E.I. 1988, c. H-12 (continued)

Evidence
28.2 (2) Evidence may be given before a Human Rights Panel in any manner that the Panel considers appropriate, and the Panel is not bound by the rules of law respecting evidence in civil proceedings.

28.3 Stated case
A Human Rights Panel may, at any stage of the proceedings, refer a stated case under the rules of court to the Supreme Court, on any question of law arising in the course of the proceedings, and may adjourn the proceedings until the decision is rendered on the stated case.

28.4 Powers of Panel
(1) A Human Rights Panel

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in future from committing the same or any similar contravention;

(iii) to make available to the complainant or other person dealt with contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;

(iv) to compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention.

Costs
28.4 (6) A Human Rights Panel may make any order as to costs that it considers appropriate.

28.6 Settlement not more than one year prior to discriminatory act
Subject to subsection 28.4(2), no settlement effected pursuant to this Act and no order made by a Human Rights Panel may compensate a person for wages or income lost or expenses incurred prior to one year before the date of the discriminatory act on which the person's complaint is based.

28.8 Decision final and binding
A decision of a Human Rights Panel is final and binding upon the parties.

Interpretation Act, R.S.P.E.I. 1988, c. I-8

9. Enactments remedial
Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

10. Preambles part of enactments
The title and preamble of an enactment shall be construed as part thereof intended to assist in explaining its purport and object.

Public Inquiries Act, R.S.P.E.I 1988, c. P-31

3. Powers of commissioners
The commissioner may summon before him any witnesses, and may for that purpose under his hand issue a subpoena requiring and commanding the person therein named to appear at the time and place mentioned therein to testify to all matters within his knowledge relative to the subject matter of the investigation, and to bring with him and produce any document, book or paper, which he has in his possession or under his control relative to any such matter as aforesaid; and any such person may be summoned from any part of this province by virtue of the subpoena.

4. Enforcing attendance and compelling witnesses
The commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Enforcement of guaranteed rights and freedoms
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

PRINCE EDWARD ISLAND
COURT OF APPEAL

Proceeding commenced at
Charlottetown, PE

FACTUM

**filed on behalf of the
(proposed) Intervenor**

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