PROVINCE OF NEW BRUNSWICK

New Nouveau Brunswick

Labour and Employment Board

HR-007-06

IN THE MATTER OF THE *HUMAN RIGHTS ACT,* R.S.N.B., 1973, c. H-11

AND IN THE MATTER OF A COMPLAINT PURSUANT TO SECTION 3 OF THE *ACT*

BETWEEN:

Warren McConnell

Complainant

- and -

New Brunswick Human Rights Commission

Commission

- and -

Brunswick News Inc.

Respondent

PRELIMINARY RULING ON DELAY

BEFORE: G.L. Bladon, Vice-Chairperson

APPEARANCES:

For the Human Rights Commission:	*Chantal L. Gauthier, Esqe.*
For the Complainant:	*Tricia Gallant-LeBlanc, Esqe.*
For the Respondent:	*Kelly VanBuskirk, Esq.* and *Natalie L. Godbout, Esqe.*

DATES OF HEARING: February 28, March 28, April 18, 2008

DATE: May 21, 2008

1. The Respondent asks this Board to stay the Human Rights Complaint filed by Warren McConnell for delay.

FACTS

The Complaint – December 3, 2002

2. On December 3, 2002, McConnell filed a complaint under the *Human Rights Act* (the *Act*) alleging that he had been discriminated against under the *Act* as the termination of his employment was "based solely on my mental disability – severe depression." More particularly he alleged that the employer failed to accommodate his disability upon his return from sick leave in April of 1998 and again in October of 2001, ultimately leading to his termination on June 2, 2002.

The processing of the Complaint

3. The respondent was not served with the complaint until December, 2003 – the precise date of service is unclear. This delay of 12 months is the first in a series of delays which the respondent says, taken together, amount to an abuse of process justifying a stay of the proceedings.

4. Under the *New Brunswick Human Rights Act*, the Human Rights Commission is under an obligation, upon receipt of a complaint, to "inquire into" the complaint – the investigation stage, and "endeavour to effect a settlement of the matter complained of" – the mediation stage [section 18(1)]. If the Commission is unable "to effect settlement", the complaint may be referred to the Labour and Employment Board as a Board of Inquiry [section 20(1)]. The Board, upon conclusion of an inquiry, may dismiss the complaint, or if it finds a violation of the *Human Rights Act* has occurred, it may fashion the appropriate remedy within section 20(6) of the *Act* including reinstatement, compensation for consequent financial loss and compensation for "emotional suffering including injury to dignity, feelings or self respect" in such amount as a Board considers just and appropriate.

(i) The investigation stage: December 3, 2002 – March 9, 2004 (15 months)

5. The affidavit of Susan Butterfield, the Director of the Human Rights Commission, filed in opposition to this motion indicates that upon receipt of the complaint on December 3, 2002, a conflict of interest was perceived between the then Director of the Commission and the Complainant as they were related by marriage. The Commission therefore decided to retain an "outside" investigator on February 26, 2003. On March 7, 2003, a letter went forward from in-house counsel retaining a local solicitor to investigate the complaint. On June 12, 2003, the investigator wrote to the respondent advising that he was inquiring into McConnell's complaint against the respondent under the *Human Rights Act* alleging "discrimination on the basis of a physical or mental infirmity".

6. Despite letters to the investigator from the Commission on June 24 and August 25, 2003 together with unanswered voice mail messages, the investigation appeared to have stalled such that the Commission requested the return of the file from the investigator on September 10, 2003. "At least" three attempts were made to retrieve the file. On December 19, 2003, a second investigator was retained. The investigator wrote to counsel for the respondent on December 22, 2003, requesting a response to the complaint by January 13, 2004, which, at the request of the respondent's solicitor, was extended to January 30, 2004. The response was received by the investigator on January 29, 2004. An interview of the respondent by the investigator was arranged for February 23, 2004. Following that interview (of counsel for the respondent in substitution for a representative of the respondent), the investigator submitted his report on March 9, 2004.

(ii) The Mediation Stage: April 22, 2004 – March 21, 2005 (11 months)

7. On April 22, 2004, the Commission met and decided to refer the complaint to mediation. The Commission's mediation counsel, according to Butterfield's affidavit, "tried to conciliate the matter by way of letters, e-mails and telephone conversations with counsel for the parties" between June 2004 and December 2004 without success. On January 20, 2005, the parties agreed

to meet face to face for a mediation session on March 21, 2005. The meeting transpired, but the mediation attempt failed.

(iii) The pre-referral stage: March 2005 – March 17, 2006 (12 months)

8. The affidavit of Jamie Eddy, co-counsel for the complainant, reveals a request from the Commission to gather medical information in support of the complaint in March of 2005. On March 21, 2005, Mr. Eddy's office wrote three medical professionals (including Wendy Rogers, a clinical psychologist) enclosing a release executed by the complainant requesting detailed information and a report. Voice mail messages from Dr. Rogers were left with Mr. Eddy's office on May 9, 2005, August 18, 2005, October 12, 2005 and February 28, 2006 promising a report which appears to have been delivered about March 1, 2006. On March 17, 2006, the medical documentation was forwarded to the Commission.

(iv) March 17, 2006 – August 30, 2006 (4.5 months)

9. During this period the Commission presumably reviewed the file and on July 11, 2006 adopted a motion to refer the matter to a Board of Inquiry. The formal request for the appointment of a Board under section 20(1)(b) of the *Act* went forward from the Commission on July 19, 2006. The matter was referred to the Labour and Employment Board by the Minister of Post-Secondary Education and Training on July 31, 2006. The Board received the file on August 23, 2006. The Board communicated with the parties for the first time on August 30, 2006.

(v) The pre-hearing process: Disclosure of Documents – August 30, 2006 – November 28, 2006 (3 months)

10. The Board scheduled a conference call among the three parties for October 2, 2006. In advance thereof, counsel for the respondent faxed counsel for the complainant on September 22, 2006 requesting disclosure of all documents upon which the complainant intended to rely at the hearing. The pre-hearing conference call resulted in an agreed schedule for production of documents to be completed by October 31, 2006. During that conference call, counsel for the

respondent did not "raise any issues with respect to delay", but he did indicate that the respondent may need "to retain independent medical information to respond to the medical information to be used by the Commission and the complainant." This decision was to be taken by the respondent by November 15, 2006. The complainant and the Commission provided the list of its documents and copies of a medical report from Dr. Rogers, Dr. Thorpe's chart and a psychiatric assessment by Dr. Ruben on October 13, 2006. The respondent provided its list of documents on November 28, 2006.

(vi) Further medical production: November 29, 2006 – February 28, 2008 (15 months)

11. On November 29, 2006, counsel for the complainant received a request from the respondent for the following medical materials:

> "1. Copies of all discharge summaries from the Dr. Everett Chalmers Hospital, or any other hospital where Mr. McConnell received inpatient treatment. On that note, Dr. Ruben's report refers to numerous discharge summaries, yet only one (July 2000) is included in the material;
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> 2. Copies of the complete hospital inpatient record for Mr. McConnell, including all interdisciplinary notes by medical personnel such as psychiatrists, nurses, psychologists, social workers and others;
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> 3. Copies of all consultation reports from specialists, including the report from Dr. Addleman to Dr. Ifabumuyi, dated February 4th, 2000;
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> 4. Copies of all psychological reports and correspondence from Mr. McConnell's attending psychologist, Dr. Wendy Rogers;
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> 5. A copy of the letter to Dr. Wendy Rogers from Mr. VanSlyke, Community Mental Health Centre, Fredericton, NB (November 27th, 2000); and

6. All counselling notes, records related to Mr. McConnell, including records relating to his marriage counselling and day therapy sessions, as well as his counselling with Dr. Wendy Rogers."

The complainant's counsel sought direction from the Board and a conference call was scheduled for December 21, 2006. Production of further medical information was requested of the complainant and the respondent was asked in the conference call to provide all documentation in its possession relating to the complainant.

12. During the next seven months there were written and voice-mail exchanges between counsel for the parties relating to the production arranged on December 21, 2006. On July 5, 2007, counsel for the respondent confirmed to complainant's counsel that it had disclosed all of its documentation. On July 12, 2007, counsel for the complainant forwarded its further medical information to the respondent.

13. On July 20, 2007, counsel for the respondent requested Dr. Rogers' "session notes and other raw data" from the complainant. Dr. Rogers' reluctance to produce this information was known to the parties and counsel for the complainant invited counsel for the respondent to issue a summons to compel the production of the material from Dr. Rogers on August 15, 2007. On the same date and again on September 14, 2007, counsel for the complainant wrote to the Board with copies to the respondent requesting a hearing date in January of 2008. Following a further pre-hearing conference call on October 26, 2007, counsel for the respondent requested a summons be issued for Dr. Rogers to compel release of "all file notes, interview notes, correspondence, reports, test results, charts and any other documents of any nature or kind whether in electronic or other format". On the same date, the Board scheduled the hearing of the complaint to commence on February 25, 2008 and continue during the course of that week. Despite being served with a summons, Dr. Rogers refused to produce her raw data and session notes to counsel which the respondent required in order to assess the need for an independent medical examination. Dr. Rogers attended before the Board on February 25, 2008 and produced the material requested. The Board ordered a release of the materials to the respondent on March 27, 2008, subject to the outcome of this Application for a stay of the proceedings.

14. In support of this motion, the respondent filed an affidavit alleging prejudice from delay as a number of potential witnesses are no longer in the employ of the respondent and, in some cases, their whereabouts are unknown.

ANALYSIS

15. The jurisdiction of this Board to stay proceedings because of pre-hearing delay is well settled. The Board must have the capacity to protect itself from litigants who use its process improperly: see *Gagné v. Canada Post Corporation*, [2007] C.H.R.T. 18 at para. 8.

16. It is equally well settled that the public decision maker, *i.e.* the NB Human Rights Commission, must meet a general duty of fairness and conduct itself in a manner consistent with the principles of natural justice and procedural fairness. The consequences of delay in this context are examined extensively by Bastarache J. in *Blencoe v. BC* (*Human Rights Commission*), [2000] 2 S.C.R. 307. The essence of his decision is summarized in the head note which reads:

> "There are remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. *There must be proof of significant prejudice which results from an unacceptable delay*. Here, the respondent's ability to have a fair hearing has not been compromised. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. Unacceptable delay may also amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. *Where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. A court must be satisfied that the proceedings are contrary to the interests of justice*. There may also be abuse of process where conduct is oppressive. A stay is not the only remedy available for abuse of process in administrative law proceedings and a respondent asking for a stay bears a heavy burden." [Emphasis added]

1. Prejudicial Delay

17. The only evidence of delay that impacts on the fairness of the hearing is found in the affidavit of Shelley Wood, filed on behalf of the respondent. It identifies three potential witnesses, the whereabouts of two of whom are unknown. Certainly the former publisher of the respondent newspaper, Rick Smith, would by virtue of his position appear to have pertinent evidence to offer. Similarly Michelle Foster-Manning, who was involved in supervising McConnell on his return to work in 2002, would seem to have relevant evidence. The affidavit, however, does not detail the evidence they might offer nor does it indicate what, if any, efforts have been made to locate these potential witnesses. With the technology available in 2008, a statement that the whereabouts of a witness is unknown cannot lead to an inference that the evidence of that witness is lost. John Hammill, who supervised McConnell in 2002 and is expected to have meaningful evidence, has also ceased his employment with the respondent but he is available although he currently resides in Ontario. In my view the evidence of prejudice falls far short of meeting the burden faced by a respondent seeking to terminate the hearing of a Human Rights complaint. And in particular, the words of the tribunal in *Gagné v. Canada Ross Corp*., [2007] C.H.R.T. 18 at para. 11 are appropriate:

> "In any event, I am not of the view that merely because potential witnesses have retired and perhaps moved away from their original place of employment, they will inevitably be untraceable and therefore, unavailable for a hearing. While trying to find these witnesses may pose a challenge, it is not necessarily an impossible task, and it is in my view not sufficient cause to conclude at this early stage that a respondent's ability to answer the complaint is so impaired as to justify the Tribunals' refusing to conduct a hearing into the complaint.
>
> Nor is there any indication at this stage that the witnesses' memories have necessarily "faded" in this case. It should be noted that the bulk of the incidents alleged in the complaint occurred between 1996 and 2000, i.e. between eleven and seven years ago. This would not be the first case before the Tribunal to have received testimony regarding incidents that date back a similar length of time."

2. Delay *per se*

18. Under this heading the respondent bears the "heavy burden to satisfy the court that the damage to the public interest in the fairness of the administrative process should the proceeding

go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" – *Blencoe v. B.C.* (*Human Rights Commission*), [2000] SCJ No 43 at para. 120, *i.e.*, the respondent must demonstrate that the administration of justice would be best served by staying the proceedings.

19. Looking at the process from the respondent's perspective: the respondent was advised of the complaint on June 12, 2003 – six months after it was filed and six months prior to the expiration of the one-year limitation period contained within section 17.1(1) of the *Act*. It would appear, however, that the complaint itself was not provided to the respondent until December 22, 2003 – some six months later. The respondent was then actively engaged in the investigation stage through March 9, 2004. Following a delay of three months, the mediation process began in June of 2004 involving the respondent until it terminated in failure on March 21, 2005 – some nine months later. From the material filed, it appears that there was no contact with the respondent from March 21, 2005 until July 18, 2006 when the decision was taken to refer the matter to a Board of Inquiry, a period of 16 months. During this time, counsel for the complainant was actively attempting to gather supporting medical information. This Board received the referral from the Minister on August 23, 2006. On August 30, 2006 it corresponded with the respondent for the first time. From that date to this, the respondent through his counsel has been consistently involved in the pre-hearing process which up to the present has taken approximately 15 months. Much of this time was spent gathering medical information requested by the respondent.

20. The question is whether the period of "delay" from June 2, 2002, the date of the alleged violation, through September 15, 2008 – the currently scheduled date for the commencement of the hearing, approximately five years and nine months, is unacceptable delay that amounts to an abuse of process; *i.e.*, delay so oppressive as to taint the proceedings.

21. As Justice Lebel noted in *Blencoe* at para. 160, the answer requires a contextual analysis. It may involve considerations of time limitations in the legislation, legal and factual complexities, time for procedural safeguards to protect the parties and the public, whether the

respondent contributed or waived part of the delay, the impact of the delay on the evidentiary process and the harm in terms of stress and stigma to the parties involved.

22. Courts have examined delay in similar cases: In *Misra v. College of Physicians Surgeons of Saskatchewan* [1988] 5WWR 333 (Sask.C.A.) the court stayed a medical disciplinary hearing because of a five year delay in convening the hearing occasioned by the medical council's decision to await the outcome of criminal proceedings arising out of the same facts. In *Brown v. Association of Professional Engineers and Geoscientists of British Columbia*, [1994] BCJ No. 2037, a delay of two years between the recommendation of an Inquiry Notice under the *Engineers Act* (BC) and the service of the Notice of Inquiry followed by a one year delay in bringing the charges to a hearing gave rise to a prohibition order. Similarly, a prohibition order was issued in *Ratzlaff v. British Columbia* (*Medical Services Commission*) [1996] BCJ No. 36 where four years after the retirement of a physician, the Medical Services Commission sought an audit of the physician's billing practices for a 13 year period immediately preceding the physician's retirement. On the other hand, in *Nisbett v. Manitoba* (*Human Rights Commission*), [1993] M.J. No 160, the Manitoba Court of Appeal refused to stay a medical disciplinary hearing despite a two-year delay between the laying of the complaint and the decision to proceed to adjudication. The court held that there was not "demonstrated evidence of sufficient magnitude to impact on the fairness of the hearing".

23. In this case, the respondent was advised of the complaint six months after it was issued. It participated in the investigation stage six months later. After a delay of three months, the respondent engaged in the mediation process over nine months. There was a 12-month delay during which counsel for the complainant diligently pursued the gathering of medical information. There was then a delay of four and a half months before the matter was referred to the Board following which the respondent has been continuously involved. Certainly this matter has not moved ahead with haste but the periods of the delay are explained in large measure and, importantly, as Bastarache J. said in *Blencoe* at para. 131 "…*the communication between the parties… was ongoing*". Consequently, while I am of the view that the delay is unfortunate, given the particular circumstances which include the absence of stigma, it does not amount to delay that would offend the community's sense of decency and fairness.

24. The Application to stay for delay is dismissed.

Dated at Fredericton, NB, this 21st day of May 2008.

G. L. BLADON
VICE-CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD