PROVINCE OF NEW BRUNSWICK

New Nouveau Brunswick

Labour and Employment Board

HR-009-06

IN THE MATTER OF THE *HUMAN RIGHTS ACT*

AND IN THE MATTER OF A BOARD OF INQUIRY

BETWEEN:

Neville Tracey
Saint John, New Brunswick

Complainant

- and -

502798 NB Inc. (formerly Melanson's Waste Management Inc.)
and Kerry McLellan
Saint John, New Brunswick

Respondents

BEFORE: George P. L. Filliter, Chairperson

APPEARANCES:

For the Human Rights Commission:	*Chantal L. Gauthier, Esqe*
For Neville Tracey:	*Kelly Vanbuskirk, Esq.*
For 502798 NB Inc. (formerly Melanson's Waste Management Inc.) and Kerry McLellan:	*Donald V. Keenan, Esq.*

DATE OF HEARING: February 12 and 13, 2007

DATE OF DECISION: February 21, 2007

DECISION OF THE BOARD

I. INTRODUCTION

1. On October 31, 2002, Neville Tracey filed a complaint with the Human Rights Commission (hereinafter referred to as the "Commission") in which he alleged that his employer, Melanson's Waste Management Inc. (hereinafter referred to as "Melanson's) and its owner Kerry McLellan contravened section 3 of the *Human Rights Act*. The allegation centered upon the decision of Melanson's to terminate Mr. Tracey due to a relationship between him and fellow employee Vanessa Bishop. A response to this complaint was filed on behalf of Mr. McLellan and Melanson's on May 5, 2004.

2. On October 20, 2006, the Minister of Post-Secondary Education, Training and Labour referred this matter to the Board to act as a Board of Inquiry pursuant to section 20(1)(b) of the *Human Rights Act*. After a pre-hearing conference with the parties, the Board convened on February 12 and 13, 2007 to hear evidence and submissions from the parties.

II. PRELIMINARY MATTERS

3. Although section 20(4.1)(a) of the *Act* states that the Commission is a party and "…shall, subject to subsection (4), have carriage of the complaint" the Board was advised that the parties were in agreement that counsel for Mr. Tracey would take the lead and adduce the evidence in support of the complaint, whereas counsel for the Commission would represent the interests of the public. The Board agreed to proceed in this manner.

4. At the outset of the hearing the Board was advised that on July 7, 2006, Melanson's changed its name to 502798 N.B. Inc. and for the purposes of this decision, the Board will continue to refer to the employer as "Melanson's". Apparently, around the end of July 2005, a portion of the Melanson's operation was sold to Atlantic Industrial Cleaners, but the remaining portion of the operation stayed in the possession of Mr. McLellan who changed the name of the company a year later.

III. FACTS

5. During all material times, Melanson's and its sister operation Ready John Inc. ran an industrial waste management company, supplied portable toilets and performed septic tank services. The employees of these companies were located throughout New Brunswick, Nova Scotia and Prince Edward Island. Both of these companies were owned by Mr. McLellan and managed by Patrick Desmond. Mr. Tracey was hired in April 2001. Although the letter of offer indicated that he was to be hired as a salesman, it was generally agreed by all witnesses that he was engaged as the sales manager.

6. Although six witnesses were called to provide evidence before the Board, it is the view of the Board, and conceded by all counsel, that the relevant facts in this matter were not in dispute. The following witnesses appeared before the Board: Neville Tracey, the complainant; Vanessa (Bishop) Tracey, the complainant's wife; Patrick Desmond, the General Manager for Melanson's; Kerry McLellan, the owner of Melanson's; Brad Melanson, the Operations Manager for Melanson's; and Peter Lambert, the manager in Prince Edward Island.

7. The job of Neville Tracey required him to travel around the three Maritime Provinces and develop business amongst existing and new clients. At the end of 2001, Mr. Tracey received a relatively positive appraisal. In early January 2002, Mr. Tracey asked the office manager, Vanessa Bishop, as she then was, on a date. According to the evidence of Ms. Bishop and Mr. Desmond, this was no secret and certainly neither Ms. Bishop nor Mr. Tracey were asked to terminate their relationship. The relationship between the two escalated and in early February, Mr. Tracey moved in with Ms. Bishop. Mr. Desmond testified that he knew about this at least by May 2002 and in fact spoke to Ms. Bishop about difficulties that may arise if the relationship were to sour. Regardless, at no time, until the culminating event, were either Mr. Tracey or Ms. Bishop advised that their employment was in jeopardy as a result of their continued relationship.

8. However, this changed in late August of 2002. Around this time, Mr. McLellan had a telephone conversation with Mr. Desmond during which he learned about the relationship between Mr. Tracey and Ms. Bishop. During this telephone conversation, Mr. McLellan indicated to Mr.

Desmond that in his view, this was not an acceptable business practice and created an unacceptable business and financial risk. Mr. Desmond was clear in his testimony that he did not share this view. However, Mr. McLellan indicated he wanted to meet with Mr. Tracey and Ms. Bishop when Mr. Desmond returned from vacation.

9. On August 30, 2002 when Mr. Desmond had returned to work, Mr. McLellan decided to come to the office and meet with all the parties. At about 1:30 p.m. on August 30, 2006 and with only a five-minute notice to Mr. Desmond, Mr. McLellan arrived at the office and asked to meet with Mr. Tracey and Ms. Bishop. During this meeting, Mr. McLellan expressed his opinion that this relationship was not an acceptable business practice and he suggested that either Mr. Tracey or Ms. Bishop would have to leave. Mr. McLellan asked these two to talk about it over the weekend and either provide an alternative option or decide which one would leave the company.

10. During the weekend, Mr. Tracey and Ms. Bishop thought that Mr. McLellan had overreacted and would cool down. But such was not the case and the next week, Mr. McLellan asked to meet Mr. Tracey at a location away from the office. At this meeting, Mr. McLellan told Mr. Tracey that he would have to leave; however, he agreed that for a while he would allow Mr. Tracey to try to find alternate employment. On September 4, 2002, counsel for Mr. Tracey corresponded with Mr. McLellan and on September 19, 2002, Mr. McLellan signed a letter terminating Mr. Tracey and providing three months pay in lieu of notice. Mr. Tracey was successful in obtaining alternate employment. The evidence also confirms that at all times relevant to this matter he was considered a trustworthy and valuable employee.

11. Mr. McLellan testified that although Melanson's was his company, he rarely came to the office and relied upon Mr. Desmond, his General Manager to run the business. On a regular basis, he received financial statements that were prepared by Ms. Bishop and vetted by Mr. Desmond. According to the evidence of Mr. McLellan he relied upon these two individuals to protect his investment. Therefore, when Mr. McLellan first heard of the relationship between Mr. Tracey and Ms. Bishop, he was concerned on two levels, one being that Ms. Bishop was in possession of confidential information, such as management salaries, that Mr. Tracey had no right to know. In addition, Mr. Tracey's employment contract entitled him to a bonus based upon performance. Ms.

Bishop was responsible for inputting data that would be used to determine the level of the bonus to which Mr. Tracey was entitled. Although Mr. Desmond did not share these concerns, it was these reasons that Mr. McLellan relied upon to support his decision that either Mr. Tracey or Ms. Bishop would have to leave the company.

IV. ISSUES

12. The issues in this matter are as follows:

a) Was the relationship that developed between Mr. Tracey and Ms. Bishop in 2002 one that equates to "marital status" for the purposes of the *Human Rights Act*?;

b) If the answer to the first issue is in the affirmative, were the actions of Melanson's Waste Management Inc. and Kerry McLellan in contravention of the protection provided in section 3(1) of the *Human Rights Act?*;

c) If the answer to the second issue is in the affirmative, have the Respondents established that their actions were justified because of a Bona Fide Occupational Qualification (hereinafter referred to as a "BFOQ") as contemplated by section 3(5) of the *Human Rights Act?*;

d) If the answer to the third issue is negative, then what is the appropriate remedy under the circumstances?

V. RELEVANT STATUTORY PROVISIONS

13. The relevant provisions of the *Human Rights Act* are set forth as follows:

> **3**(1) No employer, employers' organization or other person acting on behalf of an employer shall
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> *(a)* refuse to employ or continue to employ any person, or

(b) discriminate against any person in respect of employment or any term or condition of employment,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity.

3(5) Notwithstanding subsections (1), (2), (3) and (4), a limitation, specification or preference on the basis of race, color, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity shall be permitted if such limitation, specification or preference is based upon a *bona fide* occupational qualification as determined by the Commission.

20(6.2) Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act

(a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,

(b) to rectify any harm caused by the violation,

(c) to restore any party adversely affected by the violation to the position he would have been in but for the violation,

(d) to reinstate any party who has been removed from a position of employment in violation of the Act,

(e) to compensate any party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in such amount as the Board considers just and appropriate, and

(f) to compensate any party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feelings or self-respect, in such amount as the Board considers just and appropriate.

VI. STATUS OF RELATIONSHIP

14. The relationship between Mr. Tracey and Ms. Bishop started as dating in January 2002 and by February of the same year the two were cohabiting. Although the particulars of their cohabitation were not specifically put into evidence, both individuals did indicate that they were living as a married couple. It is the view of the Board that despite the contention of counsel for the Respon-

dents, this is sufficient evidence to draw the conclusion that the parties were living, for all intents and purposes, as a married couple.

15. However, this does not address the issue fully. The Board raised the issue of how long a couple must cohabit before being considered in a "common law relationship". This determination is a relevant consideration to determine the status of the relationship for the purposes of the *Act*; (see *Jensen v B.C. Report Magazine Ltd.* (1993), 19 CHRR, D/495, (B.C.H.R.C.), *Bell v National Electronic Agencies Ltd.* (1988), 9 CHRR D/5062 (B.C.H.R.C.) and *Gipaya v Anton's Pasta Ltd.* (1996), 27 CHRR D/326 (BCHRC)). In these cases, referred to by the Commission in its Pre-hearing Brief, the term "marital status" is typically linked to the words "common law relationship". However, in other legislation it would appear that in order to acquire the rights of a "common law relationship", the parties must cohabit for at least a year. In general the Board refers to the provisions of the *Income Tax Act*, the *Pension Benefits Act* (New Brunswick), the *Canada Pension Benefits Act* and the *Family Services Act* (New Brunswick).

16. However, after consideration, the Board accepts and adopts the approach of the British Columbia Human Rights Commission in the case of *Jensen*, *supra*, where at paragraph 38 the Commission opines:

> 38 For the purposes of the *Human Rights Act*, I do not accept the definition of "spouse" as contained in the *Family Relations Act* (FRA). The focus or concern of the FRA is the stability of family relationships and resolution of disputes in family matters; it deals with child custody, maintenance and support obligations, and matrimonial property issues. The definition in the FRA is for the purposes of that *Act*. In my view there is no reason to import that definition into the *Human Rights Act*. If legislators had intended "marital status" to have a restrictive definition, they would have defined it in the *Act*.

17. So in the view of the Board, for the purposes of the *Human Rights Act*, the restrictions imposed by virtue of other legislation do not apply. Therefore, in the circumstances of this case, the Board is of the view that Mr. Tracey and Ms. Bishop established, that at least by August 30, 2002, they were living in a relationship contemplated by the words "marital status" in section 3(1) of the *Act*.

VII. DID THE ACTIONS OF THE RESPONDENTS AMOUNT TO DISCRIMINATION?

18. The facts of this case are not in dispute. Mr. McLellan and therefore Melanson's met with Mr. Tracey and Ms. Bishop on August 30, 2002 because they were in a romantic relationship which this Board has found to be, within the meaning of "marital status" for the purposes of the *Act*. In fact, during testimony, Mr. McLellan acknowledges that if they had only been friends, or indeed good friends, he would not have required one of them to leave their employment. But, does this amount to discrimination?

19. In the view of the Board, this question has been addressed in the case of *Re Tri-Gill Paving and Construction Ltd.* (1997) N.B.H.R.B.I. D No 1, where at paragraphs 32 and 33, the Board of Inquiry determined as follows:

> 32 "The test of whether or not there has been discrimination on the basis of marital status is usefully discussed in the decision in *Cashin v. Canadian Broadcasting Corporation*, [1987] C.H.R.D. No. 2, T.D. 2/87 in which the panel noted, referring to the *Canadian Human Rights Act*, which in the relevant respect is similar to that of New Brunswick:
>
> > In choosing between the competing views as to the scope of marital status we return to the direction that the Supreme Court of Canada has given in terms of the manner in which human rights legislation should be interpreted. It is to be liberal enough so that the purpose of prohibiting discrimination is achieved. The policy underlying a prohibition of marital status discrimination should be considered in light of the objectives of the C.R.H.A. to prevent employers from treating people differently because of characteristics specified in the *Act* and to require employers to consider people on the basis of their individual merits. The policy is clearly violated when a person is denied an equal opportunity because he or she is married. It is equally repugnant whether the employer discriminates against married people as a class or because of the person to whom he or she is married. If the marital status is the proximate cause then it is right that the employer bear the burden of justifying its actions.
> >
> > Mrs. Cashin's contract was not renewed because of the person to whom she was married. We believe that the logical interpretation of marital status should include discrimination based on the identity of one's spouse and agree with the analysis in the Mark case. The decision in the Monk case with respect to family status is useful by analogy. This interpretation is the only one which meaningfully gives effect to the underlying policy against this ground of discrimination. We therefore find that the Tribunal below was correct in finding that a broad interpretation was appropriate

> and that Mrs. Cashin's marital status was a proximate, if not the primary, cause for the C.B.C.'s decision refusing to renew Mrs. Cashin's contract.
>
> 33 The key to this test for present purposes, in the Board's view, is whether Mrs. Henwood was treated by Tri-Gil Paving based upon her individual characteristics, abilities and behaviour, or based upon her marital status. […]".

20. In the view of this Board, Mr. Tracey was treated differently than other employees when in early September he met with Mr. McLellan and was told he would have to leave the employ of Melanson's and again when he was terminated on September 19, 2002. This treatment was clearly not because of his ability or behaviour, for both Mr. Desmond and Mr. McLellan confirmed him to be trustworthy and valuable. Clearly the reason for this treatment was his relationship with Ms. Bishop and this amounts to discrimination.

VIII. ARE THE RESPONDENTS ENTITLED TO THE BFOQ DEFENCE?

21 Section 3(5) of the *Act* provides an employer with a defence if it can establish a BFOQ. The Supreme Court of Canada in 1999 established a test to determine if such a defence exists. At paragraph 54 of *British Columbia (Public Service Employee Relations Comm.) v B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 (S.C.C.) (most often referred to as "*Meiorin*:), the Court stated:

> "Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> > (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> >
> > (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
> >
> > (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonable necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer".

22 This three-pronged test has found favour across the country and in the view of this Board is applicable in this instance. In other words, for Mr. McLellan and Melanson's to be successful in raising this defence they must establish each of the elements set forth in *Meiorin*.

(a) Was the standard adopted for a purpose rationally connected to the performance of the job?

23. The standard adopted by the Respondents prohibited Ms. Bishop and Mr. Tracey from entering into a common-law relationship, because of the position held by Ms. Bishop. The respondents argued that her position was confidential in nature and that she therefore could not have such a relationship. Furthermore, with respect to Mr. Tracey, it was suggested that as his bonus was tied to his performance and Ms. Bishop was responsible for entering this data that again she was prohibited from being in such a relationship. It is helpful to reiterate that in making these assertions, it was conceded that there was no concern as to the trustworthiness of either Mr. Tracey or more importantly, Ms. Bishop.

24. The evidence of all witnesses was that Ms. Bishop held the position of office manager, and although she inputted data, all of her work was reviewed by Mr. Desmond, the General Manager, who could, if the need arose, cross-check the reports provided to him by Ms. Bishop with raw data.

25. Accordingly, this Board finds the standard imposed upon Mr. Tracey and Ms. Bishop was not rationally connected to the performance their separate positions. Given this finding, it would normally be unnecessary to proceed with a further analysis; however, in case the Board is in error, it will continue the Meiorin review.

(b) Was the adoption of the standard done honestly and in good faith?

26. This subjective element of the *Meiorin* Test, if not proved, may result in a standard being struck down despite it being otherwise rationally connected to the job performance. In the case at hand, and after listening to the evidence of Mr. McLellan, the Board is of the view that there was no bad faith involved and he honestly believed he had to do something under the circumstances. Mr.

McLellan is a highly educated individual with a PhD in business administration, and expressed concern about protecting his investment in Melanson's. For this reason the Board would conclude this element of the defence had been established if the standard was rationally connected to the performance of the job.

(c) Was the standard reasonably necessary to the accomplishment of the legitimate work related purpose?

27. The Board notes that there was no independent evidence that this standard was "reasonably necessary"; rather the Respondents relied only upon the evidence of Mr. McLellan. Although as noted, Mr. McLellan is a highly educated individual who has clearly a good grasp of some basic concepts of financial control, in this instance it became apparent to the Board during cross-examination that he had, for whatever reason, overlooked relatively simple checks and balances that were available to him to achieve his expressed desire to protect his investment. These would have offered him a level of protection, at least with respect to the possibility of Mr. Tracey obtaining unearned bonuses because of inaccurate data input by Ms. Bishop.

28. It was evident to the Board that Mr. McLellan overlooked the very obvious alternative approach of having his General Manager, Mr. Desmond, review the input of data in those situations where Mr. Tracey was entitled to a bonus. When faced with this possibility neither Mr. McLellan nor his counsel were able to offer an explanation as to why this would amount to "undue hardship". For this reason, the Board would conclude that even if the standard was rationally connected to the performance of the job, there was an alternative approach that would have accommodated the needs of Mr. Tracey and Ms. Bishop.

29. There was one other area of concern voiced by Mr. McLellan and that was with respect to the possibility of Mr. Tracey obtaining confidential information from Ms. Bishop. When pressed, Mr. McLellan indicated he was referring to the confidential wage packages offered to managers. Mr. Melanson and Mr. Lambert testified to a situation where Mr. Tracey apparently spoke about a rumour that the newly hired manager in Nova Scotia was earning more than other managers. Mr. Tracey does not recall this situation, but at best the evidence is that he spread an existing rumour. In

fact, Ms. Bishop and Mr. Tracey both were asked and denied that any such confidential information was provided by Ms. Bishop and the Board accepts this testimony as truthful.

IV. REMEDIES

30. Counsel for Mr. Tracey and the Commission withdrew their request for special damages and requested that the Board order general damages, costs, a letter of apology and an order that the Respondents receive Human Rights Training. In a recent case, this Board dealt with similar requests (see *Dante's Dance Club Inc.* [2006] N.B.L.E.B.D. No 36). Although the fact situation in this case is significantly different than that in Re Dante's, supra, a number of the principles are applicable.

(i) General Damages for loss of Dignity and Self Respect

31. In *Re Dante's*, *supra*, counsel referred the Board to a large number of cases of somewhat similar fact situations, that being one of sexual harassment. In this case the Board was not referred to any case law to support a claim for general damages under similar circumstances. However, in paragraph 35 of *Re Dante's*, *supra*, the Board stated as follows:

> 35 However, the complainant also submitted that the Board should award general damages for loss of dignity and self-respect. In making this claim, counsel reminded the Board of the significance attached to employment in our society, a submission which this Board accepts. It is the view of this Board that the law is unclear as to whether or not such a claim requires proof of wilful or reckless conduct.

32. In the view of this Board, the impact to the dignity and self-respect of one who is the subject of sexual harassment is greater than that of one who is discriminated against on the basis of marital status. Furthermore, the Board observed Mr. Tracey during his testimony and he did not display or testify to any significant impact upon his self-respect. However, the Board recognizes that general damages should be awarded given the significance attached to employment in our society. For all of these reasons the Board orders general damages in the amount of $2000.00 to be paid jointly by Mr. McLellan and Melanson's.

(ii) Costs

33. Once again, the Board is not prepared to conclude that costs will never be awarded, but in this case Mr. Tracey decided to retain counsel on his own behalf, even though the *Act* suggests that the Commission has carriage of the case. Additionally, the Board notes that this case was in the hands of the Commission for almost 4 years before they referred to the Minister and no explanation was offered for this lapse of time, even though the nature of the complaint was not complicated. For all of these reasons the Board is not inclined to award costs.

(iii) Letter of Apology

34. The Board is of the view that Mr. McLellan should send a letter of apology to Mr. Tracey admitting his error in this matter, and will make this order.

(iv) Human Rights Training

35. Mr. McLellan in his testimony maintained that he had done nothing inappropriate and thus the Board hereby orders that the Human Rights Commission design a one-day program dealing with the duty to accommodate. The development of this program is to be completed within two months of this award. Once the program is designed, Mr. McLellan is ordered to participate in the program within one month of being informed of its existence.

X. CONCLUSION

36. The Board concludes that Mr. McLellan and Melanson's have violated section 3(1) of the *Human Rights Act* by refusing to employ Mr. Tracey due to his marital status with Ms. Bishop in 2002. As a result, Mr. McLellan and Melanson's are jointly ordered to pay $2000.00 in general damages to Mr. Tracey for loss of dignity and self-respect. Furthermore, Mr. McLellan is ordered to write Mr. Tracey a letter of apology and participate in a one-day training course on the duty to accommodate designed by the Human Rights Commission.

Issued at Fredericton, New Brunswick, this _____day of February 2007.

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GEORGE P. L. FILLITER
CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD