IN THE MATTER OF: The *Human Rights Act*, R.S.N.S., 1989, c. 214 as amended

AND

IN THE MATTER OF: A Nova Scotia Human Rights Board of Inquiry

BETWEEN:

Sandra Wakeham

(the "Complainant")

-and-

Nova Scotia Department of Environment

(the "Respondent")

-and-

Nova Scotia Human Rights Commission

(the "Commission")

DECISION ON REMEDY

Nova Scotia Human Rights Board of Inquiry:	Kathryn A. Raymond, Q.C., Chair
Place of Hearing:	Halifax, Nova Scotia and Dartmouth, Nova Scotia
Dates of Hearing:	June 27, 28, 29 and 30, 2016; July 4, 5, 6, 7, 8, 11, 12, 13, 19, 20, 21 and 22, 2016; August 2 and 3, 2016;
Dates of Final Written Submissions:	October 31, 2016 and November 15, 2016
Representation:	Sandra Wakeham, the Complainant Ann Smith, Q.C., and Jason T. Cooke, Counsel for the Commission Andrew Taillon, Counsel for the Respondent
Date of Decision:	June 30, 2017

Introduction

1. This is a continuation of reasons for decision in relation to *Wakeham* v. *Nova Scotia Department of Environment*, 2017 CanLII 36575 (the "Decision on the Merits") issued June 9, 2017, in which it was held that the Respondent discriminated against the Complainant on the basis of physical disability in the context of her employment contrary to the Nova Scotia *Human Rights Act*, R.S.N.S., 1989, c. 214 (the "*Act*"). These reasons address issues of remedy.

2. As indicated previously, the parties filed pre-hearing submissions. It was agreed that these would form part of the final submissions to be considered at the conclusion of evidence. At the time pre-hearing submissions were filed, the Complainant was represented by counsel. For purposes of these reasons, I will refer to the Complainant's former counsel as "Complainant counsel". The Complainant also gave evidence at the hearing respecting the impact of the discrimination she experienced. The details of this evidence have been considered but this evidence will only be summarized. All parties made final oral submissions. I have made detailed reference to the parties' submissions so as to clearly identify the issues that were both raised and not raised before me.

3. Following the hearing, additional written submissions were made respecting two issues at my request, namely the applicability of apportionment to a loss of income claim and the potential deductibility of LTD benefits from any loss of income awarded.

4. By way of overview of the parties' positions, the Complainant seeks compensation consisting of general damages of $150,000.00, loss of income in the amount of $162,921.00 and future loss of income in the amount of $254,841.00. The Complainant also claims a "gross-up" amount of compensation to be calculated to make up for the additional income tax payable by her as a result of receiving a lump sum payment of income, as opposed to a stream of income over the years since she stopped working for the Respondent.

5. The Commission takes various positions respecting the issues on a substantive basis. However, it declined to take a position respecting the actual amount of general damages to be awarded and respecting whether loss of income, past or future, should be awarded in this case.

6. The Respondent submits that general damages of less than $10,000 should be awarded and that no payment of loss of income should be ordered.

7. I include in this Introduction my authority to address the issue of remedy pursuant to the *Act* pursuant to section 34(8):

> (8) A board of inquiry may order any party who has contravened this *Act* to do any act or thing that constitutes full compliance with the *Act* and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances. (emphasis added)

8. In keeping with the ruling of the Court of Appeal in *Nova Scotia (Environment)* v. *Wakeham*, 2015, NSCA 114 (CanLII) concerning the preliminary issue that arose with respect to the scope of this complaint, the determination of liability in this case begins as of February 21, 2012. Likewise, the remedy being ordered is based on events and circumstances as of the Complainant's return to work in February 2012 and as a result of what occurred subsequently.

9. Commission counsel submitted that the issues respecting appropriate remedy are to be guided by two fundamental principles:

> 1) In a human rights context, the role of remedy, including damages, is to make the Complainant whole (as much as is possible); and,

2) At least in a situation of a single Respondent, the Respondent should be expected to compensate the Complainant for the discrimination that occurred, but no more.

10. Complainant counsel similarly submits that "the purpose of compensation is to restore a Complainant as far as reasonably possible to the position that the Complainant would have been in had the discriminatory act not occurred": *Sharon Fair* v. *Hamilton-Wentworth District School Board (Decision on Remedy)* 2013 HRTO 440 (Canlii) at para 29, citing *Airport Taxicab (Malton) Assn.* v. *Piazza* (1989), 10 C.H.R.R. D/6347 (Ont. C.A.).

11. Counsel for the Respondent did not take issue with these basic statements of principle.

12. I agree that these principles are to guide this stage of the inquiry.

General Damages

A) Submissions on Behalf of the Complainant

13. By way of general introduction to this topic, Complainant counsel references *Robichaud* v. *Canada (Treasury Board)*, [1987] SCJ No. 47, where the Supreme Court of

Canada commented upon the proper approach to the interpretation of human rights legislation, at para 8:

> ...As McIntyre J.S. speaking for this court, recently explained in *Ontario (Human Rights Commission) and O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, the *Act* must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly [i.e. stingy or miserly] fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional".

14. Complainant counsel submits that damage awards should reflect the severity of impact upon the particular Complainant. Counsel relies upon *Sears* v. *Honda of Canada Mfg.* 2014 HRTO 45 (Canlii) at para 217, citing *ADGA Group Consultants Inc.* v. *Lane* 2008 CanLII 39605 (ON SCDC), in this regard.

15. As pre-hearing submissions were prepared prior to the preliminary ruling by the Court of Appeal in this matter, Complainant counsel's submissions are based upon the premise that the Respondent had failed to accommodate the Complainant over a thirteen year period from 1999 to 2012. I am not taking into consideration counsel's submissions to the effect that the Complainant suffered thirteen years of aggravated stress and pain by reason of discrimination before becoming totally and permanently

disabled on March 9, 2012. However, in other respects, the submissions made by Complainant counsel are not without potential relevance to the determination of remedy in this case. I have considered these submissions from the standpoint of a finding of discrimination which began when the Complainant returned to work in February 2012, continued until she became unable to work on March 9, 2012, and with respect to the subsequent effects of that discrimination upon the Complainant.

16. Complainant counsel submits that general damage awards for discrimination should reflect an individualized assessment of the impact of the discrimination on the victim in the same manner that general damage awards in tort for personal injury reflect an individualized assessment of the impact of the injury upon the person harmed. As indicated in the Decision on the Merits, I have held that the discrimination by the Respondent aggravated the symptoms and functional limitations of the Complainant's disabilities which led to the Complainant being unable to work. Complainant counsel requests that I order general damages for discrimination causing severe psychological harm, significant physical adverse treatment by reason of the Complainant being required to work without accommodation (originally based on an alleged 13-year failure to accommodate) and total permanent disability.

17. Complainant counsel referenced the "trilogy" of cases decided by the Supreme Court of Canada in 1978 respecting damages for personal injuries and submitted that, as of

November 2014, the upper limit for general damages for personal injuries was $356,154. Counsel submits that the "trilogy" supports a general damage award to the Complainant in the range of $200,000 to $250,000 because the discrimination caused the Complainant to be totally disabled for the rest of her career.

18. In this vein, counsel submits that an assessment of the impact of the discrimination in this case requires an assessment of the degree of psychological harm caused to the Complainant. Counsel submits that general damage awards for discrimination causing psychological harm which is totally disabling should be in the range of $150,000.

19. In this regard, Complainant counsel relied on *Sulz* v. *Canada (Attorney General)*, [2006] BCJ 121 (BSSC), affirmed [2006] BCJ 3262 (CA), where a female police officer had been subjected to sexual harassment and suffered depression as a result, preventing her from continuing her career as a police officer. There was expert medical evidence, which was accepted, that she had lost her ability to handle stress and her capacity to return to any type of competitive employment was very much in question. The Complainant was awarded $125,000 in general damages. As that was a 2006 decision, counsel submitted that the same award made today would be $143,250, to allow for inflation.

20. Complainant counsel submits that the damages that were awarded to compensate the police officer in *Sulz* should be no different from those awarded by a human rights tribunal hearing evidence of failure to accommodate an employee for 13 years, causing permanent disability and inability to work. Counsel submits that there is no reason for a tribunal to arrive at any different conclusion respecting the amount of relief awarded, as the facts and principles of damage assessment are the same under either a tort-based or human rights approach.

21. Complainant counsel also relies upon the *City of Calgary* v. *CUPE Local 38*, 2013 Canlii 88297 (Alberta Grievance Arbitration Award), where a female complainant, who had been sexually assaulted multiple times by being fondled by her supervisor at her desk, was awarded $125,000 in general damages. In that case, the Union claimed $150,000 in general damages, relying upon the *Sulz* case. However, the arbitrator reduced the award to $125,000 because there was not the "certainty of many years of suffering and limited functioning having been documented as there was in *Sulz* and there was evidence that the Complainant's functions might improve".

22. Counsel submits that, while these cases involve sexual harassment, they apply equally to the assessment of general damages in any case involving discrimination in the work place that creates the same degree of harm.

23. Counsel for the Complainant also submits that an award of $150,000 of general damages to the Complainant would not be disproportionately large compared to recent general damage awards in human rights cases in Nova Scotia. Counsel compared this case to other decisions in Nova Scotia, focusing on the period of time over which the discrimination was found to have occurred. Counsel cited *Borden and Smith* v. *Bob's Taxi* 2015 CanLII 9153 (NSHRC), at para. 153, where each complainant who had been discriminated against on the basis of race and colour with respect to "one taxi trip" was awarded $7,500 damages for discrimination. Counsel submits that, in contrast, Ms. Wakeham suffered thirteen years of a failure to accommodate by the Respondent and will suffer permanent disability for the rest of her life.

24. On the basis of the above submissions, counsel submits that the Complainant in this case should be awarded $150,000 in general damages. As noted, this submission was made in the context of counsel's position, both, that the Complainant suffered thirteen years of aggravated pain and stress from 1999 until 2012 and that she has been totally disabled since March 2012 by reason of the discrimination she experienced.

25. Counsel also referred to the decision in *Athey* v. *Leonati*, [1996] 3 SCR 458, 1996 CanLII 183 (SCC) ("*Athey*"). This is a tort case involving an appellant with a pre-existing back injury and two accidents. A further injury was the subject of litigation that

occurred while the appellant was recovering from the second accident. At paragraph 49, the Court stated:

> The trial judge erred in failing to hold the defendant fully liable for the discrimination after finding that the defendant had materially contributed to it. Once it is proven that the defendant's negligence was the cause of the injury, there is no reduction of the award to reflect the existence of non-tortuous background causes. In this case, this thin skull rule reinforces that conclusion.

26. Complainant counsel also highlights general damage awards in other more recent human rights cases outside of Nova Scotia. This includes *Kerr* v. *Boehringer Ingelheim (Canada)* (no. 4) 2009 BCHRT 196, where the British Columbia Human Rights Tribunal held that a three-year delay between the Complainant's request to return to work and the adoption of a return to work plan was a breach of the duty to accommodate and had a significant impact upon the Complainant. She was awarded $30,000 in general damages for injury to dignity, feelings and self-respect.

27. Also referenced is *Sears* v. *Honda Mfg.,* 2014 HRTO 45 (CanLII), where the Ontario Human Rights Tribunal awarded the Complainant $35,000 in general damages because of a delay of about a year in starting the accommodation process and medical

evidence of related depression and anxiety for which the Complainant required treatment. The Tribunal stated, at para 217:

> The Tribunal has applied a degree of objectivity in assessing the amount of compensation.... At the same time it has recognized that the actual impact of the discrimination on the applicant is an important consideration in assessing compensation. In addition, the Divisional Court has recognized that the Tribunal must ensure that the quantum of damages for this loss is not set too low, because doing so would trivialize the social importance of the *Code* by effectively creating a "license fee" to discriminate. See *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), 2008 CanLII 39605 (ON S.C.D.C.)

28. Complainant counsel submits that the impact of the discrimination on the complainant in the *Sears* case was much less than the impact upon Ms. Wakeham, as the complainant in *Sears* was not left totally disabled as a result of the failure to accommodate.

29. Complainant counsel also relies upon *Sharon Fair* v. *Hamilton – Wentworth District School Board (Decision on Remedy)* 2013 HRTO 440 (CanLII), where the Human Rights Tribunal of Ontario made a finding that a complainant had been discriminated against when the employee failed to accommodate her disability-related needs and

terminated her employment a little over a year later. The Tribunal awarded $30,000 in general damages for injury to dignity, feelings and self-respect.

30. I was also asked to consider *Walsh* v. *Mobil Oil Canada,* 2013 ABCA 238, where the Alberta Court of Appeal upheld a human rights award for discrimination on the basis of gender. The total amount of general damages awarded was $35,000.

31. In short, counsel submits that there has been a severe impact upon the Complainant in this case and that this impact should not be trivialized by awarding a nominal sum for general damages.

32. At the time of the hearing, the Complainant was self-represented. She took the position during final submissions that she did not know what would be an appropriate award of general damages, given that the pre-hearing submissions filed on her behalf by her former counsel had been prepared prior to the preliminary decision by the Court of Appeal respecting the scope of her complaint. She asked the Board to exercise its judgment based on the law in this regard.

Submissions of the Commission

33. The Commission submits that general damages should not be decided based on the trilogy of cases referenced by Complainant counsel. The Commission submits that

general damage awards have been decided based on comparison with other Board of Inquiry cases. That said, the Commission submits that general damage awards have, in general, increased in amount over the years.

34. Commission counsel provided the decision of *Canada (AG)* v. *Morgan*, [1992] 2 FC 401, 85 DLR (4th) 473, at para 19, to the effect that the ultimate role of a Board of Inquiry is the same as that of the Court, which is to make the victim whole for the damage caused.

35. Commission counsel submits that Complainant counsel was correct to identify the *Sulz* case as being relevant to a determination of appropriate remedy in this human rights complaint. Commission counsel submits that, even though *Sulz* involved a tort action, the British Columbia Court of Appeal held that the complaint in that case could have been addressed in a human rights context, at para 130.

36. Commission counsel suggests that I also consider the award in *Willow* v. *Halifax Regional School Board*, 2006 NSHRC 2(CanLII) ("*Willow*"), where $25,000 was awarded for general damages. Counsel suggests, as well, that I consider *Johnson* v. *Halifax Regional Police Services,* (2003) 48 C.H.R.R. D/307 ("*Johnson*"), where $10,000 was awarded as general damages. Commission counsel submits that the

range of general damages in relation to proven human rights complaints in Nova Scotia is between $1000 and $40,000.

37. The Commission submits that the Respondent is relying only on cases that involve physical disability to support its position respecting the quantum of general damages. It submits that there is no need to consider the issue of an appropriate award based only on the prohibited ground of discrimination and that doing so limits a proper consideration of such an award, to some extent.

38. The Commission submits that general damages should be assessed based on the criteria in *Wigg* v. *Harrison* [1999] N.S.H.R.B.I.D. No. 2. ("*Wigg*"). While the tribunal was dealing with a sexual harassment case, it identified factors that the Commission submits have relevance, in general, to an assessment of general damages. At para 137, the tribunal took into consideration the following criteria:

i) The nature of the harassment, that is, was it simply verbal or was it physical, as well?

ii) The degree of aggressiveness and physical contact in the harassment;

iii) The ongoing nature, that is, the time period of the harassment;

iv) The frequency of the harassment;

v) The age of the victim;

vi) The vulnerability of the victim;

vii) The psychological impact of the harassment upon the victim.

39. In relation to the criteria that are applicable to the Respondent, the Commission submits that, while the intent to discriminate is not relevant, no one would attribute any malice to the Respondent in this case. In relation to the criteria that are applicable to the Complainant, the Commission submits that the effect of the discrimination on the Complainant is important, as is recognized in *Wigg.* The Commission relies upon the evidence offered by the Complainant respecting her experience at work and in relation to how her life was effected after she left work. However, as indicated, the Commission declined to take a position respecting the actual amount of general damages to be awarded.

Submissions of the Respondent

40. The Respondent took the position that the Complainant's approach towards the assessment of general damages is wrong in law, as it is based in tort law. The Respondent submits that the Complainant is, in effect, asking for general damages for personal injury. The Respondent takes the position that, if the Complainant wished to allege that she was injured by the discrimination, she should have brought a civil claim forward in the courts. (I will note here that the Commission took the position that the Complainant could not sue her employer as a unionized employee).

41. The Respondent submits that any award for general damages should be based on cases decided by the Nova Scotia Human Rights Board of Inquiry in relation to physical disability. Counsel for the Respondent relies upon the review of discrimination awards in the context of employment in *Trask* v. *Nova Scotia (Justice)*, 2010 NSHRC 1 ("*Trask*"), at paras 197-205:

> 197 The Nova Scotia Human Rights cases dealing with discrimination in employment usually arise in the context where the complainant's employment has been terminated by the employer, often while the complainant is on disability leave.
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> 198 In *Cottreau* v. *R. Ellis Chevrolet Oldsmobile Ltd.*, (2007), 61 C.H.R.R. D/8 (N.S. Bd.Inq.) a physically disabled employee terminated from his employment while on disability leave was awarded $10,000 in general damages.
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> 199 In *Hall* v. *Seetharamdoo* (2006), 57 C.H.R.R. D/322 (N.S. Bd.Inq.), a disabled employee was terminated from her employment while on disability leave received $3,500 in damages.
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> 200 In *Marchand* v. *3010497 Nova Scotia Ltd.* (2006), 56 C.H.R.R. D/178 (N.S. Bd.Inq.), a disabled employee was terminated from her employment while on disability leave and received $4,500 in general damages for the discrimination.

201 In *McLellan* v. *MacTara Ltd. (No. 2)* (2004), 51 C.H.R.R. D/103 (N.S. Bd.Inq.), a physically disabled complainant had his employment terminated on the basis of his physical disability as he was unable to do any other work at the factory. The board awarded $1,000 in general damages for damage to his dignity arising from the termination.

202 In *Bobbitt* v. *Royal Canadian Legion, Branch 19* (2003), 47 C.H.R.R. D/137 (N.S. Bd.Inq.), a disabled employee was terminated from his employment just prior to returning to work, and was awarded $2,500 in general damages.

203 In *Pinner* v. *K. Burrill's Supermarket Ltd.* (2002), 45 C.H.R.R. D/251 (N.S. Bd.Inq.) an employee who was terminated because of a mental disability received $2,000 in general damages for injury to his self-esteem.

42. Respondent counsel submits that, unlike the cases relied upon by the Complainant, these are all cases that were decided by Nova Scotia Human Rights Boards of Inquiry pursuant to the *Act*. Respondent counsel submits that they are the best indicator of an appropriate range of damages. Accordingly, Counsel submits that any award for damages should be in the range of $1,000 to $10,000.

43. The Respondent did not take a position respecting how the facts of this case compare to the facts in the cases in the summary within *Trask* or where this case would fall in that range. Counsel submits that existing case law in this province has never exceeded $10,000 for damages for discrimination based on physical disability.

44. Counsel acknowledges that the cases referenced by the Commission, such as *Willow* and *Johnson,* have higher damage awards and could be considered in this case. However, counsel submits that those cases are distinguishable. Counsel submits that the police report filed in *Willow* respecting sexual orientation is a more serious breach of the *Act* than an inability to reach agreement on accommodation. In the *Johnson* case, the complainant was stopped by the police and his car impounded for racially driven reasons. Counsel submits that being pulled over by the police because of the colour of your skin is more traumatic than what happened to the Complainant in this case.

45. Respondent counsel also relies upon the recent decision of this Board in *Tanner* v. *Alumitech Distribution Centre Ltd*. 2015 CanLII 15118 (NSHRC) ("*Tanner*"). Counsel submits that in this case a lower amount of damages was ordered because the employee was not terminated and there was no indication of malice on the part of the employer.

46. Counsel submits that, for the foregoing reasons, general damages should be set between $1,000 and $10,000.

Analysis and Decision Respecting General Damages

47. I turn first to the Respondent's submissions that an award of general damages based upon the fact that the Complainant was harmed or "injured" by the discrimination that occurred in this case would be required to be obtained through a civil claim before the courts. Implicit in this submission is the suggestion that this Board lacks the jurisdiction to take the nature and extent of the harm caused by the discrimination that occurred in this case into consideration. No case authority was provided in support of the submission that an award of general damages that includes restitution for the aggravation of disability-related impairments and a resultant inability to work as a result of discrimination must be sought from a civil court.

48. To be clear, the finding in the Decision on the Merits is that the nature of the discrimination that occurred between February 20, 2012 and March 9, 2012, on the facts of this case, caused an aggravation of the functional limitations associated with the Complainant's physical disability. This aggravation of her functional limitations led to her inability to work in her position by March 9, 2012. There has been no finding that the Respondent aggravated this Complainant's injuries or disabilities by actions that would constitute a tort. Here we are only concerned with discriminatory acts and the

effects of discrimination. An award of general damages in this case will not assess damages based on tort law and personal injury awards that, in part, quantify damages based on the extent of the injury.

49. The powers of a Board of Inquiry under the *Act* are to make an order "to rectify any injury caused to any person...or to provide compensation therefore". That language, in my view, provides statutory authority to this Board to make an award that provides compensation for any harm or "injury" caused by the Respondent by reason of discrimination. In this case, there has been an aggravation of the Complainant's disability-related impairments by reason of the discrimination the Complainant experienced, which caused her to become unable to work. In my view, an "aggravation" of this nature and extent can be fairly characterized as a type of "injury", as that word is used in section 34(8) of the *Act*. I am not persuaded that this Board cannot award general damages for discrimination in this case because of the nature of the harm that has been caused by the discrimination in this case. To put it another way, I see no basis to conclude on the wording of section 34(8) that general damages can only be awarded for loss of dignity, self-worth and hurt feelings. The type and nature of the harm that can arise from the experiences of being discriminated against is not so limited or closed to further analysis. That a claim can, theoretically, be brought in a civil court based in tort that would address the same outcome or similar harm as

that caused by discrimination, such as a loss of income, for example, does not negate the jurisdiction of this Board to make a justiciable order in an appropriate case.

50. It is also sometimes the case that the jurisdiction of the Courts and administrative tribunals may overlap in some respect. Any such overlap can be addressed through the mechanisms of res judicata, issue estoppel or the principle against double recovery, should some further proceeding be taken arising from the same facts. The Respondent's position, with respect, confuses a claim for damages for a personal injury suffered by the Complainant by reason of a tort with what is claimed here, which is an award for damages to compensate for the effects of this Complainant's experience of discrimination. A claim of discrimination and redress for its effect is to be brought before this Board, given the statutory regime for dealing with human rights complaints in this province: *Seneca College* v. *Bhadauria*, [1981] 2 SCR 181, 1981 CanLII 29 (SCC).

51. In addition, there are similarities in compensatory principles between tort law and human rights. Both are based on restitution and placing a party who is "injured", either by reason of discrimination or tort, back in the position they would have been, but for the discrimination or tort. A party who discriminates is responsible for the impact it has on the person effected by the discrimination but only to that point and no more.

52. The goal of general damages in human rights cases is to provide restitution to the Complainant. It is remedial and is not intended to punish the Respondent or to provide any additional compensation to the Complainant beyond what is objectively required to achieve appropriate restitution, although the goal of restitution places the focus upon the Complainant and, to some extent, the Complainant's subjective experience.

53. Often compensatory principles in one setting make absolute sense in another. For example, in tort law, the tortfeasor must "take their victims as they find them". This has been recognized in human rights cases. This approach taken by my fellow Board Chair, Eric Slone, in *Yuille* v. *Nova Scotia Health Authority*, 2017 CanLII 17201 (NSHRC), where he held at paragraph CLXIV:

> In other areas of the law, where general damages are awarded, courts look closely at the actual suffering experienced. A so-called "meat chart" approach has been rejected. One cannot say that a whiplash is worth $x, without looking to see how it has affected the person's life. It is said that the tortfeasor must "take their victims as they find them", so long as their reaction to the wrong done to them is not out of all reasonable proportion to reasonable expectations (bringing into play the so-called "crumbling skull" concept.) By the same token, a perpetrator of discrimination must take their "victims" as they find them.

54. There is both fundamental logic and good policy that underlies the "crumbling skull" concept. As the Supreme Court of Canada in *Athey* held, the "crumbling skull" rule simply recognizes that a pre-existing condition was inherent in the plaintiff's original position. The defendant is not expected to put the plaintiff in a position that is better than her original position. The defendant is only liable for the additional harm it caused, not the pre-existing damage. This is entirely consistent with and part of the principles applicable to the assessment of damages in human rights cases, whereby the goal of a general damage award is to provide restitution but not require a party who has discriminated to provide compensation beyond this point. While the concept of the "crumbling skull" rule may have arisen in the context of tort law, the same logic, fairness and underlying policy reasons make it reasonable to be applied in human rights cases. Taking this approach does not transform a human rights complaint into a tort case, nor does the adoption of the concept of the "crumbling skull" complainant change an award of damages for discrimination under the *Act* to an award of general damages in tort.

55. I offer this example specifically because, for the reasons given in the Decision on the Merits, the Complainant in this case was highly vulnerable. Years ago, she had been diagnosed with environmental sensitivities and had some history of depression. The Complainant had a motor vehicle accident in 1999 that left her with both physical and

mental disabilities and led to a three-year absence from work. That motor vehicle accident caused the development of chronic pain and other disabilities.

56. This was followed by a second motor vehicle accident in 2005 which caused further injury, aggravation of chronic injuries and further absences from work from time to time.

57. Finally, the Complainant suffered a head injury in 2010. While there has been no definitive diagnosis as a result, it seems more probable than not that the Complainant suffered post-concussion syndrome to some degree subsequently.

58. In addition to the physical injuries the Complainant has sustained, she has had cognitive difficulties that pre-date her post-concussion syndrome. As well, she has suffered from episodic depression, in addition to elevated states of anxiety and stress.

59. I do not mean to attempt to capture here the full extent of the Complainant's medical history or detail the significant amount of medical documentation that was canvassed in the Decision on the Merits. My point is simply this. Some individuals are more susceptible to illness and disability than others.

60. In February 2012, the Complainant presented herself to the Respondent as a person who had experienced chronic pain for many years that had not resolved. She was returning to work with chronic pain. The Complainant, in my view, falls squarely within

the concept of the "crumbling skull" complainant. To fail to recognize this rule, or at least its concept, and fail to take it into consideration the context of remedy in this case because the rule originates in tort law, would lead to an indefensible result. This would ignore the reality of the circumstances in this case as they existed when the Complainant returned to work.

61. Whether the label "crumbling skull complainant", is used or not, the Respondent either knew or should have known that it was dealing with an employee who was at a high risk of exacerbation of her disabilities and loss of functional ability in the workplace. As has been reviewed in the Decision on the Merits, the Respondent had in its possession over 40 medical forms, as well as other medical information concerning the Complainant, including additional reports from Dr. Lewis. These were acquired over a period of 13 years prior to the Complainant's return to work in February 2012.

62. Furthermore, had the Respondent objectively considered the timeliness and completeness of its efforts to accommodate the Complainant over the years in a more comprehensive manner and considered the Complainant's re-occurrent inability to keep working, the Respondent should have reasonably known that, if the Complainant was not properly accommodated, it was almost certain that she would be unable to continue working.

63. Why is this so significant? The Complainant worked a limited number of days after she returned to work in February 2012, before she became unable to continue to work on March 9, 2012. Without considering the Complainant, as she was, based on all the facts, the impact of the discrimination upon the Complainant could be significantly underestimated. There is some tendency in the case law to measure the impact of the discrimination in accommodation cases by the length of time over which the failure to accommodate occurred. This is not a case where a relatively resilient disabled employee returns to work after a lengthy absence, is not accommodated for a few weeks and is then terminated. If this case were simply about a three-week failure to accommodate, I might award fairly minimal damages, depending on all the facts. In this case, the duration of the failure to accommodate is short but the Complainant was highly vulnerable to any further failure to accommodate her. She was attempting to return to work in good faith with chronic pain and other disabilities.

64. The Complainant was not properly accommodated. Not all physician recommendations were specifically addressed in the Respondent's accommodation letter or implemented. When she returned, the Complainant was in effect told that she was going to lose her position through the application of the Respondent's attendance management policy. At the time, she was still on an "ease back" to work, and the Respondent had been informed by the Complainant's physician that she needed to be protected from additional stress in the workplace. To arrive at a fair and reasonable assessment of

damages in this case, it is important that the impact of discrimination upon this particular Complainant, with her vulnerabilities, be given accurate recognition.

65. While concepts relevant to appropriate compensation that developed in the context of tort law may have relevance in a human rights case, in my view, the trilogy referenced by Complainant counsel is not applicable. Awards for personal injury arise out of tort law, not discrimination. A discrimination case involves ongoing and specific legal obligations such as an ongoing duty to accommodate that has little to do with how a disability was acquired. To illustrate, the Complainant could have presented with a physical disability that was not the fault of any other party but was simply genetic. The Respondent would still have an obligation to accommodate the Complainant. If it failed to do so and its failure aggravated the functional limitations associated with that disability and led to the Complainant's inability to work, this Board would make an award of general damages to provide compensation for the "injury" to the Complainant, one which takes into account the effects of that injury. Where disability is caused by injury, there may be some overlap in terms of the harmful effects arising from either the tortious conduct or any discrimination, but such overlap does not, in my view, contradict or cause harm to the principles to be applied in assessing general damages in human rights cases.

66. This tribunal can make orders consistent with what a court would order in a tort claim, such as damages for lost income. However, Boards of Inquiry must make their own assessment of general damages based on the nature and degree of the discrimination experienced and its effects.

67. What further principles should guide the assessment of general damages in the context of the facts of this case? I do not accept that this tribunal is restricted to a consideration of damage awards issued in this province. In my view, it would be an error to not take into account decisions from human rights tribunals in other provinces. It is in the interests of the administration of justice that there be a reasonable degree of overall consistency in the law respecting remedy, as there is with respect to liability for human rights violations, as among the provinces.

68. I do not accept that this Board need be constrained by older case law when more recent awards have recognized that it is important to address the compensatory aspects of an award of general damages. The issue of remedy is very important as it is the practical means of ensuring that the values enshrined in human rights legislation are protected. That awards have been, generally, perhaps too low was commented upon by this Board in *Cromwell* v. *Leon's Furniture Limited and NSHRC 2014* CanLII 16399 (NSHRC) at paras 401-402. This decision and others by Boards of Inquiry in Nova Scotia (with similar comments), as well as decisions in other provinces, have signaled

to prospective parties that reliance on older cases may not be as persuasive as it has been in the past. There are many older cases where damages in the range of a few thousand dollars were awarded, although there was fairly significant discrimination. Today, fairly nominal damages for discrimination, unless appropriate in the circumstances, are inconsistent with the goal of attempting to make restitution, nor do they recognize the importance of the protections provided by human rights legislation.

69. All of the cases referenced in *Trask* are at least 10 years old. They are, in my view, out of sync with current case law, considering that awards have increased across this country over the past 10 years. Also, with one exception, the cases referenced in *Trask* are cases where the employee was already off work due to disability. While removed from the work environment, the employee was informed that he or she had been terminated.

70. The cases in *Trask* may be distinguished on the facts. I do not mean to minimize the impact of being terminated in such circumstances. General damage awards for such cases should keep in step with current case law. However, these cases do not involve a failure to accommodate, followed by termination, the related humiliation of being at work and losing your job, being required to work without accommodation, or being unable to work because you are not accommodated. None involve an aggravation of the functional limitations associated with disability, causing the employee to be unable

to work due to a failure to accommodate. In this case, the Complainant's inability to work has proven to be a complete disability for the remainder of the Complainant's working life. Based on the evidence of Dr. Lewis and Ms. Milner-Clerk, the chances of the Complainant being able to resume work before age 65 is 0-10%.

71. None of the cases to which I have been referred involve a combination of a failure to accommodate and the discrimination experienced by this Complainant caused by the Respondent's attendance management plan and the Respondent's actions based upon that plan. In my view, it would be an error to apply the cases referenced in *Trask* or the other decisions of Nova Scotia Boards of Inquiry to which I have been referred to the more complex factual situation that has occurred here.

72. Counsel for the Respondent correctly points out that *Tanner* is a more recent decision and that a lower amount of damages was awarded in that case. However, the facts in *Tanner* are not comparable. In *Tanner*, the complainant was absent from work due to a back injury. The employer actually wished to continue to employ the complainant and had assured him that he still had a job to come back to. The employer was held to have wrongly taken the position that it had no transitional or modified duties available and that the complainant had to be medically fit to perform all of his duties before he could return. The employer also failed to address the conduct of the complainant's supervisor who had been disrespectful towards the complainant's disability. General

damages were awarded for these two breaches of the *Act* in the amount of $2,500. This assessment was influenced by the fact that the employer did not terminate the complainant, rather, the complainant was not forthcoming in his evidence in this regard and had simply gone to work somewhere else. Board Chair, Gail Gatchalian, found that the employer's discriminatory treatment did not play any part in the complainant's decision to not return to work. As well, the employer impressed the Board of Inquiry because of its sincere interest in learning what it should have done to comply with the *Act* and because of its willingness to educate its employees respecting human rights.

73. The *Willow* case (general damages, $25,000) and the *Johnson* case (general damages. $10,000) referenced by the Commission were decided in 2006 and 2003 respectively. They are both more than 10 years old and were decided before damage awards in human rights cases increased. I agree that both cases involve serious breaches of the *Act*. However, the *Johnson* case cannot be distinguished on the basis that it is a more traumatic example than what occurred in this case. The discriminatory act in *Johnson* was more reprehensible, but it was not more traumatic. Mr. Johnson was a champion boxer, in excellent health. The Complainant was much more vulnerable because of the existence and nature of her disabilities. Being placed on an attendance management plan in the manner that occurred here, with the probability of job loss, was comparably traumatic for this Complainant.

74. Respondent counsel characterized this case as, "an inability to reach agreement on accommodation" in his submissions. There was no discussion with the Complainant in this case whereby she was engaged in the process. There was no clarification of her accommodation needs with her physician. Notwithstanding what was written in the accommodation letter, the Respondent simply informed the Complainant of what it was prepared to do to accommodate her. This is not a case, in my view, where there was simply a failure to reach agreement on accommodation.

75. The Complainant's health was placed at risk and was, in fact, harmed by the Respondent's failure to implement accommodations to address all of her functional limitations, as identified by the medical documentation that it had in its possession and the recommendations of her physician. To be clear, there was no malicious intent by the Respondent or any of its employees in this regard. However, on these facts, the Complainant presented as a person with chronic pain and cognitive difficulties who had a demonstrated pattern of having difficulty maintaining attendance. The Respondent allowed the Complainant to return to work without its own questions having been answered by further inquiries of the Complainant, her physician, an independent medical evaluation or a full occupational assessment. While the Respondent had decided that an independent medical examination was required, the Respondent expected the Complainant to work in the interim with accommodations that it did not have confidence in, and which were incomplete, in any event, as found in the Decision

on the Merits. These facts come perilously close to demonstrating a reckless disregard for the Complainant's health.

76. The Complainant's functional limitations were aggravated as a result, to the point that she was found ill in the washroom at work and had to be driven home. She had become sufficiently upset that she had stopped osteopathy treatments out of fear that she was going to lose her job as a result of her attendance difficulties. The Complainant has been unable to work since and is almost certainly never going to be able to work again.

77. The Complainant experienced a loss of self-respect and dignity by reason of no longer being able to be a productive member of society by being able to work. She also testified about the hurt feelings that she experienced and other aspects of psychological harm she experienced by reason of the discrimination that occurred. The fact that she experienced additional stress and anxiety for which she received treatment is confirmed by medical evidence.

78. As indicated, the Commission submits that considering only physical disability cases can operate to restrict the assessment of damages to some extent. Counsel for the Respondent submits that the highest award in the Province for physical disability is $10,000.

79. I do not accept the premise that I should only consider those remedies granted in cases that involve physical disability. I recognize that *Yuille* and other cases have differentiated the assessment of general damages based on the ground of discrimination. As the Board in *Yuille* stated: "...Cases of racial discrimination, or discrimination based on sexual preference or identity, are largely unhelpful here."

80. Given the facts and issues the Board of Inquiry was addressing in *Yuille*, the Board's comment is entirely understandable. As well, it can be easier to compare the degree and nature of discrimination within one prohibited ground. However, in theory, there appears to be no legal basis to differentiate damage awards for discrimination based solely on the ground of discrimination. Adopting such an approach, as submitted by the Respondent, would minimize to some extent the value placed upon certain grounds of discrimination and maximize others. There is nothing in the *Act* to support the contention that there is a different starting point and/or end point or cap to the range of damages that can be awarded that depends upon the ground of discrimination upon which the complaint is based. All grounds of discrimination, assuming proven, start at a point of equal value in a conceptual way. Damages are then adjusted depending on the facts of the case.

81. Here, the evidence is that the Complainant was not only unable to work but suffered a significant loss of enjoyment of life. In relation to the psychological harm she suffered, she testified that she was unable to speak normally with friends for a period and was unable to participate socially outside her home. Her cognitive difficulties became much more pronounced. Her mental health was very much effected.

82. The effects of the discrimination she experienced included anxiety over financial matters. Being without income for several months before she became eligible for LTD compounded her mental stress. The Complainant's reaction to being no longer able to work and being left without income was reasonable. I have no doubt that she experienced significant fear and anxiety during those months on a daily basis.

83. The Complainant was vulnerable. The Respondent did not act reasonably. The impact upon this Complainant was severe.

84. Focusing on the facts as they were in February 2012 and thereafter, a more robust award of damages is required in this case. While an award of monetary damages cannot truly rectify an injury of this nature to the Complainant, damages are being awarded to the Complainant for the experience of being discriminated against during the period February 20, 2012 to March 9, 2012 and as restitution for effects of this discrimination, which in this case include both injuries to her self-worth, dignity and

psychological harm (hurt feelings, further depression and anxiety) and the aggravation of the functional limitations associated with her disability while she was at work, which in turn caused or re-triggered her inability to work, such that she was unable to return to work.

85. While the period of time over which the failure to accommodate occurred in this case is relatively limited, being required to work without proper accommodation even for relatively short periods can have significant health consequences. The subsequent impact of the discrimination, in terms of psychological harm and inability to work, have been significant and of long duration. In the circumstances, an appropriate award of general damages is $35,000.

86. If the complaint in this case had included events between 1999 and 2012 and led to findings of liability for a failure to accommodate over many years on an ongoing basis, I may have been prepared to award significantly higher general damages.

Loss of Income, Past and Future

87. Complainant counsel offered several decisions in support of the position that the Complainant should be awarded damages for loss of past earnings, as well as future earning capacity.

88. Counsel relied upon *Kerr* v. *Boehringer Ingelheim (Canada) (no. 4)* 2009 BCHRT 1960 where 2.5 years of loss of wages was awarded, as well as pension benefits and a tax gross-up to compensate for extra income tax, because of the lump sum payment, as well as interest. Damages for future loss of income were not awarded as the Complainant could have returned to work but chose not to do so.

89. In *Sears* v. *Honda Mfg.*, 2014 HRTO 45 (CanLII), the Complainant was awarded 6 months loss of wages as the employee was able to return to work at the end of 6 months.

90. In *Sharon Fair* v. *Hamilton – Wentworth District School Board (Decision on Remedy)* 2013 HRTO 440 (CanLII), the Human Rights Tribunal of Ontario ordered loss of wages from the date of the beginning of the employer's failure to accommodate the complainant's disability, beyond the date she was terminated until the date of the employee's reinstatement.

91. In *Walsh* v. *Mobil Oil Canada*, 2013 ABCA 238, the Alberta Court of Appeal upheld an award of a loss of past earnings of $472,766 and loss of pension benefits of $139,154.

92. The Complainant had an Actuarial Report prepared by Jessie Gmeiner. Ms. Gmeiner was qualified as an expert and provided evidence at the hearing. Ms. Gmeiner testified that she calculated the Complainant's total past loss of wages, as of January 1, 2016, as being $160,142 plus simple interest of $2,779 for a total of $162,921. She calculated the Complainant's past loss of income for each year since March 10, 2012 up until January 1, 2016 as follows:

Year	Losses
2012	$33,061
2013	$41,462
2014	$42,655
2015	$42,964

93. Ms. Gmeiner testified that the present value of the Complainant's loss of future earnings, assuming the loss continues until the Complainant reaches age 65, is $254,841. This is based upon an assumed annual salary, as it was on April 1, 2014, of $42,964. The total amount of future loss of income includes a disability contingency to allow for the possibility that the Complainant may have become completely disabled in any event, even if the discrimination had not occurred. This contingency was calculated on the basis of disablement rates for females taken from the 26th Actuarial Report of the Canada Pension Plan.

94. The Commission took the position that past or future loss of earnings could be awarded in this case. However, the Commission did not take a position respecting whether this Board should award such damages.

95. With respect to the Complainant's loss of income claim, the Respondent's primary argument is that the Complainant was unable to work because of her disability and, therefore, no loss of income ought to be awarded.

96. The positions of both the Complainant and the Respondent took an "all or nothing" approach. The Complainant submitted that her loss of income was caused by the Respondent's discrimination. Complainant counsel took the position that, but for the Respondent's discrimination, the Complainant would have worked until she was age 65. She was 55 years old at the time she returned to work in 2012. The Respondent claimed that it was not responsible at all for the Complainant's loss of income, past or future, because, it said, she was already unable to work when she returned to work in February, 2012 and ought not to have returned at all.

97. At the hearing, I asked the parties to consider whether the injuries the Complainant sustained in her motor vehicle accidents were a contributing factor to her inability to work and, if so, how that might apply to the consideration of damages for lost earnings, whether with respect to loss of past income or the Complainant's claim that the

Respondent's discrimination caused a permanent impairment of her future earning capacity. Counsel for the Respondent advised that there was no case law to his knowledge respecting this type of notional apportionment of damages in the context of causation in human rights cases. Respondent counsel further submitted that in this context, the Complainant was claiming damages for loss of income and future lost earnings based on tort law, which is not applicable to a human rights case. Counsel submitted that I ought not to take the Actuarial Report into account at all.

98. Because the parties had not had a full opportunity to make submissions in response to my questions at the hearing and I had not had an opportunity to consider this issue to any extent, I conducted a preliminary review of case law following the hearing and advised the parties of the cases that I had reviewed. These cases are:

1. *Seneca College v. Bhadauria*, [1981] 2 SCR 181, 1981, at p 195;
2. *Chopra v. Canada (Attorney General)*, 2007 FCA 268;
3. *Ayangma v. Eastern School Board and Ano.*, 2008 PESCAD 10, at para 40 ("*Ayangma*")
4. *Tahmourpour v. Canada (Attorney General),* 2010 FCA 192;
5. *Gichuru v. The Law Society of British Columbia* (No. 9), 2011 BCHRT 185;
6. *Senyk v. WFG Agency Network* (No. 2), 2008 BCHRT 376, at paras 436-440 ("*Senyk*").

99. The parties were advised that I would be prepared to consider any submissions they wished to make or any additional case law that they wished to offer.

The Commission's Submissions

100. The Commission agreed with the Respondent that there did not appear to be any case law directly on point relating to the apportionment of damages for loss of income in human rights cases. In the Commission's view, the Board should be hesitant to "automatically import legal principles from either tort or contract into a human rights context". However, the Commission took the position that, if I found that the discrimination was part, but not all, of the reason the Complainant went on disability, I could apportion damages accordingly. The Commission submitted that this would ensure that the Complainant was made whole from the discrimination of the Respondent while not penalizing the Respondent for damages for which it would not otherwise be liable.

101. The Commission submitted that none of the cases provided appeared to be directly on point. The Commission had not discovered any additional relevant cases. The Commission suggested that the cases that were of the most assistance were the *Senyk* and *Ayangma* decisions. Of these, the Commission submits that *Senyk* is the most helpful authority.

102. In *Senyk*, the complainant was seeking damages for lost salary following termination. The Tribunal found that, although the complainant was wrongfully dismissed and the dismissal constituted discrimination, the complainant was disabled at the time and would not have returned to work. The Tribunal concluded that it was not appropriate to award lost salary in lieu of reinstatement or lost wages post-termination. At paras. 434-440, the Tribunal held:

> [434] Ms. Senyk faces two insurmountable hurdles in obtaining an order for lost salary after her termination. First, the evidence showed that she was, as of the date of the termination, and has remained thereafter, unable to work in any occupation. As a general rule, complainants are not entitled to an order for lost salary for any period during which they are medically incapable of working, on the principle that if they were medically incapable of working then, even absent the discrimination, they would not have been able to earn a salary: *Toivanen* v. *Electronic Arts (Canada) Inc.*, [2006] BCHRT 396, paras. 117 – 119.
>
> [435] Ms. Senyk submitted that the Tribunal should apply common law wrongful dismissal principles as a basis for ordering damages in lieu of reasonable notice of the termination of her contract. Such damages are available in a wrongful dismissal action, despite the fact that a plaintiff may be unable to work during the notice period.

[436] By contrast, Tribunal orders for lost salary are not based on the concept of reasonable notice. As stated in Vanton v. British Columba (Council of Human Rights) (1994), 21 C.H.R.R. D/492 (B.C.S.C.) (cited in Toivanen at para. 120):

Does the concept of "reasonable notice" apply in human rights compensation? ... The Ontario Court of Appeal in Piazza v. Airport Taxicab (Malton) Assn. (1989), 1989 CanLII 4071 (ON CA), 60 D.L.R. 759 ... stated that the purpose of compensation in the human rights context is to restore a complainant to the position he or she would have been in had the discriminatory act not occurred. This is unlike the usual measure of economic loss in contract law for wrongful dismissal where the wrong suffered by the employee is the breach by the employer of an implied contractual term to give the employee reasonable notice before terminating the contract of employment is *not* the correct measure to compensate an aggrieved complainant under the *Human Rights Code*. I agree with that conclusion.

[437] Applying the principle that the purpose of compensation in a human rights context is to restore the complainant to the position he or she would have been in had the discriminatory act not occurred, it follows that, where the complainant was unable to work by virtue of disability, and thus was unable to earn a salary, no order for lost salary is available.

[438] I would be prepared to recognize an exception to this general principle in a case where a complainant was rendered incapable of working by virtue of the respondent's discrimination. Indeed, such an exception can be seen to be at work in the many cases where the Tribunal has held that it was reasonable for a person to take some time following a discriminatory termination of employment before being able to look for work, and has ordered lost salary during that period, without any deduction for a lack of mitigation: see, for example, *Morris v. BCRail*, 2003 BCHRT 14 (CanLII), para. 251.

[439] That, however, is not this case, as the second insurmountable hurdle which Ms. Senyk faces is that I have found that WFG's discriminatory conduct, while it worsened her condition, did not itself render her incapable of working. She was already, on the evidence before me, incapable of working as of April 2006, and I have been unable to find that, even absent the discriminatory termination of her employment, it is likely that she would have been able to work within a reasonable period following her termination.

[440] Had Ms. Senyk's disability improved sufficiently by the date of termination, to the point that the evidence established that it was the termination which caused her inability thereafter to return to work, WFG could have been liable for an order for substantial lost salary. On the facts before me, it is not.

103. The Commission likewise referenced paragraph 40 of the *Ayangma* decision, in which the Prince Edward Island Court of Appeal held:

> [40] Subsection 28.4(1)(b)(iv) of the Act is applicable to the appellant's claim for compensation for lost income. The wages or income lost, as well as the expenses incurred, must be "by reason of" the discrimination of the respondent. There must be a causal connection between the act of discrimination and the loss suffered by the complainant if the Panel is to make an award of compensation for loss of income or wages under this subsection.

The Respondent's Submissions

104. Counsel for the Respondent made similar reference to the *Senyk* decision. However, the Respondent's primary submission with respect to *Senyk* is that the case stands for the proposition that there must be a causal connection between the discrimination that occurred and the disability. Respondent counsel highlighted paragraph 439 of *Senyk*, which I will repeat here for ease of reference:

> [439] That, however, is not this case, as the second insurmountable hurdle which Ms. Senyk faces is that I have found that WFG's discriminatory conduct, while it worsened her condition, did not itself render her incapable of working. She was already, on the evidence before me, incapable of

> working as of April 2006, and I have been unable to find that, even absent the discriminatory termination of her employment, it is likely that she would have been able to work within a reasonable period following her termination. (emphasis added)

105. Respondent counsel submits that *Senyk* makes it clear that there must be an evidentiary connection between the lost income and the discrimination and that the discrimination cannot merely be something which "worsens" the underlying condition. Respondent counsel submits that there is no causal connection in this case.

106. Respondent counsel submits that *Ayangma* makes the same point.

107. Since these submissions were made, I have found that there is a causal connection, as held in the Decision on the Merits. Accordingly, the Respondent's submission in this regard has been previously addressed.

108. However, Respondent counsel further submits that it would be impossible to apportion damages between the disability and the accommodation of that disability. Counsel submits:

> This is because it would require a means of separating income loss attributable to the injury apart from income loss attributable to discrimination.

Such a finding would require first, evidence showing such separation, of which none was led in the instant case; but second and more importantly, a legal ruling that the same physical injuries which prevented Ms. *Wakeham* from earning an income (and which were attributed by medical witnesses to her car accidents) and form the basis of her claim of discrimination were also caused by the discrimination. Clearly those physical injuries cannot be both the basis of the claim and the result of it. That is a legal contradiction.

109. Respondent Counsel made further submissions, which I will also simply repeat:

Once the employer stopped relying on the faulty and questionable advice from Ms. Wakeham's family doctor, the independent Medical Examinations revealed that Ms. Wakeham was completely disabled from performing her job. If a person is completely disabled, it is impossible to accommodate them short of LTD benefits, which DOE did provide. As Ms. Wakeham was completely disabled, then *Senyk* is clear that she would not be entitled to an Order for lost salary for any period which she was not capable of working.

This principle is important to this matter, as on the evidence, it is clear that, even if discrimination is found, Ms. Wakeham's health issues were such that she was unable to work irrespective of any discrimination that may have

taken place. Moreover, when Ms. Wakeham found those accommodations wanting, she was placed on LTD, which is itself a form of accommodation. Now Ms. Wakeham seeks compensation for being accommodated, on the grounds that she was not accommodated. This is also a contradiction.

Analysis and Decision

110. In this case, there is no need to separate income loss attributable to the Complainant's motor vehicle injuries from her loss of income attributable to the discrimination she experienced. At the time of the discrimination, the Complainant was able to work. Dr. Lewis and Dr. Koshi both testified that she could work. There is no medical evidence that is based on assessment of the Complainant, as she was when she returned to work, respecting the Complainant's ability to work on or about February 20, 2012, other than the evidence of Dr. Lewis. I have made a finding of fact that the Complainant was able to work at that time with the injuries she sustained in her motor vehicle accidents. Accordingly, the Respondent's submissions that the Complainant's health issues were such that she was unable to work irrespective of any discrimination that may have taken place is based upon an incorrect assumption of fact.

111. The reason why the Complainant became unable to work subsequently was primarily because she was not accommodated, but also because of the discriminatory impacts of the application of the attendance management plan to her.

112. The independent medical examinations conducted by Dr. Bourke and Dr. Theriault found that the Complainant was unable to work due to her disability in her current position and attributed that inability to her car accidents, because of the focus of their reports, which were requested and framed by the Respondent. Their reports responded to the questions they were asked. The Complainant's underlying disability was reported to Dr. Bourke and Dr. Theriault as being based on her motor vehicle accidents. These physicians were not informed of the facts respecting what occurred to the Complainant from February 20, 2012 until March 9, 2012. They were not asked to express an expert opinion respecting whether the Respondent's failure to accommodate the Complainant when she returned to work aggravated the functional limitations associated with her disabilities or whether the application of the attendance management plan caused her additional psychological harm or worsened her chronic pain and mental illness. They were not asked to determine whether this aggravation caused her to become unable to work on March 9, 2012 and thereafter. Furthermore, the independent medical examinations were conducted after March 9, 2012, several months later at a time when the Complainant was already unable to work.

113. I have found that when the Complainant became unable to work on March 9, 2012, it was because of the Respondent's discrimination. There was no other cause that led her to be unable to work. The Respondent submits that nothing catastrophic occurred

between February 20, 2012 and March 9, 2012. That presumes that a catastrophic event was required to aggravate the Complainant's disabilities. A catastrophic event was not required because Ms. Wakeham was a "crumbling skull complainant".

114. The only other explanation offered by the Respondent is that the Complainant became unable to work because of her tailbone. I found that there was insufficient evidence to this effect in the Decision on the Merits.

115. There was sufficient evidence available, based on the Complainant's history of absences, to lead to the reasonable conclusion that working without proper accommodation would put her off work on disability leave. Accordingly, the Complainant's loss of income is the responsibility of the Respondent alone and the issue of apportionment of damages for loss of income does not arise on these facts, at least at the outset of the Complainant's loss of income. However, I am required to determine how long the Complainant would have continued to work but for the discrimination.

116. The Respondent took the position that a finding of any type of apportionment of damages for lost income caused by the original disability and the inability to work because of discrimination is impossible because there is no specific evidence about what happened. The Respondent also submits that it is "conceptually impossible to

assign causation on the basis of both the existence of a disability and the accommodation of that disability".

117. The Commission submitted that apportioning responsibility is as much "art as science".

118. Despite the lack of direct evidence, I am nonetheless required to make what I believe to be the right decision. The Federal Court of Appeal in *P.S.A.C.* v. *Canada*, *the Department of National Defence* (1996), 27 CHRR D/488(FED.C.A.) ("*PSAC*") held that a Human Rights Tribunal has the authority to order lost wages resulting from discrimination. Such an order will require an answer to the question: what wages was this victim deprived of as a result of the discriminatory practice? In *Remedies in Labour, Employment and Human Rights Law*, at page 610, the authors wrote:

> The Federal Court of Appeal [in *PSAC*] found it to be settled law that once it is known that a Plaintiff suffered damage, a Court cannot refuse to make an award simply because the precise amount is difficult or impossible. It is the tribunal's duty to make such an assessment.

119. I return to the Respondent's submission that no loss of income is payable on these facts because the Complainant was unable to work. The *Senyk* case may be readily distinguished on its facts because Ms. Senyk was already unable to work at the time that she was terminated. As the Tribunal noted, "even absent the discrimination, Ms. Senyk would not have been able to earn a salary". Furthermore, in the *Senyk* case,

the Tribunal found that, while the Respondent's discriminatory conduct worsened her condition, it did not render her incapable of working. She was already incapable of working as of the dates of the discriminatory events.

120. In this case, the Complainant was working at the time of discrimination. The issue is for how long she would have been able to work but for the discrimination she experienced. I note that, in *Senyk*, the Tribunal commented at para. 440:

> Had Ms. Senyk's disability improved sufficiently by the date of termination, to the point that the evidence established that it was the termination which caused her inability thereafter to return to work, WFG could have been liable for an Order for substantial lost salary. On the facts before me, it is not.

121. The Complainant claims that she would have worked for another 10 years until age 65. In this regard, she advances a sizable loss of income and future loss of income claim.

122. However, I have found that the Complainant falls into the category of a "crumbling skull" victim of discrimination. Although there is no specific medical evidence to the effect that the Complainant's disabilities would have worsened over time, irrespective of the discrimination, it seems more likely than not that this would have occurred. In my view, it is more probable than not that the Complainant's underlying disabilities would have

overtaken her, in any event, such that she would have been unable to work until age 65, even if the discrimination had not occurred.

123. This is not a case where there is a "finding of causation on the basis of both the existence of disability and the accommodation of that disability". This is a case where the Complainant had a pre-existing disability which I find would have led her to eventually be completely and permanently disabled and unable to work. Her inability to work occurred earlier than it would have otherwise by reason of the Respondent's discrimination.

124. It would be an error to award the Complainant a full award of loss of income if I am not persuaded on the basis of the evidence that the dominant reason she cannot work over the remainder of her working life is as a result of the discrimination she experienced. My conclusion that she could not have worked until age 65 is based on circumstantial evidence and inference. However, this Complainant was a highly vulnerable individual with a lengthy history of chronic pain who was at an age where, over the next 10 years, it could reasonably be expected that health problems would become more of an issue. Accordingly, notwithstanding the Respondent's position that I cannot conceptually make the separation necessary for apportionment of loss of wages to identify what is the responsibility of the Respondent, I propose to do so by limiting the length of time over which I am prepared to order a loss of income award.

125. Before doing so, there is one further issue that was raised by the Respondent on the issue of whether damages for loss of income can be awarded. The Respondent submits that no loss of wages can be ordered in a case such as this where wage replacement is already in place for the Complainant, as she is in receipt of LTD.

126. In this regard, the Respondent relies upon *Bobbitt* v. *Royal Canadian Legion, Branch 19* (2003) NSHRBID No. 4, where the Board of Inquiry commented as follows, at para. 60:

> Mr. Bobbitt was on Workers' Compensation and his salary continued except for perhaps a week. That week period pre-dated his dismissal. I find therefore that an award for lost wages is not appropriate in this case. The Workers' Compensation Board is not in place to subsidize those who discriminate. However, if Mr. Bobbitt was not on Workers' Compensation, this Board would be making an award of lost wages.

127. Counsel for the Respondent submits that the same principle applies here because the Complainant is on long-term disability. Counsel submits that it is not appropriate for the Complainant to receive an award of lost wages when she is on LTD. Counsel submits that LTD is the only appropriate accommodation for the Complainant given her inability to return to work.

128. In *Bobbitt*, the complainant was on medical leave in receipt of Workers' Compensation benefits at the time his employment was terminated. His complaint concerned the issue of whether his disability was a factor in the employer's decision to terminate his employment. Accordingly, Mr. Bobbitt was already in a position whereby he could no longer work when the discrimination occurred. *Bobbitt* may, therefore, be distinguished on its facts.

129. I will not address the Respondent's submission respecting LTD as an accommodation. The issue of LTD as an accommodation goes to the merits and has already been determined in the Decision on the Merits.

130. Long-term disability insurance does not replace salary, rather only a percentage of salary.

131. A Complainant being in receipt of long-term disability insurance does not alleviate a responsible party from their obligation to pay damages. Rather, as Cromwell J. commented in *IBM Canada Ltd.* v. *Waterman* [2013] S.C.J. No. 70 ("*Waterman*"), at para 24, albeit in the context of whether LTD benefits should be deducted from a loss of income award, the responsible party pays the damages they owe. To the extent that triggers a repayment of LTD, that issue is dealt with separately.

132. As to the amount of any loss of income claim to be awarded, I am persuaded that, had the Complainant been fully accommodated to the point of undue hardship, she would have been able to continue to work for another 3 years before she would have had to stop working because of her disabilities, in any event.

133. In my view, this finding is required to be discounted for various contingencies. These contingencies include the Complainant losing her position for some other reason or because of some intervening accident or event that could lead to job loss. In this regard, there was no evidence respecting what occurred to the Complainant's position in the years since 2012. I have no reason to expect that the position was eliminated, for example, or that the Complainant would have developed performance issues that would have led to her termination. She had a good performance record over the many years she had worked for the Respondent, dating back to 1991. I attach a modest contingency in this respect.

134. There is a chance that, had the Complainant been accommodated to the point of undue hardship when she returned in February 2012, she would not have been able to continue to work for three years, in any event, because of her disabilities. On the facts, we simply do not know with any certainty how long the Complainant would have been able to work, had she been properly accommodated. To take into account all

relevant contingencies, I have determined that it would be appropriate to discount the loss of income award to the Complainant by the amount of 40%.

135. On the basis of these findings, I conclude that the Complainant, had she been fully accommodated, would have worked the remainder of 2012, 2013 and the first three months of 2014, until the end of March 2014. At that point, she would have been 58 years old. Based on the Actuarial Report, which determined a loss of income of $33,061, $41,463 and $42,655 for each of the years in question, including an adjustment to income in 2014 to allow for an end to employment at the end of March 2014, I find that the Complainant is entitled to a loss of income claim in the amount of $85,186. This is to be discounted for contingencies by 40%, which is a reduction of $44,074.40. Accordingly, the Complainant is entitled to damages for loss of income in the amount of $51,000.

136. As well, the Complainant is to receive an amount, to be calculated and agreed upon by the parties, as a "gross up" to compensate the Complainant for any additional income tax she is required to pay by reason of receiving this loss of income as a lump sum in one taxation year.

137. Because of my finding that the Complainant would have worked for 3 years after she returned to work, before becoming unable to work in any event, I am not prepared to

award any future loss of earnings. However, I conclude that it is within my jurisdiction to do so. A Board of Inquiry's authority to order future loss of income has been recognized by the Federal Court of Appeal, as noted in *Sulz* at para 87-88:

> The remedies available under the CHRA appear to be sufficient. Section 53(2) provides for compensation for pain and suffering, special expenses, and wage loss caused by the discriminatory acts. Although the wording of the statute appears to contemplate only past wage loss, the Federal Court of Appeal has determined that the Human Rights Tribunal may award compensation for future wage loss based on tort principles. The Federal Court of Appeal found that the ultimate goal of the tribunal must be the same as that of the courts; to make the victim whole for the damage caused (See *Canada (A.G.) v. Morgan*, [1992] 2 F.C. 401, 85 D.L.R. (4th) 473 at paragraph 19).

138. Had the facts been different, specifically, had I been persuaded that the Complainant could have continued working beyond the date of the hearing or until age 65, I would have been prepared to make an award of future loss of earnings. I would, however, have closely considered the contingencies referenced in the Actuarial Report to determine whether they required any further adjustment.

Deductibility of LTD Benefits

A. The Issue

139. The parties were asked to provide written submissions to address this issue:

> Assuming a past or future loss of income were awarded on a basis of a finding of liability against the Respondent, would such compensation be subject to deduction of LTD benefits received by the Complainant? Does the LTD plan trust fund have a right of subrogation in these circumstances?

140. Before turning to the parties' submissions, I will provide the following explanation of the Nova Scotia Public Service Long-Term Disability Plan, which was in evidence.

B. The Evidence

141. The Nova Scotia Public Service Long-Term Disability Plan (the "Plan") is managed by the Nova Scotia Public Service Long-Term Disability Plan Trust Fund which has a Board of Trustees which, in turn, appoints an administrator to be the Plan Administrator. The Plan provides that benefits be provided to employees who are disabled. In the Plan, "disabled" is defined as:

> ...The complete inability..., of an employee, because of illness or injury, to perform the regular duties of his/her occupation during the applicable elimination period and the next 24 months of any period of disability.

142. The “applicable” elimination period is defined as 100 consecutive work days of short-term illness leave. After 24 months of disability, an employee remains disabled if he or she is unable to engage in “any occupation for remuneration or profit for which the employee is or may become fit through education, training, experience or rehabilitation.”

143. The evidence is that the Complainant eventually received a retroactive payment of LTD, back to the first day that she was unable to work, on March 10, 2012. No evidence was led as to how the Complainant was able to receive LTD retroactively. As indicated, the evidence was that she did not receive short term illness disability during the first 100 consecutive workdays, as short-term illness disability had been denied by the Respondent.

144. Pursuant to section 7(6), where the employee has returned to work, the Plan allows for successive periods of disability of an employee to be considered as occurring in the same period of disability, as long as the employee has not returned to work for a continuous period of 30 consecutive work days before the disability reoccurs. In this case, the Complainant had not yet worked 30 work days. Perhaps this provision allowed the Complainant to eventually receive LTD retroactively.

145. As the Complainant has now been in receipt of LTD for longer than 24 months, it is safe to assume that the Plan determined at some point since March 10, 2012 that the Complainant became unable to work in any occupation, as opposed to her own position.

146. The Plan requires employees and employers to make equal contributions to the cost of LTD benefits.

147. Section 8(1)(aaa) sets out the amount of benefit to which an employee may be entitled:

> For employees whose elimination period commences on or after January 1, 2009 and who make a claim under the Plan, the bi-weekly benefit for an employee covered by this agreement shall be, for the first 3 years of benefits, 65% of the employee's pre-disability salary to a maximum benefit of $4,375.00 bi-weekly, and thereafter, 70% of the employees pre-disability salary to a maximum benefit of $4,711.54 bi-weekly.

148. The Plan provides that benefits cease the last day of the month during which the employee attains the age of 65 years.

149. Benefits are reduced by the receipt of Canada Pension Plan payments and any benefits payable from any other disability plan that is sponsored by the employer.

150. Of most significance, section 9(8) provides that benefits to an employee are reduced by:

> 9(8) The amount of earnings recovered through a legally enforceable cause of action against some other person or corporation.

151. Section 16 of the plan provides a right of subrogation to the Trustees. Section 16(1) provides as follows:

> Where a long-term disability benefit is payable for an injury or illness for which any third party is, or may be, legally liable, the Trustees will be subrogated to all rights and remedies of the employee against the third party, to recover damages in respect of the injury or death, and may maintain an action in the name of such employee against any person against whom such an action lies, and any amount recovered by the Trustees shall be applied to
>
> > (a) payment of the costs actually incurred in respect of the action, and reimbursement to the Trustees of any disability benefits paid, and the

balance, if any, shall be paid to the employee whose rights were subrogated.

(b) any settlement or release does not bar the rights of the Trustees under subsection (1) unless the Trustees have concurred therein.

(c) an employee will fully cooperate with the Trustees in order to allow the Trustees to do what is reasonably necessary to assert the Trustees' rights to subrogation.

152. It appears that there are further provisions in section 16 with respect to subrogation. The above excerpt is labelled section 16(1). However, these were not in evidence.

Submissions of the Parties

153. Complainant counsel submits that LTD benefits are not deductible from the Complainant's wage loss claim against the Respondent. Counsel relies upon the comments of the Supreme Court of Canada in *Waterman*, at paras 23-24, where Cromwell, J. held:

> 23 Not all benefits received by the Plaintiff raises a collateral benefit problem. Before there is any question of deduction, the receipt of the benefit

must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty.

24 For example, there is no excess recovery if the party supplying the benefit is subrogated to — that is, steps into the place of — the plaintiff and recovers the value of the benefit. In those circumstances, the defendant pays the damages he or she has caused, the party who supplied the benefit is reimbursed out of the damages and the plaintiff retains compensation only to the extent that he or she has actually suffered a loss: see, e.g., *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, at pp. 386-88, *per* McLachlin J., as she then was, dissenting in part....

154. Complainant counsel submits that, since payment of loss of income damages by the Respondent to the Complainant reduces the amount of LTD benefits payable to the Complainant under the Plan pursuant to section 9(8), there is no excess recovery issue to be addressed. The Plan, by reason of a requirement for reduction of LTD benefits, eliminates any excess recovery and there is no need for the Complainant to rely upon the collateral benefit exception.

155. Commission counsel similarly submitted that the Plan is subrogated to the rights of the Complainant by virtue of section 16 of the Plan. Commission counsel suggests that the mere existence of a right of subrogation eliminates any collateral benefit problem and

establishes that full damages are to be awarded with no deductions. In this regard, counsel made the following submissions:

1. Applying the Supreme Court of Canada decision in *Waterman* to the case at hand suggests that if there is a subrogation clause then the complainant should be awarded past loss of income damages without any deduction for LTD benefits. It would then be up to the Plan to determine whether it wants to pursue a subrogated claim.

2. In the Commission's view, unless a section such as Section 16 of the Plan expressly excludes Human Rights awards, then the Chair should proceed as if the subrogation clause applies. In a situation such as this, the burden is on the Respondent to clearly establish that the subrogation clause does not apply to avoid the award of full damages.

3. To find otherwise could result in significant unfairness to the Complainant. For example, if the Chair decided that the subrogation clause did not apply then the award for past loss of income would presumably be less than the LTD benefits received. However, such a decision would not bind Plan administrators. That could mean that ultimately, even though the intent was to make the Complainant whole, some or all of the damages awarded could be clawed back by the plan administrators.

4. Given the *Waterman* decision and the language of the Plan, it would be appropriate in this instance not to deduct the LTD benefits for any

damages award and rather to award the full amount of loss of income damages (if any and subject to the application of apportionment.....).

156. The Respondent's submission on the issue of whether the Plan or Trustees have a right of subrogation pursuant to section 16(1) of the Plan is brief. It is as follows: "....it would appear that the appropriate consideration in this instance is not subrogation, as the LTD trust has not taken control of Ms. Wakeham's claim, but rather offset". The remainder of the Respondent's submissions address the issue of "offset", to the effect that LTD benefits must be deducted from awards for lost income where there is excess recovery to the complainant: *Lethbridge Industries Ltd.* v. *Alberta (Human Rights Commission)*, 2014 AB QB 496 ("*Lethbridge*") and cases cited therein. The Respondent did not take a position respecting the effect of section 9(8) of the Plan.

A) Analysis and Decision Respecting Deductibility of LTD Benefits

157. In *Lethbridge* there was a "potential compensating advantage problem", to use the term adopted by Cromwell, J. in *Waterman,* whereby the complainant would receive compensation beyond his actual loss. The facts in *Lethbridge* and the cases cited within that decision respecting the issue of a collateral benefit problem are clearly distinguishable from the facts here, where the Complainant will not receive compensation beyond her actual loss.

158. The Respondent does not suggest that section 9(8) of the Plan would not lead to a reduction in the Complainant's LTD benefits. The Respondent is suggesting that subrogation does not apply to these facts because the Trustees did not step in and advance a human rights complaint on behalf of Ms. Wakeman.

159. I do not read section 16 and section 9(8) as requiring the Trustees to necessarily initiate a legal action in order to recoup disability benefits that were paid to the Complainant. LTD benefits may quite simply be subsequently replaced by payments of income received by the Complainant. I am not aware of any case where an insurer has advanced a human rights complaint on behalf of an insured and I do not read section 16 as requiring this procedural step. Assuming that damages for loss of income are subsequently received by an insured employee, due to negotiations or the initiation of legal action by the employee, the Plan authorizes the Trustees to reduce the LTD payments payable to the employee and also requires the employee to cooperate with the Plan to ensure that its interests in this regard are addressed.

160. I agree that the burden is on the Respondent to establish that section 9(8) and section 16 of the Plan do not apply to avoid an award of full damages for loss of income. I am unable to conclude, based on the evidence or the legal authority provided that "offset" based on the common law would apply in these circumstances or that

"reduction" pursuant to section 9(8) of the Plan or subrogation pursuant to section 16 would not apply.

161. On the basis of *Waterman*, there is no excess recovery issue to be addressed and no need to determine whether the Complainant can rely upon the collateral benefit exception. Accordingly, I will not address the additional submissions that were made on the basis of *Lethbridge* by the Respondent.

162. Because section 9(8) of the Plan reduces LTD benefits received by the Complainant by the amount of earnings recovered from the Respondent, I am not prepared to make any deduction of long-term disability benefits from the Complainant's award of compensation for loss of income. To do so would work a singular injustice to the Complainant, as the intent of the award of loss of income is to put her in the position that she would have been in "but for" the discrimination. I agree with the concern expressed by Commission counsel. Should this Board make an adjustment to the amount of loss of income awarded, it would not lead to reimbursement of the Plan by the Respondent. I have no jurisdiction to make an Order that would be binding on the Plan Administrator or the Trustees.

Deductibility of CPP Benefits

163. On March 4, 2013 the Complainant began to receive CPP disability pension benefits of $420.56 bi-weekly. At that time, her LTD benefit was reduced to $574.20 bi-weekly.

164. Complainant's counsel submitted that CPP disability pension benefits are not deductible from the Complainant's wage loss claim against the Respondent because the Complainant contributed to the cost of the CPP disability pension benefits. Counsel relies upon *Sarvanis v. Canada* [2002] SCJ No. 27 at para 33 ("*Sarvanis*"), citing *Canadian Pacific Ltd. v. Gill* [1973] SCR 654 at p. 670 and *Cugliari v. White* (1998), 159 D.L.R. (4th) 254.

165. In *Sarvanis*, the Supreme Court of Canada commented at paragraph 33:

> ...(T) he clear purpose of the CPP disability benefits is to supplement the incomes of disabled Canadians who have difficulty meeting the day-to-day expenses because of their inability to work, that is, their status as disabled. For this reason, it has already been held by this Court that CPP disability benefits are not to be considered indemnity payments, and therefore that they are not to be deducted from tort damages compensating injuries that

factually caused or contributed to the relevant disability. See *Canadian Pacific Ltd.* v. *Gill*, 1973 (CanLII 2 CSCC), [1973] S.C.R. 654, at p. 670; *Cugliari*, supra, This rule is premised on the contractual or contributory nature of the CPP.

166. This was not disputed by the Respondent.

167. Accordingly, I find that CPP benefits are not to be deducted from the award for loss of income in this case.

Order

168. For the above reasons, I hereby order the Respondent to pay to the Complainant the following sums within 60 days of the issuance of this decision:

1. General damages of $35,000;
2. Damages for loss of past income of $51,000;
3. A gross-up amount to be calculated and agreed upon by the parties to offset any additional income tax that the Complainant is required to pay; and
4. Interest on this award commencing February 21, 2012 until the date of issuance of this decision, to be calculated on the basis of simple interest of 2.5% annually.

169. For the limited purpose of resolving any issue respecting the interpretation or implementation of this Order, I will retain jurisdiction for 90 days.

170. I wish to take this opportunity to thank all counsel and the Complainant for their submissions and courtesies to this Board throughout this matter.

Kathryn A. Raymond, Q.C.
Nova Scotia Human Rights Board of Inquiry
Chair