IN THE MATTER OF: THE NOVA SCOTIA *HUMAN RIGHTS ACT* (the *"Act"*)

and

IN THE MATTER OF: **Board File No. 51000-30-S11-1908**

BETWEEN:

Douglas Foster

Complainant

- and –

Cape Breton Regional Municipality

Respondent

- and –

The Nova Scotia Human Rights Commission

DECISION

Chair:	**Dennis James**
Hearing Date:	**January 28, 29 and 30, 2014**
Counsel:	**Blair Mitchell and Marion Ferguson, Counsel for Douglas Foster, Complainant** **Eric Durnford, Q.C. and Krista Smith, Counsel for CBRM, Respondent** **Lisa Teryl, Counsel for Nova Scotia Human Rights Commission**

1. In his evidence before the Board, Jerry Ryan, now retired CAO for the Cape Breton Regional Municipality (CBRM) testified, in part:

> (page 17) A. I think a mandatory retirement for CBRM as an employer is, is probably the most workable. We built an organization on mandatory retirement.

2. Prior to July 1, 2009 the longstanding practice of mandatory retirement was confirmed in a policy passed by CBRM Council, in Collective Agreements with CUPE and in the terms of the Defined Benefit Pension (DBP). It was not an express term of the other pension plan in existence, which is the Defined Contribution Plan (DCP) but due to the policy it was a part of CBRM's employment relationship. In fact, the language of the DCP contemplated an employee working beyond the age of 65. At a Council meeting on June 16, 2009 Council approved an amendment to the DCP which provided for mandatory retirement at the age of 65. The amendment was passed in contemplation of the *Mandatory Retirement Act*, 2007 SNS c. 11 ("*MRA*") which was to take effect July 1, 2009.

3. The issue raised in this proceeding before this Board is whether the amended DCP is a *bona fides* pension plan as set out in ss.6 (g) of the *Human Rights Act*, 1989, R.S.N.S., c 214 as amended, ("the *Act*") and thereby an exception to the protection against age discrimination as provided in Section 5 (h) of the *Act.*

Mandatory Retirement Act

4. The legislature of Nova Scotia passed the *MRA* in April 2007, but it did not take effect until July 1, 2009. The *MRA* introduced a number of amendments to the *Act* or *Labour Standards Code* that brought some changes to the scope of mandatory retirement in Nova Scotia.

5. A plain reading of the *MRA* shows it to be a concise piece of legislation introducing amendments to the *Act* or the *Labour Standards Code* follows:

> i. It introduced a *bona fide* occupational requirement exception to 6 (f) of the *Act*;
>
> ii. It removed the retirement plan exception that had been part of section 6 (g) of the *Act*;
>
> iii. It removed section 6 (h) of the *Act* which had permitted as an exception "a *bona fide* plan, scheme or practice of mandatory retirement";
>
> iv. It added section 6 (a) to the *Act* as an exception for a term of office based on age if required by an enactment;

v. It changed language in the *Labour Standards Code* to introduce a *bona fide* occupational requirement rather than an established practice test.

6. Most important of these changes to the complaint of Douglas Foster, was the removal of "the retirement plan" exemption under ss. 6 (g) of the *Act* and the removal of 6 (h) which included as an exception, a *bona fide* plan, scheme or practice of mandatory retirement as an exception to age discrimination.

7. The *MRA* left ss. 6 (g) of the *Act* in place as it relates to pension plans. Notably, the amendment did not change the language nor did it modify the purposes of the *Act* in a way that could impact ss. 6 (g) as it relates to the *bona fide* pension exception.

8. The language of ss. 6 (g) before and after the effective date of the *MRA* is set out:

> (g) to prevent, on account of age, the operation of a *bona fide* retirement or pension plan...(prior to July 1, 2009)
>
> (g) to prevent, on account of age, the operation of a *bona fide* pension plan...
>
> (after July 1, 2009)

9. During oral submissions in the preliminary hearing in December 2012 dealing with three other complaints, Ms. Teryl for the Commission agreed that there was no change in the language of ss. 6 (g) as it relates to the *bona fide* pension plan exemption to age discrimination:

> "**MR. JAMES:** ...as it relates to the exemption for a pension plan, that the only, and Ms. Coen can certainly interfere if I'm or intervene if I'm misunderstanding her argument, but the point of this is to illustrate that what the *Mandatory Retirement Act* was exempted only the retirement plan aspect of 6 (g) but left the exemption of the bona fide pension plan in place with the exact wording that would have been considered in Talbot. I think that's her point and so...
>
> **MS. TERYL:** Oh, yes. And that, the Commission does not differ with that. That is correct. The remaining, the remaining wording in the Nova Scotia *Act* is identical to what was in Talbot."

10. In this decision the Board is not concerned with CBRM's DBP which was the subject of a complaint in *Talbot v Cape Breton (Municipality)* 2009 NSHRC 1 (CanLII). There were three other complaints which this Board was appointed to hear at the same time as Mr. Foster's. Those three other complaints all dealt with the DBP, not the DCP, and those

three complaints were dismissed for reasons set out in an earlier decision *Hynes et al v Cape Breton Regional Municipality,* 2013 CanLII 86224 (NS HRC).

11. There is no challenge by either Mr. Foster or the Commission to the legitimacy of the DCP other than the contested amendment passed by the CBRM Council on June 16, 2009. The DCP was one of two plans created after CBRM was formed. Of the predecessor municipalities that were amalgamated to form CBRM, including the regional planning entity Cape Breton Metro Planning Commission ("Planning Commission") that Mr. Foster directed, only the City of Sydney had a defined benefits plan. The other municipal units had either a defined contribution plan or a group RSP. The various defined contribution pension plans then in existence were consolidated under order of the Superintendent of Pensions. To accomplish that, the plans were consolidated in 1997 under the defined contribution plan then registered by the Town of Sydney Mines and the resulting consolidated plan became the DCP that is the subject of this proceeding.

12. The DCP bears Nova Scotia Registration C939306 and bears Canada Revenue Agency ("CRA") registration Number 0939306. As of June 2012, there were 352 members in the DCP, 90 of those who were working and contributing to the plan. The evidence is that many of the inactive plan members are those who have residual benefits after they exercised rights to buy back service in the DBP. The evidence is that the number of active members in the DCP will continue to decline as a result of a decision by CBRM in 2001.

13. In 2001, CBRM made the decision to direct new employees to the DBP. In addition, employees who were members of the DCP were offered the opportunity to transfer to the DBP and, if desired, to "buy back service time". There was a six month period in 2001 for the employees to declare their intentions to transfer to the DBP but the process of transfer and "buy back of service time" took a few years to achieve. Mr. Foster elected not to transfer to the DBP and remained in the DCP.

14. CBRM provided a series of tables to summarize the participation in the respective plans:

Table 1 – Summary of DB Plan Members

	2009	**2012**
Employees contributing to DB Plan (retirement pending)	677	715
Deferred vested & inactive members	18	17
TOTAL members in DB Plan	**695**	**732**

Table 2 – Summary of DC Plan Members

	2009	**2012**
Employees contributing to DC Plan (retirement pending)	104	90
Total members in DC Plan	**397**	**352**

Table 3 – Summary of Retirements at CBRM

	August 1995 to June 30, 2009	July 1, 2009 to June 30, 2012	TOTAL
DC Plan	43	16	59
DB Plan	95	60	155
No pension	14	13	27
TOTAL	152	89	241

15. It is admitted by CBRM that it was in direct response to the *MRA* coming into effect on July 1, 2009, that Council voted to amend the DCP to include a term to introduce mandatory retirement at the age of 65. This was designed to fill a gap that would exist due to the removal of protection under the *Act* for mandatory retirement policy and practice. Without the amendment to the DCP plan, CBRM would have been in a situation where most of its work force would be subject to mandatory retirement under the DBP and a portion of its work force would not be subject to mandatory retirement. As far as senior administrators were concerned, that would have created an untenable situation.

Witnesses

Douglas Foster

16. Douglas Foster was Director of Planning for CBRM until June 30, 2012. He joined CBRM on August 1, 1995 having previously served as Director of the Planning Commission.

17. It was clear from the evidence that Mr. Foster was quite resistant to retirement at the age of 65. He raised the issue well in advance of his sixty-fifth birthday and continued his

efforts to avoid retirement until the date of his forced retirement, June 30, 2012. He was quite open with Mr. Ryan and Mr. Fleming as to his intention to file a complaint with the Nova Scotia Human Rights Commission alleging discrimination on the basis of age contrary to ss. 5 (h) of the *Act*. Still, it was clear that Mr. Foster enjoyed a solid professional relationship with Messrs. Fleming and Ryan and also shared an amicable social relationship. Undoubtedly, the issue placed some strain on those relationships but it appears all three handled the issue in a professional manner and it became a point on which they agreed to disagree.

18. According to his testimony, Mr. Foster believes he cannot afford to retire for a number of reasons that arise from his personal circumstances. From a less personal perspective he also believes mandatory retirement to be the wrong approach for the CBRM workplace. He believes there to be more creative and effective strategies that should be used for those employees who wish to work beyond the age of 65.

19. Since July 2012 when Mr. Foster was forced by CBRM to retire, he has carried on business as a consultant in planning matters.

Angus Fleming

20. As the Director of Human Resources, Mr. Fleming was principally responsible for advancing the amendment to the DCP. Throughout the hearing, and indeed during the hearing on the preliminary motion in December 2013, Counsel for Mr. Foster tried to demonstrate, in effect, that Mr. Fleming had a personal agenda he wished to impose on Council. The Board rejects that categorization of Mr. Fleming's role. The Board accepts that Mr. Fleming was motivated only by what he considered, in his professional capacity, to be in the best interests of CBRM.

21. Mr. Fleming confirmed the mandatory retirement policy had been in place since the creation of CBRM on August 1, 1995. It was very much a concern of Mr. Fleming that the effect of the *MRA* would be to create an unhealthy division between CBRM employees who would be forced into mandatory retirement and those who would not be forced to retire.

22. Facing the inevitability of the mandatory retirement policy being made unlawful, Mr. Fleming was mindful of the decision *Talbot, supra* which had been released on March 6, 2009. As a result of that decision and other public information, Mr. Fleming understood that a *bona fide* pension plan was an exception to the prohibition against discrimination on the basis of age according to ss. 5 (h) of the *Act*. He understood this exception under ss. 6 (g) would continue to exist after July 1, 2009. The strategy then was quite simple: replace the mandatory retirement policy by amending the DCP to introduce a mandatory retirement condition for employees when they turned 65 years old.

23. The proposed amendment to the DCP was addressed by a Council Issue Paper dated June 3, 2009 that Mr. Fleming prepared. A special *in camera* meeting of Council was arranged to take place immediately before the regular meeting of Council scheduled for June 16, 2009 so the issue of the amendment could be addressed. The Council does not normally sit in July and August so the timing of the discussion was important given the *MRA* was to take effect on July 1. Mr. Fleming attended the *in camera* session and the public session of Council and spoke to the issue of mandatory retirement and the recommended amendment to the DCP at each meeting.

24. In the June 3 Issue Paper Mr. Fleming wrote in part:

> The DC Plan does not contain this provision, and without it there will be no requirement for the 200 or so employees who are members of the plan to retire at age 65. This will create an inconsistency on how both groups of employees are treated for retirement after July 1, 2009. Employees of the DC Plan can continue to work after 65 and those in the DB Plan will be required to retire at 65.
>
> With mandatory retirement ending July 1, 2009 it is important for CBRM to remain consistent with all employees.

25. As it turns out the "200 or so employees" was a gross over-statement. The evidence was that there were only 104 active employees in the DCP that were contributing to the DCP. The other 293 members were not contributing actively.

26. It was the consensus of Council during the *in camera* meeting and the motion adopted by Council in open session that the recommendation from Mr. Fleming, be approved:

> Motion that the provisions of the Defined Contribution (DC) Sun-life Plan be changed as follows:
>
> a) remove those provisions in the Plan allowing a member to participate after age 69 and;
>
> b) include a provision similar to that in the Defined Benefit Plan that "All employee of the Employer shall retire on the first day of the month following their sixty-fifth (65th) birthday".

27. At the same time, Council directed that:

> **Amendment**
>
> Moved by Councillor Bruckschwaiger, seconded by Councillor MacDonald, to proceed with the noted changes and to also

request Staff to prepare an issue paper on the subject of mandatory retirement to be brought back to Council in the fall.

28. There is no suggestion in the June 3 Issue Paper that the amendment was required for the operation of the DC plan, nor was there evidence introduced to establish this point. Rather, in a forthright manner during the hearing, CBRM stipulated that the amendment was not required for the operation of the DCP. Mr. Durnford, counsel for CBRM, made this acknowledgement:

> (Page 63)
>
> "**MR. DURNFORD:** Just before Mr. Mitchell starts, I was going to ask but didn't ask but I won't bother with this. I wanted to stipulate, I was going to mention this as well in my opening that this question about whether mandatory retirement at age 65 is required for the operation of a DC plan. It isn't and we stipulate that.
>
> **MR. JAMES:** So you're stipulating that the mandatory retirement is not a requirement for the operation of the DC plan.
>
> **MR. DURNFORD:** Of the DC plan, yeah.
>
> **MR. JAMES:** Thank you, Mr. Durnford. Mr. Mitchell." [Emphasis added].

29. Despite the language of the Council motion, the issue of mandatory retirement never did come back to CBRM Council; rather the matter went before the Corporate Services Committee of Council, whose mandate included issues of human resources, at a meeting on December 7, 2009. Mr. Fleming prepared a second Issue Paper for the Committee and that included, in part, the following:

> "It is easy for people to say "abolish mandatory retirement at age 65" where as (sic) at CBRM, it is legally permitted. Maintaining this right has many important benefits for CBRM:
>
> 1. Many unions including the Canadian Union of Public Employees support mandatory retirement at age 65. This point is evident at CBRM as all employees represented by CUPE have agreed in their Collective Agreements with CBRM that they must retire upon reaching the age of 65.

2. It avoids the highly problematic issue of requiring older workers who display evidence of declining physical or mental capacities, the embarrassment and stress of being tested to ensure they have the required abilities to carry out their work;

3. It reinforces the important benefits of your very good pensions which give your workers meaningful income when they cease working at CBRM. CBRM's financial commitment to funding pensions is approximately $2,600,000.00 annually.

4. It provides opportunities to hire new employees (priority given to CBRM residents) thereby assisting in reducing our high unemployment rate) and gives opportunities for younger employees to receive promotions though the organization without having to wait too long to obtain such positions.

5. It provides certainty rather then (sic) the uncertainty of knowing when long-service employees are going to leave the workplace and allows for orderly and predictable training for other workers who will be taking their places.

6. Overall, departing from our present position would not be in the interest of CBRM. the unions, or employees (non-union)."

30. What was not contained in the December Issue Paper was any alternate approaches to mandatory retirement. It simply was not in the range of options that Mr. Fleming thought to provide to Council.

Jerry Ryan

31. The third witness of the hearing was Jerry Ryan, retired CAO of CBRM. Mr. Ryan was the CAO for CBRM from its inception on August 1, 1995 until September 30, 2013, when he retired. For the most part Mr. Ryan endorsed the recommendations that are outlined by Mr. Fleming in his two Issue Papers. Under challenge by counsel for Mr. Foster, Mr. Ryan defended the work of Mr. Fleming in preparing the two memoranda that addressed the issue of the amendment to introduce mandatory retirement to the DC Plan and the issue of mandatory retirement, itself. However, Mr. Ryan did agree that the December Issue Paper could certainly have been more complete. He testified:

> (page 18) ...As I said, I would have been, if it was my paper, I would have put in a little dialogue on the age discrimination issue just, just to make sure Council's aware of what, what. Mandatory retirement is not just about making, forcing people to retire at 65, those who don't want to go. It is discriminatory in nature but is legal as far as I understand....

Mr. Ryan contrasted this with what an issue paper might look like if the recommendation was not to continue mandatory retirement:

> (page 29)
>
> I know I looked into some myself. The City of Toronto, for example, what did they do, how did it impact them, that type of dialogue, discussion, you know. And if we were going into, to, if indeed we were making the recommendation on doing away with mandatory retirement, I can assure you that issue paper probably would have been six or seven pages more because it would have represented significant change, a change in policy but also very much change in our culture and there's a whole host of things as an organization we would have to be looking at. And so that's the type of dialogue Angus and I would have....

32. He testified that in his opinion if the Council had not approved the amendment to the DCP, that it would have made enforcement of mandatory retirement policy under the DBP impossible. Specifically, this exchange with Mr. Durnford, on cross-examination:

> (page 27) Q. Right. He said that part of the thinking, at least that he has the author of June issue paper and creating consistency between the two pension plans, was to avoid morale issues in the workplace. If two people working side by side, one is required to retire at 65 and the other is not, do you agree with him that that would be a serious problem for CBRM?
>
> A. Serious to the, I would say it would threaten our ability to even enforce the defined..."
>
> Q. Benefit.
>
> A. ...benefit plan.
>
> Q. Yeah.

33. The essence of Mr. Ryan's evidence is that as senior staff members neither he nor Mr. Fleming thought the proposed amendment to the DCP to be a significant issue. He considered its passage to be a simple matter:

(page 20) Q. Yeah. And as you say in the context of the culture and the long history, indeed the universal history of mandatory retirement at age 65 in CBRM, this would not be a particularly controversial thing.

A. Not at all.

Q. And all that was intended by this, as you understood it, was to make sure that people in the two plans were treated equally.

A. Have it compliant with our policy of mandatory retirement, yeah.

Q. Yeah. That's right.

December Committee Meeting

34. Counsel for Mr. Foster spent a great deal of time discussing the December Committee meeting. There were two main points that he made. First, he said that the direction set out by Council on June 16, 2009 to have the matter of mandatory retirement reviewed by Council was not followed and that Council never did deal with it contrary to its own direction. Second, he pointed to the December Issue Paper that was prepared to discuss mandatory retirement and suggested that it was significantly lacking in analysis.

35. As to the first point, the Board disagrees with the proposition that the direction of Council to have the issue of mandatory brought back was ignored or not fulfilled. The Board accepts the testimony provided by Bernie White during the hearing into the preliminary motion on abuse of process. Mr. White testified that according to CBRM policy the Corporate Services Committee was mandated with the responsibility for human resources issues and it was appropriate the matter be referred to that Committee. It was the motion of that Committee to accept Mr. Fleming's recommendation sustaining mandatory retirement in the pension plans which meant no further action was required of Council.

36. As to the sufficiency or adequacy of the December Issue Paper, it is a fair criticism to say that the document was quite limited. As Mr. Ryan testified himself, the discussion paper prepared for the December Committee could have been more fulsome. From the Board's perspective the Issue Paper for December did not serve the Committee or Council well in understanding the issue of mandatory retirement. Commission counsel rightly pointed out that much of the underlying rationale used to justify mandatory retirement could be challenged as dated. It was a discussion that provided a one dimensional view of the issue and failed completely to present Committee with alternative strategies. If CBRM Council wished a full discussion of mandatory retirement and alternatives, Mr. Fleming's memoranda fell far short of the mark.

37. However, the discussion by the Corporate Services Committee in December 2009, and the December Issue Paper are not at all material to the issues the Board has to decide in this matter. By December, Council had already voted to amend the DCP.

Registration of the Amendment

38. Following the approval of the DCP amendment by Council on June 16, 2009, the amendment was to have been submitted to the Superintendent of Pensions for approval and registration. This is required by Section 18 of the *Pension Benefits Act*, R.S.N.S. 1989, c. 340 (*"Pension Act"*). That registration never happened until June 8, 2012 in large part due to the fault of Sun Life Financial, the Plan Administrator.

39. The evidence is that Mr. Fleming wrote to Sun Life by letter dated June 17, 2009 advising that the amendment had been approved and requesting of Sun Life that they take steps to have the amendment submitted for registration. The evidence is that Sun Life did not take any steps to register the amendment until Mr. Fleming prompted the company in May 2012. Mr. Fleming had no explanation for the long delay on the part of his office in following up with Sun Life nor did Sun Life have any explanation to justify its failure to register the amendment.

40. It was only when Mr. Foster inquired about what would his employment status be after he turned 65 in June 2012 that Mr. Fleming was caused to follow up with Sun Life. After Mr. Fleming's inquiry, Sun Life wrote to the Superintendent of Pensions on May 29, 2012:

> "On behalf of the Cape Breton Regional Municipality ("CBRM"), we are hereby submitting for your approval a restated an amended plan text for the Registered Pension Plan for Employees of Cape Breton Regional Municipality, effective June 16, 2009. The amendment serves to remove the provision of late retirement. Members and Former Members must retire no later than the first of the month following the attainment of 65 years of age.
>
> As you will note by the enclosed letter dated June 17, 2009 from CBRM to Sun Life Financial, this amendment should have been done in 2009, however, due to an administrative oversight on Sun Life Financial's part, we failed to act as instructed. In June 2009, CBRM sought to amend their defined contribution pension plan in order that it be consistent with the provisions of their defined benefit pension plan. Please know, that though we had not submitted the amendment, CBRM has enforced the provision that Members and Former Members be required to retire no later than age 65 since June 16, 2009, and in a consistent and uniform manner.

> As we are now proceeding with the amendment to the plan text for CBRM, we hope that you will take into consideration the above extenuating circumstances in your decision, and approve the enclosed restated and amended plan text."

41. By letter dated June 8, 2012, the Superintendent of Pension's office confirmed the amendment was approved, apparently, effective June 16, 2009. The difficulty, however, is that there appears to have been at least one further deficiency in the notice of the registration of the amendment. I will outline the concerns below but suffice to say that as the issues emerged during the hearing, CBRM was caused and did acknowledge that there could be a real issue as to whether the registration of the amendment complied with requirements of the *Pension Act.*

42. Ms. Teryl, on behalf of the Human Rights Commission, supported by Mr. Mitchell for Mr. Foster, requested an adjournment to permit time to call the Superintendent of Pension to give evidence on the circumstances of the registration of the amendment. Ms. Teryl expected the Superintendent would have concern especially in light of the fact that the amendment had the effect of imposing mandatory retirement on the members of the DCP.

43. The Board refused the request for the adjournment. Ms. Teryl suggested that the Superintendent might be expected to offer opinion on the registration of the amendment which the office approved. The Board inferred from the representation of possible evidence that the opinion would likely be negative, in some way, to the registration of the amendment and whether it complied with the legislation. The Board was of the view that the nature of the proposed testimony was not appropriate to the issue that it had to decide. The Board also considered the fact the issues the Commission wished to address were within the scope of the *Pension Act* and it was available to all counsel to present their analysis of the legislation and the apparent defects in registration.

44. The issues of concern to the Commission included instances of non-compliance with the *Pension Act*, specifically the failure to provide notice to the Plan members. The Commission pointed to the obligations under Section 32 of the *Pension Act* and Section 41 of the *Pension Act* regulations. Section 32 provides:

> s. 32 (1) Where the administer of a pension plan applies for a registration of an amendment to the pension plan that may reduce the prospective pension benefits, rights or obligations of a member or former member or a person entitled to payments from the pension fund, the Superintendent shall require the administrator to transmit to each such member, former member or other person written notice containing an explanation of the amendment and inviting comments to be submitted to the administrator and the Superintendent, and the administrator shall provide to the Superintendent a copy of the notice and shall certify to the

> Superintendent the date on which the last such notice was transmitted.
>
> .....
>
> s. 32 (3) Within the prescribed period of time after an amendment to a pension plan is registered, the administrator shall transmit notice and an explanation of the amendment to each member, former member and other person affected by the amendment.

45. Section 32 (4) of the *Pension Act* provides the Superintendent the discretion not to require notice pursuant to s. 32 (1) if the Superintendent is of the opinion that the amendment is of a technical nature and will not substantially affect the benefits, rights or obligations of the members, former members or person entitled to payments. Similarly, the Superintendent can, by Order, dispense with the notice obligation under s. 32 (3).

46. In this instance, the Superintendent did not require the administrator to provide notice under Section 32 (1) and no notice was provided. There was no Order dispensing of the notice required under Section 32 (3) which means the plan administrator had an obligation to give notice of the amendment to each Plan Member. The evidence is clear no such notice was ever provided by CBRM or Sun Life and there was no explanation for the failure except oversight.

47. Further, Section 41 (2) of the *Pension Act* regulations provides as follows:

> ss. 41 (2) Despite subsection (1), if the Superintendent dispenses, pursuant to Section 32 (4) of the Act, with the notice and explanation required under subsection 32 (3) of the Act, the administrator must provide notice and an explanation of the amendment to each member with the next annual statement of pension benefits required under Section 33 of the Act.

48. The evidence is that neither CBRM or Sun Life ensured notice of the amendment with the next annual statement of pension benefits. It is clear Mr. Fleming did not put his mind to the obligations to give notice of the amendment.

49. It was and is significant to the Board that through its stipulation, CBRM fairly acknowledged the uncertainty around the registration due to these failings by CBRM enabling the parties to advance the matters in argument. Finally, the Board considered the fact that the issue of the alleged failings in registration that the Commission wished to raise were known to the Commission and Mr. Foster well before the hearing. To permit the adjournment at this late stage would have caused significant delay and disruption which was avoidable had the Commission or Mr. Foster addressed the issue in their preparations for the hearing.

Common Ground

50. As the evidence was unveiled and the hearing proceeded, considerable common ground emerged among the parties:

(i) The parties agreed that mandatory retirement was a violation of age protected right set out in ss. 5 (h) of the *Act*.

(ii) The parties agreed that if the requirement for mandatory retirement is contained within a *bona fide* pension plan, then it would be a recognized exemption to prohibition of age discrimination by ss. 6 (g) of the *Act*.

(iii) The parties were of common view that prior to June 16, 2009, the DCP was a *bona fide* pension plan as contemplated by ss. 6 (g) of the *Act*.

(iv) The singular purpose of the amendment to the DCP was to avoid allowing for continued employment with CBRM after the age of 65 except for limited positions like crossing guards.

(v) The motivation of senior management employees within CBRM was to avoid the possible division in the CBRM workplace that could exist as a result of the *MRA*. The division would be between those employees who were subject to mandatory retirement and those who would not be subject to mandatory retirement.

(vi) There was no review by Mr. Fleming or anyone else within CBRM of policy options or alternate management strategies to address the lifting of mandatory retirement.

(vii) There was no consideration by Mr. Fleming or anyone else within CBRM of other strategies that could be taken to deal with the potential division in the workplace.

(viii) As previously discussed, the introduction of mandatory retirement was not required for the operation of the DCP.

(ix) There is a significant issue about whether the registration of the June 16, 2009 amendment complies with the *Pension Act* at least as it relates to notice of the amendment.

Issues

51. The parties agree that without the protection available by ss 6 (g) of the *Act* there has been discrimination contrary to ss. 5 (h) of the *Act* against Mr. Foster when he was forced to retire.

52. The issue then is whether the DCP was a *bona fide* pension plan as of June 30, 2012 when the complainant turned the age of 65.

Analysis

53. The Supreme Court of Canada decision in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc. 2008 SCR 45* sets out the determinative principles for analyzing whether the DCP is a *bona fide* pension plan. While the decision considered *bona fide* within the language of the New Brunswick Human Rights legislation, it is accepted the decision is applicable to the language in ss. 6 (g) of the *Act*.

54. Justice Abella, writing for the majority, rejected the argument advanced by the New Brunswick Human Rights Commission that the modifying phrase *bona fide* was intended to introduce a reasonableness analysis. Rather she concludes that the intention of *bona fide* was to determine whether the plan is genuine. She writes at paragraphs 32 and 33:

> [32] I agree with Robertson J.A. too that the *bona fides* test is one with both subjective and objective components. The subjective requirements of "*bona fides*" are not difficult to define—they relate to motives and intentions. It is more difficult to explain what makes a pension plan, objectively, *bona fide*. In my view, a number of sources direct us to a relatively basic conclusion: a *bona fide* plan is a legitimate or genuine one.
>
> [33] Section 3(6)(*a*), notably, states that the age discrimination provisions do not apply to the terms or conditions of any "*bona fide* pension plan". The placement of the words "*bona fide*", it seems to me, is significant. What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. But the inquiry is into the overall *bona fides* of the plan, not of its constituent components. [Emphasis added]

55. The clear direction in *Potash* is seen at Paragraph 41 and 42:

> [41] In my view, for a pension plan to be found to be "*bona fide*" within the meaning of s. 3(6)(a), it must be a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights.

> [42] Pension plans today are complicated and have, in many ways, evolved from the structures and options available in 1973 when s. 3(6)(a) was enacted. But this does not change the purpose of what was meant to be generic protection for all legitimate pension plans. Unless there is evidence that the plan as a whole is not legitimate, therefore, it will be immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination. [Emphasis added]

56. Applying these principles, it is clear that as of June 16, 2009, the DCP was by all measures a *bona fide* pension plan. The singular issue challenged by Mr. Foster and the Commission is the amendment of June 16, 2009 which introduced the term of mandatory retirement. How does that change the *bona* fide of the DCP, if at all?

57. The DCP was a longstanding plan, registered under the *Pension Act* and registered under the *Income Tax Act*. The evidence is that as of December 31, 2012, the Plan had $16 million in assets and 352 members, 90 of whom were actively contributing.

58. As described earlier, there is an issue over whether the amendment to the Plan was properly registered. The Commission contends the issue of the registration of the amendment affects the *bona fide* of the pension plan.

59. As stated, CBRM has acknowledged there is a real issue whether the registration conditions of the *Pension Act* were complied with. I think the Commission is correct to point out these concerns and whether, in fact, steps in the registration process were met. However, it is not within the purview of this Board to review the approval issued by the Superintendent of Pension nor to exercise the Superintendent's discretion to declare the amendment invalid for a failure to give notice. The Superintendent's office was provided with an application by Sun Life, 27 months after the amendment was approved. The application explained the purpose of the amendment and confirmed the delay was Sun Life's error. The Superintendent's office approved the amendment which included an express statement that the effective date of the amendment was June 16, 2009. There was no representation by Sun Life as to the whether the members were provided notice. The application was approved on the basis of the letter without further inquiry by the Superintendent.

60. From a review of the *Pension Act*, it appears Section 32 contemplates two different notices. Section 32 (1) is notice that would be a pre-condition to approval. The Commission makes a great deal over the failure to give notice to members so they could respond but this was not required by the Superintendent. It was within the Superintendent's discretion not to require this and I am not in a position to review that.

61. The notice under Section 32 (3) was not waived by the Superintendent so notice of the amendment as approved should have been given to the members as required. Somewhere between Sun Life and CBRM they yet again failed to manage an issue of

registration. However, there is nothing in the *Pension Act* to suggest this failure automatically invalidates the amendment as approved. There was no evidence the Superintendent has been asked to consider the implications of the failure to give notice under Section 32 (3).

62. For the purpose of assessing this challenge the Board accepts that the DCP meets the objective test of the assessment set out in *Potash,* supra. Registration of the amendment under the *Pension Act* is only one consideration. The DCP is a *bona fide* plan from all other measures. It is well-funded, registered for purposes of the *Income Tax Act* and has a significant number of members. As mentioned, the roots of the plan extend into various municipalities before the incorporation of CBRM. The Board rejects the suggestion the registration issues of the amendment is evidence that the DCP is "a sham". There is considerable evidence of sloppiness on the part of Sun Life and CBRM, but that is not enough to cause the Board to question the *bona* fide plan as amended. The Superintendent has approved the amendment with full disclosure of its effect.

63. The most contentious aspect of this case is the subjective aspect of the *Potash* test. What does it mean in the context of an amendment to an otherwise *bona fide* plan? What does it mean when CBRM acknowledges that the amendment was to avoid the effect of the *MRA?*

64. It is useful to review the language of Justice Abella in paragraph 32 of *Potash, supra*:

> [32] I agree with Robertson J.A. too that the *bona fides* test is one with both subjective and objective components. The subjective requirements of "*bona fides*" are not difficult to define — they relate to motives and intentions. It is more difficult to explain what makes a pension plan, objectively, *bona fide*. In my view, a number of sources direct us to a relatively basic conclusion: a *bona fide* plan is a legitimate or genuine one. [Emphasis added]

65. I agree with CBRM counsel that it is significant that Justice Abella incorporated intent within the discussion of subjectivity but I do not think it is novel to the discussion of subjective intent within human rights law. In *Large v. Stratford* [1995] 3 SCR 733 the Court confirmed there is a subjective element to a *bona fide* occupational requirement. Although it is a different context, Justice Sopinka describes that the intent of the subjective test is to ensure that the employer is imposing the requirement in good faith, for a valid reason and not for any "ulterior motive that would be contrary to the purposes of the Code." This is consistent with the direction of Justice Abella in paragraph 41 of *Potash, supra* where she discussed good faith and not for the intent of defeating a protected right.

66. On the first aspect of motive or whether CBRM acted in good faith, CBRM counsel referred the Board to two decisions dealing with the concept of good faith in a municipal

context: *Exeter (Town) v. Huron County),* 1990 CarswellOnt 468 at para 14 ("*Exeter (Town)*", Tab 45 and *Martin v. Vancouver (City)*, 2008 BCCA 197 at paras 80-82, Tab 46. The cases were cited in the proposition that municipalities are entitled to significant deference in its decision making and should only be interfered with if bad faith exists.

67. The Board had asked the parties to consider the decision in *Les Enterprises Sibeca Inc.* v. *Municipality of Frelighsburg* 2004 SCC 6. While the case deals with civil liability it does provide guidance on the notion of good faith within the municipal context. In its submission, CBRM distinguished *Sibeca* as not being related to the municipality as an employer. The Board notes that neither of the two decisions CBRM relies on relates to the municipality in its role as an employer. In *Exeter*, *supra*, the challenge was to a by-law imposing a levy, while in *Martin*, *supra*, it concerns an appointment to a committee. The cases do deal with an administrative law challenge as opposed to the issue of civil liability in *Sibeca*. The Board finds the principles of good faith as expressed in *Sibeca* to be helpful to understanding what Justice Abella directed.

68. The Commission argued against applying *Sibeca* principles in a human rights context. The Board disagrees and finds the discussion in that case of assistance, in particular, the discussion that bad faith may go beyond intentional fault and may include recklessness.

69. In *Sibeca*, *supra*, Justice Deschampes states at paras 25 and 26:

> 25 No problem arises when the bad faith test is applied in civil law. That concept is not unique to public law. In fact, it applies to a wide range of fields of law. The concept of bad faith is flexible, and its contents will vary from one area of law to another. As LeBel J. noted in *Finney v. Barreau du Québec,* [2004] 2 S.C.R. 17, 2004 SCC 36, the content of the concept of bad faith may go beyond intentional fault (at para. 39):
>
> > Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Ronacarelli v. Duplessis,* [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised....

> 26 Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it. [Emphasis added]

70. In this case there is no doubt that CBRM imposed the condition to its DCP in good faith for a valid work place policy reason, which is concern for the equal treatment of its employees. I find that the motivation of ensuring equal treatment among the employees to have been done in good faith in the context of *Sibeca*. However, it is also true that the motivation was to avoid the impact of the removal of the protection of the mandatory policy or practice that would have occurred effective July 1, 2009.

71. Does this mean that it does not meet the test of a *bona fide* plan because of an ulterior motive to defeat the protection against age discrimination?

72. The Commission argues thusly:

> 18. The Commission submits that the legislative context within which CBRM is trying to justify their actions is one which has the goal and/or purpose of eliminating mandatory retirement but for a very few exceptional situations. The only exception applicable to CBRM that permits mandatory retirement is when the elimination of mandatory retirement provisions "prevent, on account of age, the operation of a pension plan." CBRM is trying to justify the change to their plan under an exception that has not been proven to apply to their circumstances. Their actions are therefore not legislatively sanctioned; they defeat the spirit, purpose and goal of the amended Act. [Emphasis added]

73. The Commission does not elaborate on what it means by the "spirit, purpose and goal of the *Act* referring to the *MRA*. Nor does it provide any specific reference within the *MRA* that articulates that "spirit, purpose and goal."

74. In answering that submission, it is important to recognize that within the Human Rights legislative framework in Nova Scotia, there is both the protection against discrimination by virtue of age and preservation of a *bona fide* pension plan as an exception to the discrimination against age.

75. CBRM's decision to add the condition to the plan is in keeping of the human rights framework of Nova Scotia. The *MRA* did not attempt to limit amendments to a bona *fide* pension plan. In fact, the *MRA* was never intended to introduce any changes to the portion of ss. 6 (g) dealing with pension plans.

76. In the records of Hansard for April 3, 2007, the Minister responsible for the *MRA* made the following comments on second reading:

> **Bill No. 163 - *Human Rights Act.***
>
> MR. SPEAKER: The Honourable Minister of Environment and Labour.
>
> HON. MARK PARENT: Mr. Speaker...This is a bill that is brought forward basically as a labour bill to allow workers who want to continue to work beyond the mandatory retirement
>
> [Page 4198]
>
> age to have that option and freedom to do so. It touches on human rights because it amends the *Human Rights Act*, but also upon seniors...
>
> ...
>
> Anyway, many seniors want to contribute their expertise in the job force beyond the mandatory age of retirement and others do not. I want to make it very clear that this bill in no way forces anyone to work beyond the age that they want to retire. It doesn't affect pension arrangements in any way. What it simply does is allow people who are 65 to continue working if they choose to do so. Others may opt to retire at earlier ages and contribute to society through volunteer activities, but that is their choice and this bill then allows them that choice.
>
> In 2004, we gave this option to civil servants and it's only fair that we extend this option to other people.... [Emphasis added]

77. Under the *Act*, even after the effective date of the *MRA*, a pension plan can be amended at any time including an amendment to add a term to include mandatory retirement. There is nothing in the legislation that limits the scope of ss. 6 (g) to pension plans that contained mandatory retirement language as of July 1, 2009. The argument advanced by the Commission assumes that there was some larger purpose of the *MRA* that limited the right to amend a pension plan to include a mandatory retirement provision but the legislation does not support that contention nor has the Commission given the Board any authority to support its proposition. Had the legislature wished to restrict the

protection to pension plans that contained a mandatory retirement provisions as of July 1, 2009, it could have done so.

78. This balance between the right not to be discriminated against on the basis of age and the protection of pension plans is not a trifling matter. The Minister responsible spoke about it in his comments on the *MRA* and so too did Justice LaForest in *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229. In particular at page 302:

> What we are confronted with is a complex socio-economic problem that involves the basic and interconnected rules of the workplace throughout the whole of our society. As already mentioned, the Legislature was not operating in a vacuum. Mandatory retirement has long been with us; it is widespread throughout the labour market; it involves 50 per cent of the workforce. The Legislature's concerns were with the ramifications of changing what had for long been the rule on such important social issues as its effect on pension plans, youth employment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship. ....

79. In this case, despite the clumsy manner in which CBRM addressed the issue of the amendment, its decision was not made in a vacuum and should be understood from a larger perspective. As Mr. Ryan indicated, CBRM built an organization based on mandatory retirement and in that process developed an involved inter-connected set of rules that included pension rights. In almost all aspects of its management of the workplace, CBRM embraced mandatory retirement as a management tool This was not just created on June 16, 2009 rather the amendment was an extension of an approach that started in August 1995.

80. To arrive at the conclusion the Commission advances that the spirit, purpose and goal of the *MRA* was violated by CBRM, one would have to ignore ss. 6 (g). One would also have to ignore the complexity of the issue as it has been discussed and debated for a long time. In this instance, the Board fails to see how CBRM's exercise of a right contained within the *Act* can be seen as an attempt to defeat the *Act*. The Board sees that CBRM exercised a right that is available to it under the legislative framework and was not focused on thwarting Mr. Foster or other employees situated like him.

81. In order to invalidate the June 16, 2009 amendment one would have to introduce some assessment of its merit. For example, it may be of some concern to the Board that there was no offsetting compensation or benefit to employees like Mr. Foster who had this new term introduced to the DCP. However, that level of analysis is what the *Potash* decision directs ought not to be done. The analysis does not change simply because it is

an amendment to the Plan. It is not the role of the Board to review each term and condition as to its merit, rather the Board must look only at the pension plan in its totality. From the larger perspective, the DCP was a *bona fide* pension plan as of June 30, 2012 and is a full answer to Mr. Foster's complaint.

82. In conclusion, it is the view of the Board that the DCP as it existed on June 30, 2012 constituted a *bona fide* pension plan as contemplated by ss. 6 (g) of the *Act*. Accordingly, the mandatory retirement provision in the DCP is a proper exception to the prohibition against age discrimination pursuant to Section 5 (h) of the *Act* and Mr. Foster's complaint must be dismissed.

DATED at Truro, Nova Scotia this 30 day of April, 2014.

Dennis James
Board