THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY

BETWEEN:

Rachel Brothers
-and-
Black Educators' Association
-and-
Nova Scotia Human Rights Commission

Case Number: 42000-30 H07-0129

Decision

1. Rachel Brothers was employed for the better part of 2006 as a Regional Educator with the Black Educators' Association (BEA). The Black Educators Association has existed as an organization since 1969 with a mandate to assist children and adult learners specifically from the black community to benefit more fully and equitably from the Nova Scotia education system. Generally, a Regional Educator was expected to supervise the delivery of BEA programs by part-time staff in a particular region of the province, as well as to participate in provincial activities of the Association on a more *ad hoc* basis. Ms Brothers was hired to oversee the work of the Valley Region.

2. Beginning in the fall of 2006 a number of stressors accumulated for Ms Brothers in relation to the performance of her work. There were staff issues within her office and within her region. There were concerns relating to financial issues arising from a provincial BEA event that implicated Ms Brothers personally. There were ongoing concerns around Ms Brothers' relationship with Head Office and the other Regional Educators. All of these things accumulated and festered in one way or another for over a month into the very late fall.

3. Finally, in early December, 2006, it appears to have been decided at Head Office that Ms Brothers was to be terminated. Ms Brothers was summoned to a meeting in Halifax without being informed as to the true purpose of the meeting. She

was confronted at that time primarily with financial concerns, which she endeavoured to address then and in the days following. However, the day after the Halifax meeting a letter of termination was prepared at the BEA Head Office, and then delivered to Ms Brothers at her office some 3 days after that.

4. Why was Ms Brothers dealt with so abruptly and so sharply? I have concluded based on the evidence put before me during this Inquiry that Ms Brothers was terminated because she had been successfully undermined in her employment by one of her subordinates: Catherine Collier. It is clear to me that Ms Brothers was undermined in part because she was younger than, and not as black as, Ms Collier thought that Ms Brothers should be.

5. Ms Collier either had a better support network at the BEA Head Office, or better political skills in managing a relationship with the BEA Head Office, than Ms Brothers did. Perhaps it was both. Ms Collier certainly had a longer-standing relationship with those who worked at Head Office. She had an apparent ally at Head Office in the Acting Executive Director, Jacqueline Smith-Herriott. Head Office was induced into believing, and was willing to believe, that Ms Brothers was the cause of the increasing instability of the Valley Region's operations even though that instability was in fact largely the creation of Ms Collier herself. Head Office decided that Ms Brothers was so unsuitable for the job of Regional Educator that she should be terminated, and the BEA did terminate her.

6. As I will explain, the BEA's termination decision was based in part on Ms Brothers' skin colour. That constitutes discrimination against Ms Brothers by the BEA under the *Human Rights Act*. As a remedy for this discriminatory behaviour towards Ms Brothers, I have decided that it is appropriate to award global compensation to her in the amount of $11,000.00, plus interest at 2.5% since March 28, 2013, payable by the Black Educators Association.

History of the Proceedings

7. Ms Brothers began her employment with the BEA on January 16, 2006, and was terminated by that organization on or about December 18, 2006. Ms Brothers responded to her termination with proceedings under the provincial *Labour Standards Code* (Ex.6, Part II, Tab 30), and the federal *Employment Insurance Act* as it then existed (Ex.6, Part II, Tab 29). Later, on February 28, 2008, she signed a formal complaint against the BEA pursuant to s.5(1)(h)(i)(j) and (o) of the Nova Scotia *Human Rights Act*, R.S.N.S.1989, c.214.

8. Ms Brothers' complaints of discrimination in relation to employment were said to be based on colour, race, age, and mental disability. I was appointed to inquire into these complaints on March 28, 2013. On June 11, 2013, tentative hearing dates were set for November 13 – 15, 2013. Those dates proved unsuitable for the BEA witnesses. On September 4, 2013, alternative hearing dates were scheduled for December 3 – 5, 2013. Shortly before the December hearing dates, the BEA chose to become self-represented, and shortly thereafter requested an adjournment of the December hearing dates. That request was declined by a decision of mine dated November 20, 2013. That decision is appended to this decision as Appendix "A".

9. The hearing of this matter commenced as scheduled on December 3 for the taking of evidence. The inquiry continued with the taking of evidence on December 4 and 5, 2013, as well as on January 2, 3, and February 20, 2014. Written submissions were received for purposes of final argument, supplemented by a final oral hearing for submissions on May 12, 2014. That final day also included an opportunity for Ms Brothers to testify briefly in reply on certain issues that had been identified at the conclusion of the February 20 session.

The Human Rights Act

10. The Nova Scotia *Human Rights Act,* R.S.N.S.1989, c.214, as amended, provides that:

> 5(1) No person shall in respect of
> . . .
> (d) employment
> . . .
> discriminate against an individual or class of individuals on account of
> (h) age;
> (i) race;
> (j) colour;
> . . .
> (o) physical disability or mental disability; . . . .

There are exceptions permitted by the *Act*, but none were invoked by the parties in relation to this complaint.

11. The *Act* also defines the scope of my authority as a Board of Inquiry in s.32A, 34, and 34A, including particularly the following:

> s.32A
> (1) The Commission may, at any stage following the filing of a complaint, appoint a board of inquiry to inquire into the complaint; . . . .
>
> s.34
> (1) A board of inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the *Public Inquiries Act.*
> . . .
>
> (3) A board of inquiry shall give full opportunity to all parties to present evidence and make representations.
> . . .

> (7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.
>
> (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 therefore 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.

s.34A

> (1) A board of inquiry shall render a final written decision respecting a complaint within six months of the conclusion of the hearing.

The Complaint

12. As I indicated earlier, the complaint as signed by Ms Brothers in February 2008 alleged discrimination based on race, colour, age, and mental disability. At the commencement of the hearing, counsel for the Commission proposed that since the Commission had only authorized a referral to hearing on the race, colour, and age issues, I should not inquire into the full complaint. Ms Brothers wished to pursue the full scope of her complaint. Because of the wording of my appointment by the Chief Judge of the Provincial Court, I decided that I would proceed to hear the full complaint. My appointment by the Chief Judge is what gives me jurisdiction, not any decision by the Human Rights Commission as to what parts of a complaint it might decide to refer to an inquiry.

13. After the completion of the evidence led by the BEA, and before final written submissions were received from the parties, Ms Brothers indicated that she would not be pursuing the mental disability ground of her complaint further. I had heard the evidence that she had led in relation to that element of her relationship with the

BEA in late 2006. While that evidence forms an important part of Ms Brothers' narrative of her experience of those times, I am not going to decide whether or not the whole of the evidence would or would not have established discrimination on that basis. This hearing was appointed to deal with Ms Brothers' complaints about her treatment by the BEA, and she voluntarily withdrew that ground of complaint after a full hearing of the evidence, after an opportunity to consult fully with legal counsel on her own, and after consistent communication by her throughout the hearing with counsel acting on behalf of the Commission. The mental disability claim should be regarded as abandoned.

14. Therefore, the questions before this Board of Inquiry are a) whether the BEA discriminated against Ms Brothers in respect of her employment by reason of race, colour, and/or age; and if so, b) what is the appropriate remedy for that discrimination?

Discrimination

15. Discrimination is defined for purposes of the Nova Scotia *Human Rights Act* in s.4 of the *Act* as follows:

> 4. For purposes of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

16. At the heart of the definition of discrimination, and at the heart of attacking the evil created by discrimination, is the idea that it is wrong in our society to make decisions about people based on one or more of the inherent, immutable qualities

that make them unique human beings – such as skin colour, racial heritage, years of life, or sexual orientation. A more concise statement of this objective of human rights legislation was made by the late Justice Sopinka in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CarswellOnt 25 (S,C.C.), at para.17:

> The underlying philosophy of human rights legislation is that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics.

17. In this matter I am asked to assess how the BEA treated Ms Brothers in an employment relationship. Therefore, the concept of discrimination that governs is whether the BEA made an employment-related distinction about Ms Brothers in part because of her race, colour, or age; and whether that decision had the effect of imposing burdens, obligations or disadvantages on Ms Brothers that were not imposed upon others, or which limited access by Ms Brothers to opportunities, benefits, and advantages that were available to others. I therefore adopt the following as my understanding of what discrimination means in an employment context:

> Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.
>
> Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.

> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

This explanation of what employment discrimination involves comes from Abella, *Equality in Employment: A Royal Commission Report* (Ottawa: Supply and Services Canada (1984), at p. 2), quoted and adopted by a unanimous Supreme Court of Canada in the employment law discrimination case of *Janzen v. Platy Enterprises Ltd*., 1989 CarswellMan 158 (S.C.C.), at para.48. In addition to the clear language of s.4 of the *Human Rights* Act, the reference to Abella's formulation demonstrates that it has been well established in Canadian society, and the jurisprudence, that discrimination can occur in the absence of any intention to discriminate.

18. What has to be proven on a balance of probabilities to make out a successful claim in a human rights proceeding was described more recently by Justice Abella in *Ontario (Director of Disability Support Program) v. Tranchemontagne,* 2010 ONCA 593, at para.33:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, applicants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

Recently, in *Pieters v. Peel Law Assn.,* 2013 ONCA 396, at para.59, the Ontario Court of Appeal suggested that while the words "factor" or "connection" or "nexus" could be used as the connector between the prohibited ground and the adverse impact, it was preferable to stick with the word more commonly used in the jurisprudence,

which is "factor". The Court also commented that it was an error to add any requirement of causation to the claimant's burden of proof. Proof that the prohibited ground was "a factor" in the decision or behaviour is sufficient.

19. Therefore, it is not necessary for a claimant in a human rights proceeding to prove that discrimination was the *only* reason for an employer's behaviour, or that it was a *dominant* reason for the employer's action. It is enough to prove discrimination if the whole of the evidence persuades me, as the Board of Inquiry, that discriminatory thinking in relation to any of the identified grounds was a factor in the sense that it contributed in a real way to the decision or behaviours in issue.

20. I should add that while there often is an objectively negative impact such as job loss (which tends to define the scope of the appropriate remedy at the end of the case), that kind of negative impact is not a necessary element of the claimant's proof that there has been a contravention of the *Act*. Again, as s.4 of the Nova Scotia *Act* provides, any inappropriate distinction may have the effect of *either* imposing burdens, obligations or disadvantages, or limiting access to opportunities, benefits, and advantages.

21. Finally, I approach the issues in this case appreciating that human relationships are complex. Behaviour that has a discriminatory effect may be engaged in subconsciously, or perhaps even thoughtlessly, by an individual or organization. If discriminatory effects are actually intentional, that *purpose* may be consciously concealed. The underlying reasons for consciously concealed, or subconscious, or thoughtless, acts of discrimination are all equally hidden from discrimination's victims. Such hidden reasons often resist direct proof. As a result, a victim of alleged employment discrimination is not required to prove what specific thoughts were in her employer's head or directing mind. This was recently

explained by the Ontario Court of Appeal in *Pieters v. Peel Law Assn., supra*, at paras.72 – 74:

> 72 . . . The question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.
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> 73 In discrimination cases as in medical malpractice cases, the law, while maintaining the burden of proof on the applicant, provides respondents with good reason to call evidence. Relatively "little affirmative evidence" is required before the inference of discrimination is permitted. And the standard of proof requires only that the inference be more probable than not. Once there is evidence to support a *prima facie* case, the respondent faces the tactical choice: explain or risk losing.
>
> 74 If the respondent does call evidence providing an explanation, the burden of proof remains on the applicant to establish that the respondent's evidence is false or a pretext.

That is the law that I have applied to the issues in the case before me.

Colourism

22. Before discussing the evidence called in this proceeding, it is useful to understand the concept of discrimination on the basis of "colour" referred to in s.5(1)(i) of the *Act*. I am indebted to Commission counsel's reference to a few recent academic articles in relation to the meaning and significance of human "colour", which provided academic context for the personal, experiential evidence I heard on this issue from every witness called at the Board of Inquiry. The academic articles I was referred to included: Harris, A.P. (2008) *From Color line to color chart? : Racism and colorism in the new century*. Berkeley Journal of African American Law & Policy,

x(1), 52 – 69; and Herring, C. (2004) *Skin deep: Race and complexion in the "color-blind" era*. in C. Herring, Keith, V.M., & Horton, H, D (Eds.), Skin deep: How race and complexion matter in the "color-blind" era (pp. 1-21). Urbana and Chicago: University of Illinois at Chicago.

23. "Colour" is different from "race". It is generally accepted in the human rights context that "colour" refers to visible "skin colour". As discussed in some of the evidence at this hearing, the making of distinctions among people on the basis of "colour" has come to us directly from our shared heritage of the slavery relationships which were created and maintained by dominant "white" populations. Even today, in the absence of legal slavery and in the absence of legal designations as to racial purity, colourism survives as the concept of classifying people on the basis of their apparent "colour" or "shade" in a continuum away from "white" and towards some other definable hue. It is suggested by colourist thinking that the closer one's skin tone is to that of a pure white, the better access one will have to the jobs and accommodation and opportunities available to actual "white" people. At the same time, colourist thinking suggests that the more visibly black, or more visibly East Indian, or more visibly American Indian, or more visibly Asian, one is, the greater potential there will be for discriminatory distinctions to be made based on "colour".

24. Although "colour" and "race" are distinct concepts under the *Act*, there are some who also extend the "colourist" or "shade-ist" idea to include a racial and perhaps even a cultural element. The idea is that as a person appears lighter, as she is "closer" to white, she must therefore be less black, or less Asian, or less Indian – less "ethnic". Similarly, as a person appears more deeply complected in a non-white hue, she is considered more purely and more fully a member of the other race or ethnicity, and more fully integrated into, or more completely a part of that other racial or ethnic culture.

25. This is an area of particular difficulty for those who self-identify as bi-racial. While the self-identifying bi-racial person may be quite comfortable in such a self-concept, she is at jeopardy of being doubly classified by colourists who add in a racial and cultural purity component to their thinking. This double differentiation of bi-racial individuals, first on the basis of their apparent skin colour, and secondly on the basis of what that colour says about their supposed racial and cultural purity, aggravates the degree of potential impacts upon the bi-racial person. These are very real distinctions that can affect bi-racial individuals. The people who make those kinds of distinctions may come equally from either those who self-identify with an historically dominant, or an historically oppressed, community.

Summary of the Evidence

26. Rachel Brothers testified on her own behalf. She self-identified as bi-racial. She described her hiring at the BEA, and her initial months of work, with clarity. She reported on her progress in becoming comfortable with her fellow BEA Regional Educators, and the challenge of taking on a lead role with respect to a large educational conference and tribute event in early October, which I will refer to from now on simply as "the Gala". While the Gala was eventually regarded as a public success, rifts between Ms Brothers and some of the other Regional Educators and Head Office staff had already begun to appear. There were also difficulties emerging with Ms Brothers' own region staff, including particularly Catherine Collier (now Gibson, but Collier at the relevant time and in this decision). Ms Brothers also candidly explained personal failings in her own work that led to financial issues between herself and the BEA. While I have some specific reservations about the accuracy of some of her recollections, on the whole I found that Ms Brothers' evidence was honestly given, credible, and accurate. It was consistent with the documentary records which have been entered into evidence. Except where I may

specifically state otherwise, when I recount her evidence or adopt her recollection of the facts, it is because I accept that evidence given by her as true.

27. The difficulties that Ms Brothers experienced as an employee of the BEA initially involved interactions with other Regional Educators. It was in meetings with them that she first heard references to her skin colour, and her age, as setting her apart as somehow different from her colleagues. The references she heard directly were made in the context of both her work performance, and how she might better look for employment elsewhere, with a "white" employer. Her immediate supervisor at the time was Ms Jacqueline Smith-Herriott. Ms Smith-Herriott and other BEA staff were present for at least some of these comments, and the comments passed without rebuke.

28. The occurrence of such comments in relation to both age and skin colour was confirmed by the one truly independent witness in this matter – Claudette Colley. She worked as the Program Secretary in the BEA Head Office in 2006, and Jacqueline Smith-Herriott was her immediate supervisor at that time. She has since left the organization on good terms. She self-identified as a bi-racial person. Ms Colley's evidence established for me that comments about Ms Brothers' colour were made in the workplace at the BEA "on several occasions", and had the effect of making Ms Brothers "distraught", "upset", and "saddened". Ms Brothers had confided these feelings to Ms Colley at the time. Ms Colley recalled that Ms Brothers planned to complain formally about the comments to Ms Smith-Herriott, who held the position of "BEA Co-ordinator", Acting Executive Director, and who was also Ms Brothers' immediate supervisor. Ms Colley offered that the BEA's failure to respond to those kind of comments at the time when they were made left "an impression" with her about the organization.

29. Ms Smith-Herriott acknowledged being present for at least one meeting that included Ms Brothers and other Regional Educators in October 2006. This was one of the meetings when Ms Brothers says that comments were made about her age and skin colour. Ms Smith-Herriott testified that she did not recall such comments being made, but was not denying that they were made.

30. Like Ms Smith-Herriott, the BEA President, Ms Sheila Lucas-Cole, denied hearing any comments about Ms Brothers' colour at the October 6, 2006, meeting when she was present. She did recall a comment from another Regional Educator that Ms Brothers "pouts like a 12 year old" and "I'm assuming I shut that down at the time". She appreciated that comments about skin colour in the workplace would be inappropriate, although she also felt that it would be incumbent on the target of such comments to speak up and to explain how the speaker had "overstepped their bounds".

31. Crystal Angela States was the person identified by Ms Brothers as the person who specifically spoke about her skin colour at the Gala planning meeting on October 6, 2006. Ms States was called as a witness by the BEA. Ms States served as the Regional Educator for the Northern Region. In addition to her evidence about the October 6 meeting, she gave some rather non-specific evidence about the financial accountability required of Regional Educators, as well as the extent of supervisory authority that could be exercised by a Regional Educator over a Site Co-ordinator.

32. As a result of the October 6 meeting, Ms States became involved in developing the educational component of the Gala. She appreciated that the decorations Ms Brothers arranged for the Gala were "stunning", and said that from a visitor's perspective, the Gala was a "wonderful event". However, Ms States also testified that the lead-up to the Gala had been made difficult by a failure on the part

of Ms Brothers and the other lead Regional Educator to communicate effectively about the planning.

33. Ms States claimed some recall of the special October meeting to distribute responsibility for the educational component of the Gala. Ms States identified Ms Smith-Herriott as being present at the meeting. Ms States recalled that during the special meeting one of the Regional Educators criticized Ms Brothers for pouting and acting like a 12 year old, just as Ms Brothers stated in her complaint to the Commission. In responding to questions about the depth of her recollection of the meeting, Ms States acknowledged having discussed her memories of it with the Regional Educator who had actually made the "12 year old" comment. Ms States said that she had been reminded of that comment by its maker, rather than having had an independent recollection of it.

34. Ms Brothers said that Ms States made the comment at the meeting that Ms Brothers "should go work for whitey" because Ms Brothers was "light-skinned". Ms States denied making that comment. When shown Claudette Colley's signed, written statement (which Ms Colley had adopted under oath: Exhibit 6, Part II, Tab 31) recounting that Ms States had made the comment to Ms Brothers about "going to work for 'whittie'", Ms States expressed "disappointment" that Ms Colley "would make that statement against me".

35. In resolving this direct conflict in the evidence about whether or not Ms States made a potentially colourist comment towards Ms Brothers at the October 6, 2006, meeting, I have considered a number of things. I of course consider the *viva voce* evidence of Ms Brothers and Ms Colley, which I do trust as accurate. The evidence of Ms Smith-Herriott and Ms Lucas-Cole is not helpful because they disclaimed any recollection of specific colourist comments at the meeting.

36. My view of Ms States' evidence was that she was always endeavouring to tell the truth to the best of her recollection. She did however acknowledge discussing these long-ago events with another participant in the event, and acknowledged that she had been reminded of some significant details about the events of interest to this Inquiry – events that she had not recalled on her own. She also testified that she didn't know whether commenting on a person's light skin colour would be offensive, but "realistically in my world" it was a benefit to have a colour closer to that of the "dominant race". "You do have to play that game." Those were her words. She suggested that the "go work for whittie" comment should actually be seen as a compliment.

37. I conclude from the whole of the evidence that Ms States did in fact make the comments referencing Ms Brothers' skin colour at the October 6, 2006, meeting. She did not make them with any intent to offend, but was likely merely expressing her own world view. So while the comments had an enduring effect on Ms Brothers, and an obvious resonance with Ms Colley, they would have been nothing special to Ms States at the time.

38. Ms Colley's evidence suggested that such comments about skin colouring were commonplace at the BEA. That may be why they were not memorable for Ms Lucas-Cole, or Ms Smith-Herriott, or perhaps unheard. Since Ms States was not called out for the comment at the time, neither she nor these organization leaders would have had any special reason to remember the specific comment. I believe that the colourist comments were made on October 6, 2006. I also accept the evidence that similar comments about skin colour were made to Ms Brothers in the workplace at other times as well.

39. The salient points which I drew from all of this evidence is that there were comments about Ms Brothers' age and skin colour during working meetings of the

BEA, when leaders of the organization were present. I am therefore able to conclude that leaders of the organization – including specifically Ms Smith-Herriott - were aware that such colourist and age-ist comments were being made. I also drew from that evidence that the failure of the BEA leadership to respond or to react to such workplace comments was noticeable and hurtful not only to Ms Brothers, but also other bi-racial employees such as Ms Colley.

40. The BEA ultimately argued that I should not give credit to the allegations of Ms Brothers about colourist remarks in part because she never made a formal complaint that they were being made to her at the time. The failure to make a formal complaint at the time does nothing to devalue the credibility of Ms Brothers in relation to the comments being made, and the real impact of them. Ms Brothers did make a contemporaneous report about them, and their impact, to Ms Colley. Also, the failure to formalize a complaint to Ms Smith-Herriott, the BEA's Acting Executive Director, about this situation is understandable given that Ms Brothers was, soon after the Gala, fully engaged in a fairly adversarial discussion of financial issues with Head Office. Ms Brothers also knew that Ms Smith-Herriott had failed to intervene during BEA meetings when such comments were made. Finally, Ms Brothers was soon dealing with another serious problem developing with her own staff in the Valley Region.

41. Ms Brothers' Site Co-ordinator in the Valley Region was Catherine Collier. Ms Collier had unsuccessfully competed against Ms Brothers for the Regional Educator job, but then had been hired by Ms Brothers for the Site Co-ordinator position commencing in the fall of 2006. Some time in October 2006, Ms Collier, who had been previously employed by the BEA, made it clear that she did not approve of Ms Brothers' choice for Ms Brothers' new Administrative Assistant, or that the new Administrative Assistant would also be working as an Educational Specialist in the Valley Region.

42. Ms Brothers testified that she was subjected to colourist comments from Ms Collier. The majority of these comments, she said, occurred in her Kentville office. Some were made in the presence of her Administrative Assistant. The comments relating to Ms Brothers' skin colour proposed that her skin colour was a barrier with the black people in the community. Ms Brothers was, it was said, too light skinned to "officially represent them" because she "wasn't black enough.": (p.62, December 3, 2013). Ms Brothers later related the encounter as involving the comment by Ms Collier that "the community didn't like me and they wanted a black person in the Regional Educator job that was actually black to properly represent them.": (p.65, December 3, 2013). Ms Brothers said that she spoke about these at the time to her supervisor, Ms Smith-Herriott, and was directed to deal with them at the lowest level, which I understood to be some kind of verbal caution by Ms Brothers to Ms Collier.

43. That was not all. In one of their earliest encounters, Ms Collier had asked the new Administrative Assistant "Are you black?", or "Are you even black?". The Assistant perceived that inquiry to be discriminatory on a colourist and racial basis. The Assistant made a formal written complaint about the matter to Ms Brothers on November 9, 2006. Over the course of the next month, Ms Collier resisted and defied Ms Brothers' efforts to resolve that problem. She contacted Ms Smith-Herriott's office in writing on December 6, 2006 about Ms Collier's behaviour and colourist comments towards the Administrative Assistant. On December 12, 2006, Ms Brothers was still awaiting a response from Ms Smith-Herriott about how to deal with the impasse over Ms Collier's remarks which had created a "hostile situation" in her Region. No response ever came.

44. In her own evidence, Catherine Collier made some acknowledgement that she had made the comments attributed to her by Ms Brothers' Administrative

Assistant, but not the comments to Ms Brothers herself. Ms Collier was quick to point out, sharply, that her inquiry "Are you even black?", or "Are you black?" was a normal, appropriate inquiry, and not intended by Ms Collier to be discriminatory. According to her, those who took a different view of her comments were "blowing things out of proportion". That, unfortunately, is one of the central problems that I had with Ms Collier's evidence in the context of this discrimination inquiry. It is not her sense of "proportion" that is applicable when I assess her behaviour. It is not her *intention* that is applicable when I assess her behaviour. The standard that applies is how her behaviour affects others. That is the standard required by the language of the *Human Rights Act*.

45. Ms Collier was in 2006, as she remained in 2013, vocal and opinionated and unmovable in her views. Her obviously intimidating behaviour towards Ms Brothers' Administrative Assistant could be nothing other than upsetting to a new employee. It predictably prompted a written complaint by the new employee to Ms Brothers. Ms Brothers responded appropriately according to BEA policy by requesting that Ms Collier sit down with the new hire to resolve the problem that Ms Collier's behaviour had created. If, as Ms Collier suggested at times during her evidence, she had never meant anything racial or colourist by her comments, then a face to face apology would have put an end to this matter in 2006. Ms Colley refused to do that because, clearly, there was much more to it.

46. In relation to Ms Collier's testimony generally, it was clear from the whole of the evidence that even 8 years after their mutual employment at the BEA, Ms Collier maintained a persistent and active dislike for Ms Brothers as a person. That dislike was, frankly, palpable in the hearing room. Even though she was the one who maintained her employment at the BEA after Ms Brothers was terminated, Ms Collier was – nearly a decade removed from these events - by turns angry, defensive, defiant, and argumentative. During her evidence, Ms Collier stoutly refused to even

acknowledge the obvious and significant age difference between the two of them (close to 20 years). This would have hardly been a damaging concession by her, but by refusing to acknowledge it, Ms Collier demonstrated a continuing, petty vindictiveness towards Ms Brothers. In short, Ms Collier gave her evidence about Ms Brothers with an attitude that showed no respect for Ms Brothers as a person, and in my view vividly mirrored how she had behaved towards Ms Brothers during their employment relationship back in 2006.

47. I could recount several examples of Ms Collier's behaviour while under oath which would justify rejection or distrust of her evidence. I will cite only one. The example I will describe is how she chose to respond just as aggressively towards Commission counsel as she had towards Ms Brothers in 2006. When she realized that her behaviour towards Ms Brothers and the Administrative Assistant could be regarded as inappropriate, she launched a personal attack against Commission counsel for the way that he was asking questions: (pp.194, 226 – 230, December 5, 2013). She did this despite the fact that counsel had been scrupulously polite and fair in his questioning. Standing alone, Ms Collier's outburst might have been forgiven based on her possible unfamiliarity with the adversarial process. However, that reaction did not stand alone. At an earlier point during Ms Collier's examination by Commission counsel, she tried to shut down his line of questioning in relation to colourism issues on the basis that he would not be able to understand because he was "not black" – though he himself is a person of colour (p.95, December 5, 2013).

48. Ms Collier's attitude while testifying effectively discouraged me from relying upon her evidence as accurate when it conflicted with the evidence of other witnesses. She very clearly sees the world through her own lens. She demonstrated an active memory in the sense that events were always recalled in a way that supported the narrative that she wanted to communicate. I have no doubt that Ms Collier passionately believes what she said while under oath. However, I do not feel

able to rely upon what she said at all unless it is supported by some other evidence which I do find to be independently reliable. Based on the depth of dislike demonstrated by Ms Collier towards Ms Brothers in 2006 and again in 2013, and her argumentative approach to giving evidence in response to legitimate and proper questions from both Ms Brothers and Commission counsel, I am not able to trust that her testimony about the critical encounters in this case is reliably accurate and true.

49. Ms Collier has very definite views about the importance of skin colour. In addition to her acknowledged question directed at the new Administrative Assistant about her heritage, and her explicit note of Commission counsel's lack of blackness during the hearing, she also described how the focus on skin colour was, in her mind, a central mission of the BEA. In responding to questions from the BEA representative, she said this, at pp.190-191 (December 4, 2013):

> A. I work in the school system. I see a lot of children who need help, they need assistance, they need someone who's going to be visually of their colour, of their – not only their colour, but sometimes when you see a child in school and they're looking and they're going, "Oh my God, I don't see no one of my – do they like me? Do they not like me? What's going on?"
> Q. When you say, "colour," what do you mean when you say, "colour"?
> A. I mean – when I'm talking about colour, a little black child is in a school, they come in grade primary and they're in school, and all of a sudden they're in a class of all Caucasian, and that little child – when you look at that little child, you don't know what they're thinking. I can come by and they're going, "Oh." They may not speak to the rest of the class or they may be shy with the teacher, but I can walk by and that child is going to look at me and say – if I say, "Good morning. How are you?" and have a smile on, then they're going to answer me back and smile to me because, you know what, they know that they're relating to someone of their colour.

And to Ms Brothers herself she said this, at pp.181-182 (December 5, 2013):

> A. Visible Black woman means that if you're in a school setting, when I stated that, a child of colour will look and see someone of their colour. If a child has been in the home of a Black family all their life and they're growing up and all of a sudden it's the first day of school. They're scared, whatever, and they go to school. And it's – and if they see someone of their own colour, sometimes the intimation [I heard "intimidation" during the evidence] for them is a little bit less.

See also her comments to Commission Counsel: (pp.71 – 72, December 5, 2013).

50. I am persuaded by the whole of the evidence that skin colour is an important human classifier for Ms Collier now, and was just as important to her in 2006. I am also persuaded that Ms Collier's persistent interest in skin colour means that Ms Brothers' skin colour contributed to Ms Collier's thinking about and behaviour towards Ms Brothers. I therefore accept as accurate the evidence of Rachel Brothers that Ms Collier defied Ms Brothers at least in part because of Ms Brothers' age and skin colour.

51. Ms Collier's behaviour towards Ms Brothers in 2006 was, frankly, appalling. Ms Collier acknowledged that she chose to disregard Ms Brothers' efforts to get her to come to a resolution of the issue with the Administrative Assistant. Email correspondence from 2006 also documents how Ms Collier contacted the BEA head Office for the purpose of restructuring her pay and reporting obligations to avoid having to deal with either Ms Brothers or the new Administrative Assistant, or to at least minimize the contact. Ms Collier did not communicate with Ms Brothers about program delivery in a way that permitted appropriate supervision. Ms Collier also unilaterally decided not to perform tasks that she had taken on earlier in relation to a Kwanzaa event, which also detracted from the anticipated quality of BEA programs in the Region that Ms Brothers was trying to deliver. While Ms Collier endeavoured on some occasions to soften her evidence slightly by quibbling with phrasing and avoiding direct answers to many questions, it is evident to me that in

2006, Ms Collier's defiant behaviours towards Ms Brothers were motivated largely by Ms Brothers' skin colour and Ms Brothers' much younger age.

52. Jacqueline Smith-Herriott testified about what was going on at the time from the perspective of the BEA Head Office. She was the Acting Executive Director during the fall of 2006, and at the time of Ms Brothers' termination. She was also transitioning out of the role of Executive Director at the time of this Human Rights hearing. There had been a fairly large gap in between those stints as Executive Director of the BEA. She also self-identified as a bi-racial woman.

53. I had a considerable amount of difficulty with the evidence given by Ms Smith-Herriott. Although she filled the most senior paid staff position at the BEA during the critical times in 2006, and in 2013 – 2104, she presented herself as quite inadequately prepared to speak about issues that would have been in the forefront during those times. She said that she had spent time discussing the financial concerns about Ms Brothers with the former finance officer, Kathryn Herbert, in late 2013 in preparation for her appearance at this inquiry. However, she was quite vague at the hearing when making allegations and insinuations about financial misconduct by Ms Brothers. When asked whether there was any documentation about other financial concerns beyond those related to the Gala being brought to Ms Brothers' attention, she again said that there might be something "in the file", but she had nothing to produce to the inquiry. She could not provide an explanation as to why those other concerns had not been referred to in any correspondence with Ms Brothers that was produced to the inquiry. When asked whether Ms Brothers had been given some kind of warning about financial issues, Ms Smith-Herriott said that she had, and that there might be a notation in the personnel file, but she didn't know. She had not gone to look. She thought at one point that she "may" have given several verbal warnings.

54. There is further cause for me to be troubled by Ms Smith-Herriott's evidence. One of the important submissions of the BEA in this proceeding was that Ms Brothers' employment contract was only for one year, and that she was still a probationary employee when terminated in December 2006. Despite knowing that that was what the BEA argument was going to be, she did not arrange, as one of the lead presenters and witnesses for the BEA, to produce that contract, or to lead evidence that she had gone to look for it in Ms Brothers' personnel file. She did not report that it was missing, or unavailable through loss or destruction. She had simply not looked in Ms Brothers' personnel file for a document that may have been a critically important pillar to the BEA's defence to this human rights claim.

55. Most important for present purposes, Ms Smith-Herriott claimed an almost total unfamiliarity with correspondence that had been directed to her attention or her Secretary's attention (Ms Claudette Colley) in 2006, including the correspondence relating to Ms Collier's behaviour in the Valley Region. She eventually agreed that she must have seen some of the correspondence directed to her email or office address, but that is as far as she would go. She claimed little or no recall with respect to what she had done about that correspondence. I do not find that evidence reliable or trustworthy. The fact of the matter is that Ms Smith-Herriott had to have seen that correspondence relating to Ms Collier's behaviour, and either ignored it, or consciously chose to do nothing about it.

56. While Ms Smith-Herriott chose to speak at length about the concerns as to Ms Brothers' financial competence, her reticence in terms of criticizing Ms Collier's behaviour and attitudes towards Ms Brothers, and the absence of any action at all in relation to the written concerns about Ms Collier's behaviour towards Ms Brothers' Administrative Assistant, was loudly instructive. While Ms Smith-Herriott mouthed the words that discrimination based on race or skin colour or age would be inappropriate, her actions demonstrated that her office was persistently deaf when

those concerns involved Ms Brothers or Ms Brothers' Assistant. Efforts by Commission counsel or Ms Brothers to explore the events of the late fall of 2006 at Head Office were repeatedly frustrated by Ms Smith-Herriott's testimony that she did not recall receiving, or seeing, or how she responded to, specific emails and letters describing the things that were destabilizing the Valley Regions' programming and working environment. Instead, on several occasions during her evidence Ms Smith-Herriott offered ideas as to why Ms Collier might have been justified in persisting with her insubordinate behaviour towards Ms Brothers. She also refused to acknowledge, in almost the same words as Ms Collier, the significant and obvious age gap between Ms Brothers and Ms Collier.

57. Over the course of her evidence, I noted that Ms Smith-Herriott became by turns combative, defensive, and vague. I have concluded that Ms Smith-Herriott's evidence is not reliable, and that I am not able to accept her offered recollections as trustworthy. This is my conclusion not only in relation to the financial issues, but also in relation to her evidence about the issues of racial, colour, and age discrimination.

58. Sheila Lucas-Cole testified as a long-standing Board member and volunteer with the BEA since the mid-1970s. In 2006, she was the President of the organization – a position she has held on numerous occasions. As President she was a member of the Board. She was not part of the day to day operations of the BEA, and had little involvement with those operations. She relied instead on the information that was provided to her, mostly by Ms Smith-Herriott.

59. I was favourably impressed by the evidence of Ms Lucas-Cole. She candidly recalled the "pout" comment made at the October 2006 meeting with the Regional Educators, and her response to it. She did not recall a colourist comment at the same meeting. She focused instead on defusing the evident conflict that was brewing

among the Regional Educators, and getting them all to have a united focus about their shared tasks in putting on the Gala. She expressed similar views to those of Ms States in relation to light skin being a potential advantage in our society, and so I accept that she may not have noted a comment about light skin colour at the time.

60. In terms of the issue involving Ms Brothers and Ms Collier based on Ms Collier's comments to the Administrative Assistant, Ms Lucas-Cole consistently responded to many questions with the assertion that she had not been aware, or familiar, with the various pieces of correspondence arriving at the Executive Director's office on this issue. While she viewed the "Are you even black" comment as not necessarily wrong, she felt that it would have been important to have a conversation about the nature of the question, and the appropriateness of any inquiry about a person's colour. She herself recounted that she had taken advantage of that kind of question in her own life to correct the questioner without taking any personal offence.

61. Based on all of this evidence, I conclude that the facts are these. Ms Smith-Herriott failed to intervene when colourist remarks had been made about Ms Brothers at the October 6 Regional Educator meeting. Ms Smith-Herriott led an organization, according to Ms Colley, that tolerated several comments being made about Ms Brothers' colour. Ms Smith-Herriott did nothing to respond to Ms Brothers' requests about how to manage Ms Collier during November and December, 2006. Ms Smith-Herriott endorsed the insubordinate behaviour of Ms Collier towards Ms Brothers, by overruling Ms Brothers' attempt to suspend Ms Collier and taking no steps to restrain the insubordinate behaviour and attitudes being expressed by Ms Collier. Without the benefit of conducting any kind of investigation, Ms Smith-Herriott failed to act at all in relation to alleged colourist behaviour by Ms Collier towards Ms Brothers' Assistant that had been brought to

her attention. And, Ms Smith-Herriott failed to communicate any of this to the Board and President of the BEA.

62. It is therefore apparent to me from the evidence that the BEA Head Office was aware of Ms Collier's defiant behaviour, and condoned it. It was this receptive response by the BEA leadership, with the Board President at the time kept out of the loop, which is ultimately most troubling for me. Essentially the Head Office of the BEA co-operated in the undermining of Ms Brothers as a Regional Educator by a part-time employee who was disaffected by Ms Brothers' skin colour, age, and authority. The BEA Head Office did this with knowledge that Ms Collier had created a racial or skin colourist issue in the Valley Region office, and with knowledge that Ms Brothers was herself the target of colourist comments within the organization. Therefore, I have been persuaded by the evidence that the decisions made by the BEA about Ms Brothers after November 1, 2006, and including at least up to December 18, 2006, were made in part because of Ms Brothers' colour, and how employee sensitivities about that was affecting the workplace.

The Financial Competence Issue

63. The evidence did disclose that concurrent with all of the employment issues already discussed, Ms Brothers was required to complete her financial accountability for the work that she had done in support of the October Gala. The BEA led considerable evidence about their concerns in relation to Ms Brothers' financial competence and trustworthiness. In preparation for the Gala event, Ms Brothers and another Regional Educator were given leadership roles. Ms Brothers applied herself to her tasks with exuberance. During the course of preparations, the nature of the event changed somewhat – the family of one of the honorees became disinclined to participate, and funders required more of an educational component to the gathering. Shortly before the event, the other Regional Educators were

induced to participate in organizing the education program – which was the special October 6 meeting in Halifax during which some of the ageist and colourist comments were directed towards Ms Brothers.

64. As one of the leaders in preparing for this special event, Ms Brothers was provided with some cash advances for expenses. There was a mutual understanding that there would have to be some kind of accounting for these expenditures. Curiously, there was no written instruction provided by the BEA to Ms Brothers as a new employee, nor as the employee assigned to organize this event, as to where to keep this cash (a separate event bank account perhaps), whether there was a requirement for receipts for all expenditures or only those above a certain amount, whether there was a ceiling amount for any expenditures by Ms Brothers without prior Head Office approval, what kinds of expenditures were authorized, how all her financial transactions were to be reported, and finally, when her financial report would be due.

65. Developing a financial reconciliation for her part of the Gala preparation proved difficult for Ms Brothers as she had not maintained records on an ongoing basis in advance of the event. She set herself unrealistic deadlines for completion of the reconciliation work. The effort to assemble a coherent reconciliation of expenditures after the fact eventually proved quite stressful, and she felt it necessary to ask for some medical leave in the midst of that. As her dealings with the Head Office progressed through November, she was suspended, and then sought the assistance of legal counsel in responding to Head Office, and then became unsuspended for a short time. Interestingly, most of the BEA leadership were out of the country at a conference at the time. There was little or no urgency for the completion of the financial reconciliation, and yet no one at Head Office let Ms Brothers know that, or came to assist her.

66. Eventually, Ms Brothers was asked to attend a meeting in Halifax on December 14. At the December 14 meeting Ms Brothers was confronted with a number of specific, prepared financial questions that were difficult for her to answer. Ms Smith-Herriott suggested that the ambush of questions was in fact a purposeful strategy devised by Financial Officer Kathryn Herbert. Ms Brothers had asked, but been advised that she didn't need to prepare for the meeting. In retrospect, Ms Lucas-Cole felt that that was probably unfair. Ms Brothers ultimately offered to reimburse the BEA a substantial sum of money to resolve the outstanding financial issues. However, in another abrupt turn of events from her point of view, she was then visited at her office by Ms Lucas-Cole and Ms Smith-Herriott on December 18, 2006, and terminated from her employment with the BEA.

67. The BEA, and particularly Ms Smith-Herriott, pointed to various provisions of the BEA Personnel Policy Manual (Ex.6, Part III, Tab 11) regarding the level of financial responsibility required of employees. This document is confusingly dated, and I am not comfortable accepting the wording of the exhibit as the wording that would have been applicable in 2006. No one was able to describe for me what was amended on the various dates identified for amendments on the front page of the exhibit. Besides, no one testified that Ms Brothers had received any specific orientation or training in relation to the policies set out in this document. Perhaps everyone thought she should have, but no one testified that it had happened.

68. The BEA's Financial Officer at the relevant time was Kathryn Herbert. She apparently is no longer with the BEA, but helped Ms Smith-Herriott prepare to testify at this inquiry. None of the parties before this Board of Inquiry called her as a witness. She might have been able to speak to any instructions given to Ms Brothers about the arrangements for financial responsibility, and the rationale for any reporting deadlines, in 2006. Given the weight that the BEA asks me to place on Kathryn Herbert's views as justifying the termination of Ms Brothers for financial

misconduct, I would have expected them to present her evidence in some form. The BEA did not. I do not draw any adverse inference against the BEA because of that decision. However, the absence of evidence from her leaves me with nothing to ground a decision or even an inference that there was any deliberate, possibly criminal, financial misconduct or malfeasance on the part of Ms Brothers.

69. The evidence that I do have demonstrates that Ms Brothers collected a number of receipts for miscellaneous expenses over the course of the summer and early autumn of 2006 which she says involved expenses incurred for the Gala. In her eventual reporting of these expenses, she clearly (and sometimes admittedly) provided some duplicate receipts, some questionable receipts, and some inappropriate receipts. For some expenditures, Ms Brothers was unable to provide any justification at all – which seems to be what led some at the BEA to want to believe that there had been theft or some kind of breach of trust. After the accusatory meeting in Halifax on December 14, 2006, Ms Brothers ultimately offered to reimburse a substantial amount of money to the BEA, an offer that the BEA accepted and then deducted from Ms Brothers' final pay. I don't believe that the BEA suffered any financial loss as a result of Ms Brothers' behaviour.

70. Ms Brothers did take the opportunity on December 6 and 14, 2006, in the midst of her financial discussions with the BEA Head Office staff, to acknowledge, in writing, her weakness in relation to financial organization or basic accounting. There is no evidence of any effort by the BEA Head Office staff to provide guidance or assistance in relation to any admitted weakness. Instead, the evidence makes it apparent to me that as early as the first week of November, 2006, the BEA Head Office staff had adopted an adversarial attitude towards Ms Brothers. In their dealings with Ms Brothers from that point until her termination, the BEA Head Office was less interested in achieving financial accountability than it was interested

in marshalling evidence to justify a decision to get rid of Ms Brothers as an employee.

71. The BEA did have legitimate concerns about Ms Brothers' skills in terms of financial responsibility. However Ms Brothers was a new employee. She was assigned a significant task with limited guidance, and limited support, from the Head Office of the organization. Once the terms of reimbursement were negotiated, there was no apparently compelling reason for the BEA to terminate Ms Brothers based on the Gala event – particularly given its obvious and acknowledged public success. Indeed, the BEA might well have learned from the experience that its own communication and training and internal control processes were deficient.

72. The BEA also proposed that Ms Brothers could be terminated within the first probationary year of her contract with the BEA. This submission was advanced as an alternative ground to justify the non-discriminatory termination of Ms Brothers. The difficulties with this position for the BEA are several. This was not the position it relied upon in its termination letter to Ms Brothers (Exhibit 6, Part II, Tab 27) dated December 15, 2006, but delivered by hand on December 18, 2006. Second, none of the parties produced Ms Brothers' employment contract with the BEA for me. The BEA and Ms Brothers disagree about its terms – and in particular about its supposed duration, and whether there was provision for a pay increase upon Ms Brothers' university graduation. Third, I repeat my inability to weigh the provisions of the Personnel Policy Manual document as justifying Ms Brothers' termination because of the uncertainty of the applicable wording as of 2006. I have decided that Ms Brothers was not terminated because she was an unsuitable probationary employee.

Contravention of the Act

73. Based on my appreciation of all the evidence, Ms Rachel Brothers was competent and capable at all aspects of her job as a Regional Educator with the Black Educators Association. Any perceived weaknesses in relation to financial responsibility were clearly remediable with clearer instruction and supervision by her employer. Her employer suffered no financial loss as a result of Ms Brothers' accounting errors. In relation to management of her staff, Ms Brothers was capable of conducting hiring according to established rules, assigning tasks and responsibilities, and in instructing her staff as to how to resolve apparent disputes in accordance with established BEA policy.

74. Based on the evidence before me, the BEA's only articulable reason to terminate Ms Brothers was financial misconduct. I have decided that this reason was, and remains, unsupportable on the evidence presented before me. I want to be clear that I am not evaluating the *reasonableness* of a termination judgment made by responsible BEA staff. I am deciding that while the BEA had legitimate grounds for concern about Ms Brothers' financial accountability skills, these kinds of grounds simply would not constitute self-supporting grounds for the termination of Ms Brothers' employment. Accounting ineptitude in the absence of clear instruction and supervision does not amount to purposeful financial misconduct. The absence of purposeful financial malfeasance also eliminates the possibility of any true concern about employee "trustworthiness".

75. All of that then brings us back to the question of why, if not for financial misconduct, Rachel Brothers was summarily terminated on December 18, 2006? In my view, the evidence is quite clear as to why. In my view, the Valley Region and Rachel Brothers had become a problem in the minds of Ms Brothers' superiors at the BEA Head Office. Ms Brothers was a problem because a part-time employee in

the Valley Region, who had a longer history with the BEA and its established staff, decided that Ms Brothers was a problem. Ms Brothers had been chosen for the position of Regional Educator in preference over Ms Collier. Ms Brothers was substantially younger than Ms Collier. Ms Brothers did not offer to extend a job posting for her Administrative Assistant so that a candidate favoured by Ms Collier might apply. Ms Brothers hired a woman for the position of Administrative Assistant and Educational Specialist who, in Ms Collier's eyes, did not "even" appear to be black in colour. I have already explained my conclusion that in Ms Collier's eyes, Ms Brothers was not really black enough either, given her remarks to Ms Brothers in her office, and particularly those comments which supposedly related the community's view of Ms Brothers' colour.

76. Instead of doing as her Regional Educator asked, and instead of making some form of amends with the new employee on her own, Catherine Collier chose to elevate her antipathy into a direct challenge of Ms Brothers' authority. Ms Collier defied Ms Brothers as I have detailed earlier. This was extraordinary behaviour for any employee. It might ordinarily be described as "insubordinate". And yet not at the BEA in 2006 for Ms Collier. The Head Office of the BEA reacted to this situation in a way that knowingly condoned Ms Collier's insubordination. The BEA Head Office did this knowing that the root of the complaints involved Ms Collier expressing racial or colourist views towards at least one other BEA employee. The Head Office staff, and in particular Ms Smith-Herriott, did not respond to the core issue raised by Ms Brothers, or the new employee, nor did the Head Office staff conduct any inquiries of Ms Collier herself about her colourist-based views. It was as if Head Office staff felt that Ms Collier had nothing to answer for – even though two other employees of the BEA were expressing distress about how Ms Collier had poisoned their work environment and their work relationships.

77. The Head Office disregard of the complaints about Ms Collier's discriminatory attitudes and behaviour was so complete that it included a failure to even inform the President of the Board of Directors of the problem. This was a critical and conscious failure by Ms Smith-Herriott. Ms Smith-Herriott also condoned an organizational culture which allowed repeated comments to be made about Ms Brothers' colour. That, in my view, establishes liability on the part of the BEA for the discriminatory treatment of Rachel Brothers. It is a most unfortunate course of action for a volunteer-led organization such as the BEA that its paid staff failed to pass along information about colourist-based disruptive employee behaviour. This is behaviour that could have been dealt with as Ms Lucas-Cole described at the hearing of this inquiry. The BEA Head Office non-response in relation to Ms Collier's behaviour really just completed the circle with its non-response in relation to the behaviour of other BEA employees towards Ms Brothers based on her colour.

78. I was also quite troubled as I listened to the evidence that even in 2014 many of the same people who were involved in the BEA, and who were making decisions affecting Ms Brothers in 2006, remained reluctant to disassociate themselves from the kind of comments that Ms Collier and other Regional Educators had made towards Ms Brothers and her Administrative Assistant. Rather than being offended by Ms Collier's comments, too many of the staff made efforts to excuse them, or to contextualize them, or to even shrug them off as no big deal. All of this reinforced my conclusion that as an organization in 2006, the BEA Head Office accepted colourist thinking. Even if some people continue to believe that it is a compliment to remark on the lighter colour of someone's skin, they should now realize that the recipients do not always receive the comments that way.

79. However, the specific question before me is not whether there was an accepted culture of colourist-based thinking at the BEA. The question is whether the

BEA then made decisions about Ms Brothers' employment that discriminated against her on the basis of race, colour, or age. With respect to colourist thinking particularly, I am able to conclude that the whole series of decisions made by the BEA about Ms Brothers and her employment starting with the arrival of the initial Collier complaint, were made in part because of Ms Brothers' colour. Ms Brothers' skin colour was a factor in her treatment by her immediate superior and others at the BEA, which both created an unpleasant work environment for Ms Brothers, and ultimately led to her premature termination by the BEA.

80. As I have noted earlier, discriminatory behaviour involves behaving differently towards another person based on some inherent and unique personal quality of the person affected. Here the BEA Executive Director became aware that Catherine Collier had created an employment problem with two other employees in Ms Collier's region because of intimidating colour-based challenges. Despite that, the BEA's Acting Executive Director reacted as if the behviour of Ms Collier towards Ms Brothers and her Administrative Assistant did not matter. The BEA Executive Director left the country for a couple of weeks without making any effort to address the problem that Ms Collier's behaviour had created, and without even informing the President of the Board, who was traveling with her, about the problem. Why would the BEA's Executive Director act this way? I have decided that the only reasonable conclusion to draw is that the Executive Director had already decided, without investigation, that Ms Brothers concerns did not matter. This attitude towards Ms Brothers was perpetuated when it came time to inquire into outstanding financial questions relating to the Gala. Although Ms Brothers asked how she might arrive prepared for the meeting, she was consciously misled about the true purpose of the meeting for a strategic reason – which was to marshal evidence through ambush to justify her termination. That kind of conscious misleading of an employee happens when an organization has decided that the employee no longer matters to them.

81. Ms Brothers no longer mattered to the BEA because, ultimately, Ms Brothers' colour, which had already drawn comment among her fellow Regional Educators, had become a problem for Ms Collier and therefore a problem in the Valley Region office. Certainly Ms Collier's attitudes were destabilizing the work of the BEA's Valley Region. Instead of addressing the problem at the level of Ms Collier's behaviour, the BEA chose to stabilize the Valley Region situation by terminating Ms Brothers. The BEA then claimed to have terminated Ms Brothers for a reason which I have found to be unjustifiable. The only remaining articulable reason for Ms Brothers' termination on the evidence before me is that Ms Brothers' colour was causing the BEA a problem in the Valley Region. They solved that problem by terminating Ms Brothers. In my view, that constitutes a violation of s.5(1)(d) and (j) of the *Human Rights Act*.

82. Much of the persuasive evidence in this matter related to comments about Ms Brothers about her skin colour. While her young age was also the subject of comment at Regional Educator meetings, and was an irritant to Ms Collier, I am unable to conclude that it affected any of the thinking or decisions made about her by the BEA Head Office. I therefore do not conclude that there was any distinction made in relation to her by her employer based on her age.

83. I spoke earlier in this decision about the difficulty experienced by those who self-identify as bi-racial when colourist comments are made. Depending on the intent or perspective of the person making the comments, the bi-racial person must often be uncertain about whether the comment on colour also imports some concurrent qualitative evaluation of racial or cultural purity or connectedness. Based on the entirety of the evidence here, I am not prepared to find that the BEA as an organization made any racial or cultural evaluation of Ms Brothers when colourist comments were heard. In final submissions, I understood that Ms Brothers

has also fairly come to this view. This is a case about discrimination on the basis of colourism only. I do not find any discrimination here on the basis of race.

Remedy

84. Rachel Brothers lost her employment at the BEA in part because of decisions at the BEA in which her skin colour was a factor, and the problems that her skin colour had created in her office for another BEA employee. General damages are normally regarded as an appropriate way to respond to such an act of discrimination. I would agree that a cash award paid by the BEA to Ms Brothers is the most appropriate remedy here, together with special damages as described below.

85. Section 34(8) of the *Act* authorizes me to order that any party who has contravened the *Act* to do any act or thing that constitutes full compliance with the Act, and to rectify any injury or to make compensation therefore, including an order for costs. There is nothing that I can realistically do 8 years after the fact to get the BEA to act differently towards Ms Brothers in her employment. I expect that had Ms Lucas-Cole been fully informed at the time, Ms Brothers would in fact have been treated differently. There is therefore no training or education that I need to order for the staff at the BEA. It is also difficult to imagine what the BEA could do now to rectify the emotional injury of Ms Brothers' abrupt termination in December 2006. The process of the investigation, hearing, and the decision here will have provided some value in encouraging conversations at the BEA about issues around skin colour. That leaves me with the obligation to calculate some form of compensation for Ms Brothers.

86. It is my view that any compensatory award to Ms Brothers should represent an acknowledgement of the harm done by the BEA to her. Ultimately the injury to be

compensated is the injury to Ms Brothers' dignity and self-respect. I note in that regard that she did seek some medical treatment and a short period of time off due to accumulated stress in early November 2006. Any cash award should reflect the significance of the discriminatory impact: a difficult work environment, including a loss of employment. The compensation award should also take into account that the discriminatory behaviour involved repeated comments from more than one individual. This was not an isolated occasion of a single, discriminatory remark. However, some of the discriminatory attitude which Ms Brothers faced about her skin colour at work was thoughtless and careless rather than intentionally discriminatory. I will not consider the BEA's response to other legal proceedings by Ms Brothers as justifying an elevation of the appropriate compensation amount – as she suggsted that I do.

87. There is little specific guidance from one case to the next as to what the appropriate amount ought to be to compensate for a human rights injury. I have appreciated the comments about compensatory cash remedies which appear in *Cromwell v. Leon's Furniture Limited,* 2014 CanLII 16399 (NS HRC). There is a limited review of compensation amounts ordered, usually due to loss of employment because of disability discrimination, in *Trask v. Nova Scotia (Justice)*, 2010 NSHRC 1 (CanLII). I am of the view that the appropriate amount of general damages here pursuant to my authority under s.34(8) of the *Act* should be within the range of $6,000.00 to $8,000.00.

88. Ms Brothers lost her employment on December 18, 2006, but was fortunately not unemployed for long. She resumed employment on April 2, 2007, and in one form or another has been employed in the correctional field since. She did collect employment insurance in the interim, but claims a loss of wages of "approximately $3859." She also claims the BEA's failure to pay a promised salary increase after university graduation, and the cost of completing her degree – all of which she says

was part of her contract when hired. She seeks interest from the date of termination. Ms Brothers asks for the costs of attending the hearing, including the value of vacation days that were required to be taken because her current employer did not recognize this Board of Inquiry as court time within the meaning of her collective agreement.

89. I am not prepared to award compensation based on contractual terms that remain in dispute between the parties. As I said earlier, either party might have proven the terms of the employment contract by the producing it, or producing correspondence or other documentation supporting some of the specific terms now referenced in oral evidence, or by calling other witnesses who participated in the negotiation of the contract. All that I am prepared to consider in relation to lost income is the base amount claimed

90. I am not prepared to award Ms Brothers her costs in terms of transportation and vacation time to participate in this Board of Inquiry process. She may have a valid claim under her current employment contract for compensation of her vacation time. The costs of her transportation, while admittedly rather modest in this case, are not of a type which are within the control of this Board, nor the BEA. I do not think that it would be fair to make an award against the respondent in an Inquiry under the *Act* for these kinds of costs. Each of the parties to an Inquiry has their own costs of participating, and in the case of a respondent or a witness, these costs are largely involuntary with limited control of their dimensions. A claimant at an Inquiry is protected against costs being awarded against her. Therefore, I believe that it is appropriate in this case that each of the parties, including Ms Brothers, bear their own costs of participating.

91. My award of compensation to Ms Brothers pursuant to s.34(8) is a global amount, for general damages and her loss of income, in the amount of $11,000.00.

There should be prejudgment interest at 2.5% from the date of my appointment (March 28, 2013). Prior to that date, the BEA had no realistic control over the timing of any of the proceedings. If there is any difficulty in calculating the interest, I retain jurisdiction to deal with that.

92. I would like to thank all the parties, and counsel, and the witnesses, for participating in this Inquiry. I regret, on behalf of all who attended the hearing, that this matter could not have been dealt with within a couple of years of the events.

Dated at Halifax, Nova Scotia, this 29 th day of July, 2014.

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Donald C. Murray, Q.C.
Board of Inquiry

Appendix "A"

Rachel Brothers v. Black Educators' Association
NSHRC File No.51000-30-H07-0129

Decision on Adjournment Request

I was appointed to inquire into this matter on March 28, 2013. The complaint itself was made February 28, 2008, relating to alleged employment discrimination that had occurred between January and December 2006.

I arranged a teleconference among the parties for an organizational pre-hearing conference, which occurred on June 11, 2013. Earlier dates had been proposed but one or more of the parties, or their counsel, were not able to make themselves available. It was suggested that 3 days would be required for the hearing of the matter. At the time of the June 11 teleconference, hearing dates were asked for February 2014, which were regarded in my view as unnecessarily too far out. Dates in November 2013 were offered (November 13, 14, and 15) and acceptable to all – subject to the availability of witnesses from the Black Educators' Association. A further pre-hearing conference date was set for September 20, 2013. Subsequently, counsel for the Black Educators' Association indicated that the November dates for hearing would not be workable.

On August 2, 2013, I was advised that the Nova Scotia Human Rights Commission would be represented on this matter by R. Lester Jesudason. A teleconference was scheduled for September 4, 2013. Mr Jesudason spoke on the Commission's behalf at the September 4, 2013, teleconference. At that time, after canvassing all the parties, including Ms Brothers who would be required to take time from her current employment to attend, 3 hearing days were found: December 3, 4 and 5, 2013. October dates had been offered but were declined.

On Wednesday, November 20, 2013, I received email communication from R. Lester Jesudason which indicated on my email program had been sent after 11:00 pm the night before (November 19, 2013). Among other things, this email advised that:

a) Resolution discussions had taken place but had been unsuccessful;
b) As of November 8, 2013, The Black Educators' Association was no longer going to be represented by Ms Noella Martin or Wickwire Holm;
c) The parties wished to adjourn the hearing scheduled for December in case further discussions by the Board at the Black Educators' Association might result in a resolution of the matter;

d) While reluctant, Ms Brothers agreed to the request for an adjournment, the Commission was not taking a position, and that I might convene a teleconference to hear the adjournment request.

Seven years have passed since the alleged discriminatory behaviour. Five years have passed since Ms Brothers made her complaint to the Commission. November 2013 hearing dates were lost because the Black Educators' Association's witnesses were apparently not going to be available at that time. A negotiated resolution was not apparently acceptable to the Black Educators' Association Board. The Black Educators' Association has now chosen to represent itself less than a month before the scheduled hearing dates.

I have no sense from anything communicated to me by Mr Jesudason on behalf of all the parties that this matter is going to resolve. I have been appointed to conduct an inquiry into this matter and will do so commencing on the agreed dates of December 3, 4, and 5, 2013, at Halifax.

I do not have contact information for the Black Educators' Association. I expect that Mr Jesudason will deliver these reasons confirming the hearing dates to all of the parties.

Dated this 20th day of November, 2013 at Halifax, Nova Scotia.

Donald C. Murray, Q.C.
Board of Inquiry