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

AND

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

BETWEEN:

Normand Saulnier

(the "Complainant")

-and-

Conseil scolaire acadien provincial

(the "Respondent")

-and-

Nova Scotia Human Rights Commission

(the "Commission")

DECISION

Nova Scotia Human Right Board of Inquiry	Kathryn A. Raymond, Chair
Representation:	Normand Saulnier, on his own behalf
	Noella Martin, counsel for the Respondent
	Lisa Teryl, counsel for the Commission
Date of Decision:	October 9, 2014

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Introduction

1. Normand Saulnier (the "Complainant") alleges that he was discriminated against by the Conseil scolaire acadien provincial (the "Respondent") as a unionized employee of the Respondent and, therefore, in respect of his membership in an employee's organization. The discrimination is alleged to have occurred on the basis of age. The Complainant brought a complaint against the Respondent pursuant to section 5(1)(g) and (h) of the *Human Rights Act*, RSNS 1989, c 214 (the "*Act*").

2. This Board of Inquiry (the "Board") was appointed to conduct an inquiry to determine whether discrimination occurred in the circumstances of this case by the Chief Judge of the Provincial Court on October 8, 2013. No objection was taken to the Board's jurisdiction to hear and determine this matter. The parties have since asked the Board to issue a decision approving a settlement of this matter. The Board has decided to approve the settlement, subject to certain amendments and conditions. Its reasons for doing so include the following comments related to the public interest in this complaint, the issue of mandatory retirement and issues relevant to the Board's jurisdiction.

Background to the Issues in the Complaint

3. An Agreed Statement of Facts provided factual background to the issues in this complaint. Additional information was provided by the parties through the process of case management conferences with the Board and written submissions.

4. The Complainant worked for the Respondent from August, 2003 to May, 2005. He was 63 years old at the time he was hired. Before the Complainant was hired by the Respondent, he had been self employed, operating a body shop business in his local community. Upon becoming employed by the Respondent, he sold the tools he owned for his business. The Complainant estimates that his tools were worth about $3,000.00.

5. The Respondent states that, at all material times, there was a collective agreement between the Respondent and the Canadian Union of Public Employees ("CUPE") that applied to the employment relationship between the Complainant and the Respondent. An article in the collective agreement required that employees in the relevant bargaining unit had to retire at the end of the month in which they reached their 65th birthday. The

Complainant alleges that he did not know that he would become a unionized employee when he was hired and did not know he would be required to retire at age 65. The Complainant turned 65 years old in May 2005.

6. On February 14, 2005, the Respondent's Director of Human Resources wrote the Complainant to advise him that, based on the above-mentioned article in the collective agreement, he would be retired and that his last day of work would be May 31, 2005. The Respondent proceeded in accordance with the collective agreement and required the Complainant to retire, effective May 31, 2005.

7. Two related issues were raised by the Complainant and supported by the Commission:

   a) The Complainant alleged that he was discriminated against by the Respondent on the basis of his age when the Respondent forced him to retire at age 65, when his work was satisfactory. In effect, the Complainant alleged that the relevant article in the collective agreement and the Respondent's actions in reliance upon it were discriminatory on the basis of age.

   b) The Complainant alleged that the Respondent was under an obligation to inform him, at the time he was hired, that he would become a unionized employee and be subject to mandatory retirement at age 65. The Complainant disputed the applicability of the collective agreement to him on the basis of the Respondent's alleged failure to inform him of this, in effect submitting that he should have been treated like a non-unionized employee by the Respondent or that an exception should have been made in his case.

8. The Respondent acknowledges that it required the Complainant to retire at age 65. However, the Respondent submits that it was permitted to require unionized employees within the relevant bargaining unit to retire at age 65 based on a bona fide mandatory retirement plan or practice in effect for the workplace. The Respondent relies upon provisions in the *Act* that were in force at the time, namely section 6(g) and (h), which exempted bona fide mandatory retirement plans and practices from being discriminatory on the basis of age pursuant to section 5 of the *Act*.

9. Specifically, section 5(1)(g) and (h) provided as follows:

> *5(1) No person shall in respect of*
>
> ...
>
> *(g) membership in a professional association, business or trade association, employers' organization or employees' organization,*
>
> *discriminate against an individual or class of individuals on account of*
>
> *(h) age;*
>
> ...

10. Section 6, in force at the time, provided that:

> *Subsection (1) of section 5 does not apply*
>
> ...
>
> *(g) to prevent, on account of age, the operation of a bona fide retirement or pension plan or the terms or conditions of a bona fide group or employee insurance plan;*
>
> *(h) to preclude a bona fide plan, scheme or practice of mandatory retirement;....*

Section 6(g) was subsequently amended and section 6(h) was subsequently struck from the *Act* by *An Act Respecting the Elimination of Mandatory Retirement*, R.S.N.S. 2007 c. 11, which came into force July 1, 2009.

11. It is not in dispute that the events that occurred in this case happened during the period of time when bona fide retirement or pension plans, or mandatory retirement plans or practices were permitted, respectively, by sections 6(f) and (h) of the *Act.*

12. The Respondent submits that the mandatory retirement provision in the applicable collective agreement and its practice of mandatory retirement at that time met the requirements of a bona fide mandatory retirement plan or practice pursuant to section 6 of the *Act*. The Respondent states that the issue of whether its mandatory retirement practice was bona fide was previously determined in another case: *Conseil Scolaire Acadien Provincial v Canadian Union of Public Employees*, Local 2272, 2012 CanLII 43554 (NS LA) ("*Conseil scolaire acadien provincial*", cited here without full capitalization in accordance with its incorporating statute). The Respondent submitted that, if there was a hearing, the evidence would show that all employees within the CUPE bargaining unit of which the Complainant was a member retired at the end of the month in which they had their 65th birthday, during the period of time that mandatory retirement was permitted. The Respondent submitted that its evidence would further persuasively demonstrate that, at all material times, it consistently declined requests from unionized employees within the CUPE bargaining unit to work beyond the age of 65.

13. The Respondent submits, accordingly, that the combination of the wording of the legislation, the existence of a previous decision verifying the legitimacy of the mandatory retirement plan or practice in question and its consistent adherence to the practice of mandatory retirement provides a complete defence to the complaint, such that it cannot be liable pursuant to the *Act* for requiring the Complainant to retire at age 65. The Respondent submits that the complaint ought to be dismissed on the merits. During case management, counsel for the Respondent questioned the purpose of the Commission's decision in referring this matter to the Board of Inquiry. It was unclear to the Respondent what remaining issues respecting mandatory retirement required determination by a Board of Inquiry, given existing case law in this province.

14. The Complainant believes that a few exceptions had, in fact, been made by the Respondent, challenging the consistency of the Respondent's application of its mandatory retirement practice, and, therefore, the bona fide nature of its plan or practice of mandatory retirement. Whether these employees were within the same bargaining unit as the Complainant, another bargaining unit or within the non-unionized segment of employees of the Respondent was not able to be entirely clarified by the Complainant during case management, although he believed that at least one person within his

bargaining unit had been permitted to remain employed by the Respondent past the age of 65. He advised that it was his intention to locate one or more witnesses who would testify to working beyond their 65th birthday to corroborate his beliefs.

15. During case management discussions with the parties, it became apparent that the Complainant's primary concern was that he was not told that he would become a member of the Union when he was hired and, most importantly, he did not know that he would be subject to mandatory retirement. The Complainant alleged that he would not have closed his body shop business and sold his tools had he known that he was hired into a position where he would be retired within a few years.

16. The Complainant alleged that he wished to work a few years past his 65th birthday. He further alleged that he was unable to resume his former business or to obtain other employment since his forced retirement by the Respondent and thus had suffered a loss of income.

17. For its part, the Commission submitted that the lack of clarity around the terms of the Complainant's hire by the Respondent raised a legal issue regarding whether the Complainant should be subject to the collective agreement in these circumstances. In this regard, the Commission submitted that any ambiguity of contractual terms in an employment contract is to be interpreted against the drafter of the contract, such that the Complainant should not be subject to the collective agreement and, therefore, should not be subject to mandatory retirement.

18. The Commission submitted that if this Board determined that, due to the lack of notice to the Complainant, the Complainant was not to be treated as a unionized employee subject to the collective agreement, he was in a similar position to the complainant in *Theriault v. Conseil Scoliare Acadien Provincial* 2008 NSHRC 3 CanLII and 2009 NSHRC 3 CanLII ("*Theriault*"). In *Theriault*, the Board of Inquiry held that a non-unionized employee who had been forced to retire by the Respondent, but who was not subject to the mandatory retirement exemptions in the *Act,* had been discriminated against by the Respondent. In *Theriault*, the Complainant had not been notified of any requirement that he retire at age 65 and the requirement formed no part of his employment contract.

19. The Respondent took the position during case management discussions that the *Theriault* decision was distinguishable and did not apply, as it involved a non-unionized employee who was found to be not subject to an existing practice of mandatory retirement. The Respondent submitted that the Complainant was a unionized employee and, as such, was subject to the collective agreement and its mandatory retirement provision.

20. The Respondent's workplace is characterized by the inclusion of several different bargaining units, as well as the group of non-unionized employees which included the Complainant in *Theriault*. The Commission made the additional submission that, if there were differences between different groups of employees such that not all employees were subject to mandatory retirement, those inconsistencies could throw into question the bona fide nature of the mandatory retirement practice applicable to the bargaining unit of which the Complainant was a member. Commission counsel advised that she intended to review the decision of the Nova Scotia Supreme Court in *French v Nova Scotia (Human Rights Commission)* 2012 NSSC 395 Can LII ("*French*") to further investigate this issue respecting the potential legal impact of inconsistencies external to the bargaining unit in question in this case.

21. The Respondent denies that this latter issue could pose a legitimate issue.

Request for Approval of Settlement

22. The parties have made a request to the Board of Inquiry that it not proceed with its inquiry by way of a hearing. Rather, the parties request that the Board approve a proposed settlement pursuant to section 34(5) of the *Act* and issue a decision with any comments the Board wishes to make.

23. For the following reasons, subject to a condition and related amendments respecting implementation intended to address a jurisdictional issue and an amendment respecting "release" wording in the proposed settlement, the Board is prepared to approve the settlement as being in the public interest, rather than proceeding with the inquiry. In doing so, the Board has given preliminary consideration to the nature of the issues to be determined on the merits and the proposed result from the perspective of the public interest. As well, the Board has considered whether the proposed terms of settlement are within the jurisdiction of the Board to approve and are consistent with the *Act* and its

purposes. The Board wishes to emphasize the preliminary nature of its comments and recognizes that its ultimate conclusions may have differed, had this matter proceeded to a hearing on the merits.

24. Leading up to this decision respecting the proposed settlement, the parties were given an opportunity to address issues raised by draft proposals they presented for settlement during case management and through written submissions. This process resulted in amendments to the proposed resolution agreements, leading to agreement respecting a final amended proposed settlement, as described in these reasons. The parties have recently confirmed their agreement to the final proposed agreement in separate documentation filed with the Board. However, to provide a starting point for purposes of these reasons and to assist in reporting the terms of settlement, an unsigned copy of the most recent prior proposed resolution agreement, which has since been amended as set out in these reasons, is attached as Appendix "A".

25. In summary form, subject to certain terms and conditions, the proposed settlement contemplates a payment of compensation by the Respondent to the Complainant of $2500.00, to be classified as general damages.

Comments Respecting Issues Relevant to the Public Interest

A. The Public Interest

26. It is well-settled that the public interest is required to be considered by Boards of Inquiry in resolving human rights cases, whether by means of a hearing and decision or a settlement and decision. *Halifax Association of Black Firefighters v. Halifax Regional Municipality and the Nova Scotia Human Rights Commission* (April 29, 2013)(unreported) and *Pemberton v Wal-Mart Canada Corp*, 2014 CanLII 50316 (NS HRC) ("*Pemberton*") are two recent examples, where the public interest was considered in the context of settlement. The role of the Board of Inquiry in attending to the public interest component in its decisions is underscored by the legislative scheme for determining whether discrimination has occurred in the *Act*. The Board of Inquiry is appointed after the Commission has screened and may have investigated or attempted to settle the complaint and, most importantly, the Commission has determined that it is in the public interest to refer the complaint forward for an inquiry by the Board.

27. Many proposed settlements of human rights complaints include specific remedies that are openly intended to address the public interest in preventing further discrimination. As examples, settlement terms may relate to the education of employees in a workplace or to policy development by the employer, intended to advance and promote human rights values in the workplace. The inclusion of public interest remedies allows a Board of Inquiry to more readily assess whether a proposed settlement is in the public interest. The Nova Scotia Court of Appeal recently concluded in *Gavel v. Nova Scotia,* 2014 NSCA 34 (CanLII) (*"Gavel"*) at para 40, that it was reasonable for the Board in that case to conclude that a settlement was in the public interest where the settlement terms included public interest remedies. These included an internal review of the employee's employment concerns to see if improvement could be made by the employer, preparation of a training module for education purposes and preparation of an employee disability guide.

28. In this case, there are no public interest remedies within the proposed settlement terms. Respecting the broader public interest, the Commission submits that there is no precedential value to the outcome of this complaint. It submits that this is the only complaint that has been filed respecting this mandatory retirement plan by a unionized employee and that the Respondent no longer has a retirement plan since the passing of *The Act to Eliminate Mandatory Retirement.* Accordingly, the Commission does not consider there to be a further public interest to be served by proceeding with the inquiry and, therefore, no public interest remedy is included within the proposed terms of settlement.

29. It may well be the case that a public interest remedy aimed at the prevention of further instances is not required in these circumstances. It is not in dispute that once the *Act* was amended, the Respondent no longer required its employees to retire at age 65.

30. However, it is in keeping with the goals and objects of the *Act* for the Board to ensure, to the extent practicable, that the manner in which the private interests of the Complainant and Respondent are proposed to be resolved also is in the public interest. As this Board held in *Pemberton* at paras 22 & 23, there is a public or state interest in the manner in which private interests in a human rights complaint are resolved.

31. The analysis of the public interest involves the consideration of factors that include, but are not limited to, an assessment of whether the settlement is entered into with sufficient information and with freely given consent, particularly where one or more parties are unrepresented: *MacDonald v. Cambria Food Services Limited,* 2013 Can LII 85719 (NS HRC). The issue of informed consent is of particular relevance in this case, as the Complainant is unrepresented. Paragraph 9 of Appendix "A" includes an acknowledgement by the Complainant and Respondent that they have not received advice from the Commission and that Commission counsel has only represented the Commission.

32. While there is a public interest in achieving settlement, in the context of human rights, that laudable goal presupposes that the settlement itself is in the public interest, reflecting the restorative, preventative and educational purposes of the *Act.* At the very least, it presumes that the proposed settlement does not offend the public interest in how the human rights complaint is resolved. There is also a public interest in ensuring that there is a no more compelling or continuing reason to determine whether discrimination occurred through the inquiry process, notwithstanding that the settlement serves the private interests of the Complainant and the Respondent. In addressing their own private interests, the Complainant and Respondent may not necessarily consider the broader interest the public has in determining whether discrimination occurred, and, if so, what steps should be taken to minimize the likelihood of its reoccurrence.

33. As indicated, in this case the Respondent has offered to make a payment to the Complainant of $2500.00, to be classified as general damages. This payment is specifically intended to re-compensate the Complainant for most of the cost of the tools that he alleges he sold in 2003 upon becoming employed by the Respondent. It is not a payment of general damages for discrimination or damages for loss of income, for example. However, such a payment addresses a primary interest of the Complainant, which was to have the financial ability to replace the tools needed for his business. For its part, the Respondent wishes for the settlement to include a term that the settlement is not to be taken as an admission of liability, a matter which is agreeable to the Complainant and the Commission.

34. If this matter were heard on the merits and liability was established against the Respondent, the Board would consider the issue of general damages based on the nature and extent of discrimination that was found to have occurred. Damage awards in human rights cases have been increasing in recent years. In addition, where such a remedy was supported by the evidence, the award could include damages for loss of income or other types of damages. Damages awarded to replace lost income, in particular, can be significant.

35. In this case, the Complainant alleges that he was unable to mitigate his lost earnings through alternate sources of income. He lives in a small community where employment opportunities may not, in fact, be plentiful. He alleges that he intended to continue working for several years beyond reaching the age of 65.

36. By way of preliminary observation, if this matter were to proceed to a hearing and the Complainant was successful in establishing liability against the Respondent, the theoretical damage award could be fairly significant. In the circumstances, the Board initially questioned whether it would be in the public interest to approve the proposed settlement, given the modest amount and nature of compensation proposed to be provided to the Complainant. A payment towards the loss of the Complainant's tools alone did not ostensibly share an evident relationship with the range of compensation awards or the nature of remedies that could be ordered if the Complainant was successful in proving that he was discriminated against by the Respondent. On the other hand, if the Complainant was not eventually successful, the settlement outcome would represent a positive outcome for the parties and, as a means of avoiding a hearing, would be in the public interest.

37. The Board recognizes that settlements consist of many permutations of compromise that may be entirely acceptable to the parties. Some cases could settle, for example, on the basis of an apology and nothing more. Not all cases that settle without an admission of liability need to reflect terms within reach of the range of damages ordered in similar cases, as not all cases warrant such a result.

38. However, in the Board's view, this is a case where additional care was required to ensure that the settlement is in the public interest. In this case, there is a public interest in

ensuring that the outcome is understandable in the context of the proceeding and, as a compromise, appears to be in balance with the circumstances of the case, such that it could reasonably be concluded that the result does not offend the public interest.

39. This case primarily concerns legal issues, there being essential agreement respecting the facts. A balanced view in the circumstances of this case includes a consideration of the risks of the parties proceeding with the inquiry into the complaint and the public interest in having a determination of whether discrimination occurred.

40. The Complainant professed difficulty with understanding the law, as expressed in his comments to the Board during case management. In the circumstances, the Board will comment on two issues that the parties likely would have needed to address had this matter proceeded to a hearing, which could have impacted the issue of liability. These issues, in particular, have been considered by the Board in deciding to approve the proposed settlement as being in the public interest. These two issues are identified in these reasons as "the alleged failure to inform" and the "consistency issue".

B. The Alleged Failure to Inform

41. The first comment the Board wishes to make by way of preliminary observation relates to the issue of the alleged failure of the Respondent to inform the Complainant that he would be a unionized employee and, therefore, would be subject to mandatory retirement. In essence, the Complainant is alleging there was misrepresentation of the position offered to him by the Respondent or a form of breach of contract related to his hiring. This issue appeared to underscore the entire complaint for the Complainant. Because of the alleged "failure to inform", the Complainant disputes the applicability of the collective agreement to him. He says that an exception should have been made in his case.

42. It appears that the Complainant is not aware that the collective agreement applied to him because of legislation, namely due to the operation of the *Trade Union Act*, RSNS 1989 c 475. He became subject to the collective agreement automatically upon his hiring as an employee into a non-teaching bargaining unit position of the Respondent because of the requirements of the *Trade Union Act* and the collective agreement in place pursuant to that legislation. That the Complainant became part of a bargaining unit and was subject

to the collective agreement is not a matter that could be negotiated away by the Respondent.

43. Assuming that this Board were to make a finding that the Respondent had a duty to inform the Complainant of his impending retirement at age 65 at the time he was hired and failed to do so, such a finding cannot lead to a legal determination that the Complainant was not bound by the provisions of the collective agreement at the time. This Board does not have the jurisdiction to determine that the Complainant was not subject to the collective agreement. This is an issue determined under the legislative scheme prescribed by the *Trade Union Act.*

44. On this particular point the Board's comments stray into the realm of a legal conclusion. However, it is a conclusion that seems to be immutable. This Board only has the jurisdiction to address whether the mandatory retirement provision in the collective agreement or the Respondent's practice in this regard was discriminatory within the parameters of the *Human Rights Act.*

45. Further, in the context of a hearing, absent a finding of discrimination, this Board also does not have the jurisdiction to order damages. This Board cannot determine whether the Respondent is liable for damages for misrepresentation as a claim in tort, whether on the basis of intentional interference with economic relations or negligent misrepresentation or respecting a claim based on breach of contract. Such matters fall within the jurisdiction of the courts. Of course, if the impugned conduct by the Respondent can be linked to direct or adverse effect discrimination, the Board could find the Respondent liable for damages for discrimination, much as employees whose employment contracts are terminated by their employers for discriminatory reasons are able to establish valid discrimination complaints in law.

46. These observations are offered not as a ruling or pre-determination of the "failure to inform" issue, but rather to identify to the Complainant that his complaint raised potential issues that this Board would have asked the Complainant and Commission to clarify. The Board would have considered these issues in relation to its jurisdiction to make decisions of the nature sought by the Complainant.

47. If these issues are removed from consideration, the remaining issue raised by the Complainant is whether the Respondent had a mandatory retirement plan or practice that was bona fide. This issue falls squarely within the Board's jurisdiction to determine under the *Act*.

C. The Consistency Issue

48. This brings the Board to its comments respecting the second issue, namely the issue of the consistency of application of mandatory retirement within the workplace in relation to the broader issue of whether the mandatory retirement plan or practice of the Respondent was bona fide. As explained in the introductory paragraphs of this decision, the Respondent relies upon the *Conseil scolaire acadien provincial* case in support of its position that there was a bona fide mandatory retirement plan and practice in place at the time of the events that involved the Complainant via the provision within the collective agreement and the Respondent's consistent practice of mandatory retirement respecting employees in the relevant bargaining unit.

49. *Conseil scolaire acadien provincial* was an arbitration decision by Arbitrator Kydd pursuant to the *Trade Union Act*. The Respondent's position is that Arbitrator Kydd made a finding in that case that the Respondent's mandatory retirement scheme under the collective agreement was a bona fide plan or practice of mandatory retirement, such that section 6 of the *Act* properly shielded any discriminatory act by the Respondent in requiring retirement at age 65 from creating liability under the *Act*. The implication of the Respondent's submission is that this decision should end the inquiry in this case.

50. The Respondent's submission requires the Board to find, in effect, that Arbitrator Kydd's decision is binding upon the Board. It is not necessary to determine this issue in the circumstances. For other reasons, it is not clear, without hearing argument from the parties, to what extent this decision is determinative for purposes of this complaint. There is no doubt that Arbitrator Kydd confirmed in his reasons for decision that the Nova Scotia School Boards Association pension plan in place for this workplace was bona fide for purposes of section 6(g) of the *Act*, given the test for determining whether a pension plan is bona fide in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Incorporated*, [2008] 2 S..R. 604 ("*Potash*"). However, the issue of

whether, prior to 2009, the provision in the collective agreement was a bona fide mandatory retirement plan or whether there was a bona fide practice was not directly in issue. By way of background to the case, Arbitrator Kydd noted that, prior to the 2009 amendments, the Respondent and CUPE shared the opinion that section 6 of the *Act* exempted the mandatory retirement provision in the collective agreement from the prohibition against discrimination based on age in section 5(1)(h) of the *Act*. However, Arbitrator Kydd did not make any specific determination in this regard.

51. The *Conseil scolaire acadien provincial* case concerned events that occurred after the *Act* was amended in 2009 to remove mandatory retirement plans and practices from the exemption from discrimination in section 6(h) of the *Act*. The case concerned the opposite situation, namely whether the Respondent Employer violated the collective agreement by allowing employees to work past the age of 65. The Respondent did so on the basis that the provision in the collective agreement was no longer enforceable after mandatory retirement plans or practices were effectively prohibited by the amendments to the *Act* in 2009.

52. In Arbitrator Kydd's view, the issue in *Conseil scolaire acadien provincial* was whether the loss of the mandatory retirement provision in the collective agreement, as a result of the amendments to the *Act*, would prevent the operation of the pension plan. Arbitrator Kydd held, at para 43, that there was no evidence to support a finding that the elimination of the provision in the collective agreement respecting mandatory retirement would prevent the operation of the pension plan. The mandatory retirement provision in the collective agreement made no mention of any linkage to the pension plan.

53. Given Arbitrator Kydd's framing of the issue in the case, and, given that the legal setting concerned events following the amendment of the *Act* in 2009, this Board would need to be persuaded regarding the relevance of the *Conseil scolaire acadien provincial* case. This complaint concerns the mandatory retirement of Mr. Saulnier in 2005.

54. Respondent counsel indicated that she had previously collected extensive evidence related to the CUPE bargaining unit, of which the Complainant was a member while employed by the Respondent. It was her information that no one within the CUPE bargaining unit had been permitted to work beyond the age of 65. Counsel submitted that

this evidence would conclusively close the door on the merits of the complaint in the Respondent's favour by confirming that the Respondent's plan or practice of mandatory retirement was bona fide.

55. The Commission suggested that there may be more to the issue of the bona fide nature of the Respondent's practice of mandatory retirement. It questioned whether a mandatory retirement practice for the relevant bargaining unit can be bona fide if other employee groups, such as other bargaining units or the group of non-unionized employees, are not required to retire at age 65.

56. There is mention of a lack of consistency respecting the Respondent's mandatory retirement plans, schemes and practices around the relevant time period of this case in *Theriault*. That lack of consistency was identified in *Theriault* at paras 30, 32 & 33:

> *30. With respect to non-teaching, bargaining unit employees of CSAP, there was no consistency about retirement among the collective agreements inherited by CSAP at its inception [in 1996]…. The CSAP has endeavoured since 1996 to create some uniformity on this issue in its agreements with its unions. A plan or scheme is now in place with respect to those employees. It provides that non-teaching, bargaining unit employees retire at the end of the month in which they have their 65th birthday…. The CSAP, when asked, has also consistently declined requests by unionized, bargaining unit employees to work past the age of 65. In those cases, employees have consistently been required to cease work at the end of the month in which the employee turned 65. The CSAP has therefore begun to demonstrate a practice with respect to the mandatory retirement of non-teaching, bargaining unit employees, while also having that in place as a plan or scheme.*
>
> …
>
> *32. What is relevant and obvious from the evidence is that the scheme, and what is customary with respect to [unionized] teachers, is different from that with respect to non-teaching personnel. The existing plans, schemes and practices are not consistent across all bargaining unit employees as to*

when an employee must cease work. There are plans or schemes, and practices, that are consistent within identifiable employee groups, but these are not consistent across all employee groups.

33. With respect to non-bargaining unit, non-teaching staff, such as Mr. Theriault, there was certainly no practice with respect to when an employee had to cease work. No one had ever had to do so.

57. Accordingly, while the Board of Inquiry in *Theriault* recognized a consistent practice of mandatory retirement within certain bargaining units, the Board also identified inconsistencies between the unionized employee groups and between unionized and non-unionized employees. Having noted that the issue of retirement was treated differently between different employee groups, the Board of Inquiry in *Theriault* found, at para 39, that there was no practice of mandatory retirement applicable to Mr. Theriault as a non-unionized employee.

58. The *Theriault* case concerned a non-unionized employee, whereas Mr. Saulnier is unionized. Nonetheless, *Theriault* is addressed in these reasons given the Respondent's position that existing case law provides a defence to this complaint. What appears to be of potential relevance is what the Board of Inquiry in *Theriault* had to say about how you determine whether a mandatory retirement practice is bona fide.

59. The Board of Inquiry found in *obiter* that, had there been a practice of mandatory retirement for non-unionized employees such as Mr. Theriault, it would have not been bona fide. The Board of Inquiry was of the view that, if there was a plan or scheme of mandatory retirement for non-unionized employees, it was "designed to defeat protected rights", at para 41. The Board gave various reasons for this conclusion, most of which related to the lack of notice to Mr. Theriault of the requirement to retire. Those reasons included a finding that it was not permissible for the Respondent to discriminate against Mr. Theriault on the basis of his age because it had made agreements respecting mandatory retirement with other people or bargaining units after Mr. Theriault had been hired. It is in this specific context that the consistency issue as between employee groups was, in the view of this Board, subject to an express finding by the Board of Inquiry.

60. The Board of Inquiry in *Theriault* did not make an express finding respecting whether the inconsistencies between all unionized employees of the Respondent affected the bona fide nature of the Respondent's plan or practice respecting these unionized employees. That was not the issue before the Board of Inquiry. Further, the Board of Inquiry did not make an express finding respecting whether the lack of consistency as between unionized and non-unionized employees had any legal implications for the unionized employees, from the perspective of assessing the bona fide nature of the plan or practice of mandatory retirement applicable to them.

61. The Board of Inquiry's findings were limited to the determination that a mandatory retirement plan for non-teaching, unionized employees existed and that the Respondent had begun to demonstrate a practice of mandatory retirement for non-teaching, unionized employees. The Board did not determine whether that plan or practice was bona fide. The Board of Inquiry did not consider agreements with other unionized employees to be relevant to Mr. Theriault's case.

62. *Theriault* has been since subject to judicial interpretation in *French*, a case referenced by the Commission. *French* is a decision of the Nova Scotia Supreme Court which, in part, concerned the consistency of application of Dalhousie's practice of mandatory retirement to its teaching staff, not all of whom were required to retire at the age of 65. For example, former employees of the Technical University of Nova Scotia, who joined Dalhousie through a merger, were permitted to remain in their existing pension plan by the terms of the legislation that created the merger. They were not subject to mandatory retirement.

63. *French* concerned a unionized member of faculty. The requirement for mandatory retirement was contained in the collective agreement. In interpreting *Theriault*, the Court noted, at para 69, that the Board of Inquiry in *Theriault* did not suggest that the mandatory retirement plans and practices which applied to other employee groups were not bona fide because they were inconsistent. The Court stated that:

> *At paragraph 41, the Board listed reasons why, even if it had found that a mandatory retirement practice applicable to Mr. Theriault existed, it would have concluded it was not a bona fide practice. Those reasons did not*

include the inconsistency of mandatory retirement schemes across the various employee groups.

64. *French* interpreted the Board of Inquiry's finding in *Theriault* respecting whether the mandatory retirement practice would have been bona fide as implicitly refuting the consistency issue as a factor because it was not mentioned in the list of reasons given by the Board of Inquiry for its conclusion on this point. The Court held that it would have been unreasonable for the Commission to have concluded that the lack of a consistent application of a mandatory retirement practice across the workplace at Dalhousie negated the bona fide nature of the practice in Dr. French's case or for employee groups subject to mandatory retirement within the workplace. This Board may be bound by the decision in *French*.

65. Submissions on this point would have been requested from the parties. As noted previously, *Theriault* concerned a non-unionized employee. Accordingly it is not immediately clear, in the view of this Board, that the Board of Inquiry in *Theriault* intended its silence or limited comment on the consistency issue would potentially affect the rights of employees within unionized bargaining units within that workplace; nor, in this Board's view, is it plain and obvious that the reasons of the Board of Inquiry negate consistency as a factor in the analysis of what is bona fide when considering inconsistencies between employee groups who are subject to mandatory retirement or between unionized and non-unionized employees. As noted, the Board would have requested submissions respecting these points.

66. *French* was a judicial review application concerning the Commission's decision to not refer a complaint forward for inquiry to a Board of Inquiry. The legal test applied by the Court, referenced at para 87, was whether the Commission's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law". While acknowledging the Court's unreserved agreement with the reasonableness of the Commission's decision, this Board notes that the legal correctness of the original decision by the Commission was not the legal standard by which the Commission's decision was assessed. On this basis, in theory, it is possible that there is an issue respecting the extent to which the *French* decision is binding upon this Board.

67. There is a further issue in *French* concerning which this Board would have received submissions from the parties. In *French* it was held that the test for determining the legitimacy of a mandatory retirement plan based on a provision in a collective agreement was the same as that set by the Supreme Court of Canada in *Potash*. It is noted that in *Conseil scolaire acadien provincial*, Arbitrator Kydd, at paras 30-34 of his reasons, cited paragraph 3 of *Potash,* where Justice Abella stated that the only issue before the court was what constitutes a bona fide pension plan. To place this statement in context, the following excerpt is included from Arbitrator Kydd's reasons:

> *I do not agree with the Union's submission that the Supreme Court of Canada's decision in* Potash, *supra, established a binding precedent that requires me to find that the exception in section 6(h) applies, once it is established that the pension plan is bona fide. There is no question that the Nova Scotia School Boards Association Pension Plan is a bona fide plan within the meaning of section 6(g). However that is not the issue in this case. The issue is whether, pursuant to section 6(g), the loss of mandatory retirement at age 65 provision in article 35.1 [of the collective agreement] would prevent the operation of the Nova Scotia School Board Association Pension Plan.*
>
> *The* Potash *case did not deal with that issue and instead addressed the type of pension plan that was needed to qualify as a bona fide pension plan. It is clear that is the only issue the court was addressing. In paragraph 3 Justice Abella states, referring to the New Brunswick Human Rights Code:*
>
> > *The Board of Inquiry was asked to make a preliminary ruling on what constitutes a bona fide pension plan within the meaning of section 3(6)(a) of the Code. That is the only issue before us.*
>
> *The Court went on to state that to meet the bona fide requirement, a pension plan must be subjectively and objectively bona fide, it must be a*

legitimate plan, adopted in good faith and not for the purpose of defeating protected rights….

The Court restricted their discussion to the foregoing issue and did not include any reference to the Statement of Facts that were contained in the lower court decision that was being appealed. There was no issue of linkage between a mandatory retirement provision in a collective agreement and a separate pension plan, as exists in the present case. In Potash *the mandatory retirement provision was contained in the pension plan.*

I conclude that the Potash *decision has no bearing on the facts in the present case.*

68. This case concerns the same collective agreement provision and pension plan as in *Conseil scolaire acadien provincial* even though the cases concern events years apart. Arbitrator Kydd notes that participation by employees in the bargaining unit in the pension plan was optional.

69. Had this case proceeded to a hearing, this Board would have carefully considered whether the *Theriault* or *French* decisions closed the door on the consistency issue for purposes of this case, given that this issue may likely have determined whether the Complainant was successful or not. From the perspective of sound and accepted business practices, it seems somewhat incongruous on its face that there would be no practice of mandatory retirement for non-unionized employees in this workplace, or alternatively, no legitimate practice, and yet there would be a bona fide mandatory retirement practice respecting unionized employees, such as the Complainant. However, it is recognized that there may be entirely legitimate reasons for this.

70. Accordingly, while *Theriault* and *French* may well be conclusive on this point, this Board would have requested that the parties address the consistency issue as part of the broader issue respecting the bona fide nature of the Respondent's mandatory retirement plan or practice. By settling this matter, the parties are relieved of the necessity of addressing any issue that may exist related to inconsistencies in this broader context, outside the relevant bargaining unit.

D. Overall Preliminary Assessment

71. Accordingly, on the basis of a preliminary consideration of the cases referenced by the parties, it is not absolutely clear that there is no potential issue whatsoever respecting the bona fide nature of the mandatory retirement provision in the collective agreement or the Respondent's practice of mandatory retirement. However, it appears that there likely was consistency respecting the application of mandatory retirement by the Respondent to the relevant non-teaching bargaining unit of which the Complainant was a member. On the face of the complaint, assuming that consistency within the bargaining unit is the determining framework for the decision on the merits, the Complainant would face significant legal issues that would have to be addressed in order to establish the Respondent's liability for discrimination. It also appeared during case management that the Complainant may have difficulty locating witnesses to support his additional position that there was a lack of consistency within his own bargaining unit. The Complainant bears the onus in discrimination cases.

72. The particular compromise suggested in this case by the parties appears to address an issue of primary importance to the Complainant respecting the loss of his tools. The value of the payment to the Complainant is more than its monetary component, addressing, at least in part, the Complainant's sense of injustice about the events he experienced by allowing him to replace his tools. Seen in this light, the outcome is understandable in the context of the proceeding and, as a compromise, appears to be in balance with the circumstances of the case, such that it could reasonably be concluded that the result does not offend the public interest.

73. The Board is also satisfied that the Complainant has had sufficient access to information respecting his case. The parties were directed to disclose documents and other relevant information during case management. The issues were discussed during case management and in developing the settlement. The Board is satisfied that the Complainant is sufficiently informed about the issues and has no concern respecting whether the Complainant's acceptance of the settlement is voluntary.

Comments Respecting Jurisdiction

74. The proposed settlement also raises the issue of whether the Board has the jurisdiction to include the provisions of the settlement in a decision pursuant to section 34(5) of the *Act* and whether the settlement is consistent with the purposes of the *Act*.

A. Statutory Authority for the Request

75. A key issue the parties were asked to address by the Board was whether they wished the decision to include an operative order. The substantive question underlying the issue raised with the parties was whether the parties wished the Board to proceed pursuant to section 34(5) of the *Act* respecting settlement or sections 34(7) or (8), which provide for the making of orders by the Board, or both.

76. As discussed in *Pemberton*, the Board has express authority to issue a broad range of orders pursuant to section 34(7) and (8). However, an order issued pursuant to section 34(7) or (8) of the *Act* requires at least a technical finding of a contravention of the *Act*. In this case, the parties specifically wish to settle on the basis that there is no admission of liability.

77. Section 34(5) of the *Act* pertaining to approval of settlements does not include express authority for the issuance of an order. Accordingly, it is not clear that the Board of Inquiry is granted the statutory authority to issue an order pursuant to section 34(5). (See: *Craig and Robertson v. Halifax Regional Municipality and Metro Transit* (June 30, 2011), where a Board of Inquiry, in the context of a settlement, determined that an acknowledgement of a contravention of the *Act* was required before issuing a Consent Order respecting the payment of general damages and other remedies pursuant to section 34(8). The Board of Inquiry did not issue an order pursuant to section 34(5) on the basis of the settlement agreement.)

78. An order would support the legal basis for a payment of general damages in the settlement. An order would also provide an easy and discernible means for the Complainant to pursue enforcement of an order for the payment of general damages, if need be, pursuant to the *Human Rights Board of Inquiry Monetary Orders for*

Compensation Regulations, NS Reg 98/98, as the proposed settlement is of a compensatory nature.

79. As this Board held in *MacDonald,* where no order is issued by the Board in the context of settlement, a settlement should include a means to ensure the enforceability of the outcome in the event of non-compliance, other than referring the matter back to the Commission for further action. Such a provision was originally included in the proposed settlement in this case, as well as in the terms of settlement proposed in *Pemberton.* As was held in *Pemberton* at para 28, the effective and efficient enforcement of a settlement under the *Act* is a component of the proper administration of justice and, as such, is relevant to the Board's assessment of the public interest. It promotes confidence in the laws respecting human rights in this Province to have Board of Inquiry decisions issued that are enforceable, which usually occurs by means of an order of the Board becoming an order of the court. As noted in *Pemberton*, there is also a public interest in ensuring the finality of the proceedings.

80. The Board emphasizes that this is not a matter of doubting the Respondent's intention of honoring the settlement. In the Board's view, as a general matter of policy, enforcement of the outcome of human rights decisions should be achievable independently of the parties' intent to comply.

81. The Board also considered the suggestion of Commission counsel that a clause be inserted to stipulate that Respondent's counsel agrees to personally undertake the disbursement of funds to the Complainant upon approval of the settlement by the Board under section 34(5) of the *Act,* in lieu of an order. Such an undertaking was made by Respondent's counsel in *MacDonald.* It is important to note that, in the *MacDonald* case, all parties objected to the Board retaining jurisdiction over implementation of the settlement. Instead, Respondent's counsel offered to provide a personal undertaking respecting satisfaction of the terms of settlement.

82. In this case, Respondent's counsel did not respond to the suggestion that she provide an undertaking of this nature. The Board was not prepared to impose such an undertaking on counsel without her agreement. The Board was also not persuaded that the

enforcement of a settlement pursuant to section 34(5) of the *Act* should be dependent upon the personal undertaking of counsel, as a general proposition.

83. Commission counsel proposed that the Board conclude the inquiry under section 34(5) of the *Act* and issue a consent order in a similar format to that issued by the Board of Inquiry in the *Gavel* decision referenced earlier in these reasons. The Commission provided a draft consent order to accompany this submission. The Commission suggested that this Board review the *Gavel* decision to determine whether the Court of Appeal decided that a consent order could be issued by a Board of Inquiry pursuant to section 34(5) of the *Act*.

84. The Court of Appeal's decision in *Gavel* has been considered in this regard. The Court of Appeal dismissed the Complainant's appeal from a decision of the Board of Inquiry approving a settlement of her human rights complaint. The issues in that case arose in the context of an inquisitorial restorative justice process that had been used for the first time by the Commission in which the parties had agreed to participate. The fundamental issue was whether the Complainant had agreed to a restorative justice settlement and the procedural fairness, or lack thereof, of the process followed by the Board of Inquiry in deciding that she had. The Court of Appeal found that the Board of Inquiry did not make any procedural error in this regard. The decision addressed issues that included the need to publicly report all terms of settlement and the adequacy of the reasons provided by the Board Chair.

85. In dismissing the appeal, the Court of Appeal confirmed that the settlement agreement was binding on the Complainant. However, the issue of whether there is authority for an order to be issued pursuant to section 34(5) of the *Act*, as compared to sections 34(7) and (8), was not squarely raised before the Board of Inquiry or the Court of Appeal. Accordingly, the decision of the Court of Appeal is not on point with the issue raised here, which fundamentally concerns the specific authority for an order pursuant to section 34(5) of the *Act* and, ultimately, the enforceability of the outcome of a human rights complaint that is settled.

86. The Board suggested to the parties that it issue a decision pursuant to section 34(5) of the *Act* on the basis that the Board would retain jurisdiction and, thus, would be able to continue the inquiry on the merits if the settlement were not implemented. A time frame of

20 days for implementation was suggested. The parties endorsed this suggestion. In the circumstances, the Board declines to issue the draft consent order and will instead issue this interim decision and retain jurisdiction for this purpose.

B. Wording of the "Release"

87. Paragraph 8 of the draft Settlement Agreement contained wording intended to constitute a release of claims by the Complainant. Such a provision is, in theory, acceptable in this case, as a settlement is being approved pursuant to section 34(5) of the *Act*. However, the specific language within the clause, as offered, raised a concern related to the scope of the wording and the Board's jurisdiction to approve the provision as written.

88. To the extent the provision prevents further claims or legal actions on the facts related to or arising from the facts of the complaint, it is entirely acceptable to the Board. However, the wording also appears to prevent the Complainant from pursuing any other type of legal action related to the Complainant's employment. This could include, for example, a Labour Standards complaint, which could be made pursuant to the *Labour Standards Code*. The issue that arises for the Board is whether it has the jurisdiction to approve a provision of this nature, which addresses matters not founded in claims pursuant to the *Human Rights Act*.

89. The parties preferred that the Board adjust the wording of the provision to language that does not raise this issue, based on language used in similar clauses in other cases. The Paul Freeman and Paladin Security Group Limited and Nova Scotia Human Rights Commission ("*Freeman*") settlement agreement dated August 22, 2013 and the agreement between the Nova Scotia Human Rights Commission and Hockey Nova Scotia dated February 3, 2014, referenced by Respondent counsel in her submissions, are examples. The "Release" language used in *Freeman* is as follows:

> *The Complainant further releases the parties as follows:*
>
> *a. The Complainant, or anyone representing the Complainant or their estate, will not make any further claims or legal actions against the Respondent, or anyone associated with them, on the facts arising from this complaint.*

b. The Complainant further agrees there are no other side agreements and that the settlement terms in this Settlement Agreement are the only terms.

This language is acceptable to the parties and the Board. Accordingly, paragraph 8 of the draft Settlement Agreement is amended by removing the current wording and replacing it with the above-noted language.

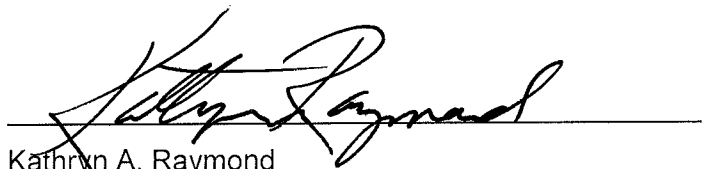
Interim Decision

90. For the above reasons, and subject to the paragraph which follows, the Board is prepared to approve the proposed settlement agreement, as amended by these reasons, as a settlement of this matter that is in the public interest, within its jurisdiction to approve and which is consistent with the purposes of the *Act*. This approval is given on the condition that the settlement terms are complied with by the Respondent within 20 days of the date of this decision.

91. The Board reserves jurisdiction to continue the inquiry on its merits and to make an order either dismissing the complaint or ordering one or more remedies pursuant to sections 34(7) & (8) of the *Act* if the settlement is not implemented in accordance with its terms, as amended by this decision.

92. Unless the Board is advised by a party in writing within 20 days from the date of this interim decision that the terms of settlement have not been complied with, the Board will proceed to issue a brief final decision concluding the inquiry pursuant to section 34(5) of the *Act*, with reference to these reasons, on the basis that the settlement has been implemented fully in accordance with its terms.

Dated at Halifax, this 9th day of October, 2014.



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

APPENDIX "A"

SETTLEMENT AGREEMENT

This Settlement Agreement ("Settlement Agreement") dated February , 2014 is

BETWEEN:

NORMAND SAULNIER
("Complainant")

- and –

THE CONSEIL SCOLAIRE ACADIEN PROVINCIAL
("Respondent")

- and -

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
("NSHRC")

Background Information

1. The Complainant made a complaint under the *Human Rights Act* on June 13, 2008 against the Respondent alleging discrimination.
2. The parties recognize that the Complainant believes that he was discriminated against

and the Respondent denies it discriminated against the Complainant. The CSAP feels that the law under the *Human Rights Act* in 2006 clearly allowed Mr. Saulnier to be mandatorily retired. Mr. Saulnier feels that he should not be bound by the collective agreement (which contained the mandatory retirement provision) since he says he did not know he was part of the union.

3. The Complainant and the Respondent have settled the complaint by this Settlement Agreement and agree to the terms below.

4. The NSHRC supports the Settlement as being in the public interest in the circumstances of this case because the parties have assessed and addressed the concerns raised by each other which is represented by the resolutions found in this agreement. The parties also indicate to the NSHRC that they wish to avoid the uncertainties associated with a Board Chair ordering an outcome and also wish to avoid the resource, time and legal costs associated with a traditional board of inquiry. Given there is no precedential value to the to the outcome of this matter since this is the only complaint in existence for this retirement plan and given the CSAP now does not have mandatory retirement since *The Act to Eliminate Mandatory Retirement* came into effect in 2009, the Commission sees no further public interest to be served based on the resolution of this complaint.

5. The Complainant and the NSHRC understand and accept that the Respondent does not, by this Settlement Agreement, admit any liability.

Terms of the Proposed Agreement

6. The Respondent will make a payment of $2,500.00, to be classified as general damages, to the Complainant to reimburse him for most of the cost of tools that he says he sold upon becoming employed with the Respondent in 2003. The CSAP will make this payment within five (5) days of receipt of written notification of the Board Chair's approval of this settlement.

7. This Agreement will be final and binding on the parties upon approval of the Board of Inquiry. The Board of Inquiry will report the Settlement terms in its decision pursuant to section 34 (5) of the *Human Rights Act* and therefore the parties understand this Settlement agreement is a public document.

8. The Complainant or anyone representing the Complainant or their estate cannot make any further claims or legal actions in any forum against the Respondent, or anyone associated with them, on the facts arising from this complaint, and/or the Complainant's employment, including the ending of that employment, with the Respondent.

9. The Complainant and Respondent understand and agree that neither of them has received advice from staff, officers, mediators or the lawyer of the NSHRC, with respect to the terms of this Settlement Agreement; including but not limited to implications regarding taxation liability under the *Income Tax Act*, employment insurance benefit repayment, or insurance policy repayments. Further, the parties agree and understand that Lisa Teryl, Legal Counsel, only represents the Commission.

Signed by:

_____

Normand Saulnier

Conseil scolaire acadien provincial

Per: _____

By the signature of its authorized agent under Section 32(1) of the *Act*, the NSHRC gives its approval to the terms of this Settlement Agreement.

DATED at Halifax, Nova Scotia this day of , 2014.

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

Per: _____