

**THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY**

BETWEEN:

ROBERT THERIAULT

Complainant

-and -

CONSEIL SCOLAIRE ACADIEN PROVINCIAL (CSAP)

Respondent

-and-

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

Commission

DECISION

Case Number 42000 H05-0039

1. The work we choose to pursue during our lifetimes can provide more than an income and more than a livelihood. The work we choose to pursue during our lifetimes can be a central source of our sense of identity, self-definition and achievement, and self-esteem. Our work is often the product of years of commitment to a course of education and training. It often requires a significant portion of our daily time, physical energy, and focused mental attention. Indeed, our participation in employment can be so essential to both our sense of self and our participation in society that we are protected by the Nova Scotia *Human Rights Act*, R.S.N.S.1989, c.214, as amended, from suffering discrimination in relation to employment. Our enjoyment of employment is therefore equated, by the legislation, with rights in relation to other fundamental parts of our lives such as our rights in respect of accommodation or shelter: s.5(1)(b). The importance of employment for each individual is referred to in *Sniders v. Nova Scotia (Attorney General)*, 1988 CarswellNS 149 (N.S.S.C., A.D.), at paras.67, and 71.

2. The *Act* protects against discrimination in these strong terms:

s.5(1) No person shall in respect of

...

(d) employment;

discriminate against an individual or class of individuals

3. This is a quasi-constitutional piece of legislation, to be interpreted in accordance with the following approach mandated by the Supreme Court of Canada:

I accept that human rights legislation must be interpreted in accordance with its quasi-constitutional status. This means that ambiguous language must be interpreted in a way that best reflects the remedial goals of the statute. It does not, however, permit interpretations which are inconsistent with the wording of the legislation.

Potash Corp. of Saskatchewan Inc. v. Scott, 2008 CarswellNB 344 (S.C.C.), at para.19, per Abella, J.. See also: *University of Alberta v. Alberta (Human Rights Commission)*, 1992 CarswellAlta 119 (S.C.C.), at paras.21, 22, per Cory, J..

4. The Nova Scotia *Act* prohibits discrimination in respect of employment on account of things such as race, religion, sex, disability, origin, family or marital status, political belief, and age: s.5(1), (h) – (v). The prohibition on discrimination on account of age contained in the *Act* means that persons are prohibited, for example, from failing to continue to employ persons on account of age: e.g., *Marcil v. Vantage Contracting Ltd.*, 2004 CarswellAlta 404 (Alta.Q.B.), particularly at para.46.

5. This Board of Inquiry was constituted by an appointment dated February 17, 2008, “to inquire into the complaint of Robert Theriault, dated June 8, 2005, against Conseil scolaire acadien provincial (CSAP)”. The complaint itself is appended to this decision as Appendix “A”. The Board proceeded to hear evidence in relation to the complaint at Pointe de l’Eglise, Nova Scotia, on June 23, 2008, and August 13 and 14, 2008. All who testified endeavoured to tell the truth as best as they could recall it. There

were no true factual disagreements on the points upon which I needed to rule to come to a decision.

6. Robert Theriault undertook a lengthy educational preparation for his work career, which culminated formally in the obtaining of an engineering degree from TUNS/Dalhousie University. This was followed by an employment career that included work with the Universite Sainte Anne, the Yarmouth Housing Authority, and the CSAP. It was in the late summer of 1996, when he was 56 years of age, that Mr Theriault was offered the position of Coordonnateur des operations for the new CSAP, based in Meteghan. This was a senior, non-union, non-bargaining unit position with the CSAP. The position had not existed prior to the creation of the CSAP that same summer.

7. In its offer of employment to Mr Theriault in August, 1996, evidenced by letter dated November 6, 1996 [Exhibit 3], the CSAP proposed a position, a salary, an amount of vacation, and indicated that more detailed terms and conditions of employment were being developed and would follow in another letter. As with other elements of the organization of the CSAP, much was new in 1996. The organization was being constructed almost from the ground up. Mr Theriault accepted the Coordonnateur position on that basis.

8. Those more detailed terms and conditions of Mr Theriault's employment with CSAP that were referred to in the 1996 letter, were developed by approximately 1998. They have had some further revision since. They are said to be contained in a written document, about 15 pages long, although the actual document was not provided in evidence to the Board at this hearing. It was clear from the evidence that those additional detailed terms and conditions of Mr Theriault's employment with CSAP did not include anything about "mandatory retirement", either using those actual words or any others that could be descriptive of the same concept. There was no agreement or mutual understanding between Mr Theriault and the CSAP that he would be required to give up his employment with the CSAP at any particular age, nor that he was being employed

only for a specific term of years. Based on the evidence I heard, there was no mutual agreement or mutual understanding between Mr Theriault and the CSAP at any time that Mr Theriault would cease his employment with CSAP at any particular age.

9. As he indicated in his evidence, by 2004 Mr Theriault had decided to provide his employer with notice of his plans in terms of when he would be leaving his position. This was, he said, so that his employer could make appropriate plans for succession to his employment responsibilities. Although it is stated in Mr Theriault's Complaint that he had expressed an intention to work for "an extra year", I am not satisfied that he was that specific in either his evidence, nor in his discussions with his superiors back in 2004. If I had to make an inference about the meaning of that comment in the June 2005 Complaint, I would consider that Mr Theriault had expected he would work for another year after he turned 65, but that he was not making a firm commitment to CSAP to do so in 2004. In 2004, he was planning to give CSAP reasonable notice when he decided that it was time to go, as his evidence has disclosed. The reference in the Complaint about the "extra year" was, in my view, a reflection of Mr Theriault's actual intentions as of the time of his involuntary retirement in April, 2005.

10. There were some discussions in advance of April 2005 about the issue of Mr Theriault's putative retirement. Mr Theriault testified that he specifically raised this issue at a meeting about a year before he was to turn 65. He indicated that he expected to keep working past the age of 65. That meeting was said to have been with Guy LeBlanc and Janine Saulnier, though on an unrelated topic. Mr Theriault also testified that he reiterated his intention to work past his 65th birthday some time in the fall of 2004, about 6 months after the first meeting with LeBlanc and Saulnier. He said that this second meeting occurred with the same group: himself, Saulnier, and LeBlanc. At that time, he said that he would provide 6 months notice of when he would be ending his work. Mr Theriault says that he was providing information at this meeting, and that he did not put this to his superiors as a request. He also recalled that, as at the first meeting, there was no response from LeBlanc or Saulnier.

11. At the time of these meetings described by Mr Theriault, Guy LeBlanc held the position of Direction Generale, or chief executive officer of the CSAP. Janine Saulnier held the position of Direction des operations. Ms Saulnier was Mr Theriault's immediate supervisor, but did not appear to take authority for human resources matters, nor to participate even as a conduit in relation to human resources decisions.

12. Guy LeBlanc did not testify. Janine Saulnier did testify. While she did not recall a specific event of Mr Theriault mentioning it, Ms Saulnier did indicate that it was "fairly well known" that Mr Theriault was "not particular about having to retire." Ms Saulnier advised that March 2004 was a fairly hectic time in her office because of an office relocation. Ms Saulnier also recalled that the issue of Mr Theriault's retirement came up frequently enough that she was able to recall that: "every so often he said he was not keen on going, and I referred him to Human Resources". She repeated that it was "common knowledge" that he was "reluctant" to end his employment. She also said that a request to work beyond the age of 65 would not have struck her as "unusual".

13. Mr Theriault turned 65 years of age on April 18, 2005. The Board concludes that Mr Theriault was correct in his recollection that he communicated his preference and expectation to his superiors that he would work beyond the age of 65, and that this may have been as much as a year before his actual 65th birthday. I infer that he did this because he was aware that he *could* retire when he turned 65, but that he did not want to do so. The Board also concludes based on the evidence that there was no specific response from anyone at the CSAP to Mr Theriault about retirement – either to arrange a specific meeting to deal with that issue, or to at least alert Mr Theriault to a differing expectation by the CSAP, until a meeting arranged by Mr Cetus David with Mr Theriault for March 31, 2005.

14. Mr Cetus David, then holding the office of Direction des ressources humaines, was in contact with legal counsel at the Department of Education for the purpose of getting advice about whether the CSAP had an obligation to retire Mr Theriault at age 65.

Mr David testified that the consultation occurred on March 21, 2005, and that the advice he received was, as noted on the March 21 page in his agenda:

Note to Judy – consistent application of retirement age [Exhibit 12]

This was barely a month before what the CSAP would designate as Mr Theriault's last day of work. I infer from this consultation with counsel that Mr David had become aware sometime prior to March 21, 2005, of Mr Theriault's expectation that he would be able to work beyond his 65th birthday. Although Mr David had initially recalled that this consultation with the Department of Education had been 2 or 3 months before Mr Theriault's retirement, he adopted the timing of March 21, 2005, when shown his note.

15. I do not infer or conclude that either Mr Theriault or the CSAP acquiesced with the other's view about whether there was a mandatory retirement date. Until late March, 2005, the situation simply remained as it had at the time of Mr Theriault's hiring in 1996. There was no agreement that his work for the CSAP would end when he turned 65. Mr Theriault obviously preferred, and expected, to keep working. The CSAP, on the other hand, became concerned late in March 2005 about what they were going to do about Mr Theriault. Mr Cetus David testified that "we" – the CSAP – "were not certain whether Mr Theriault was going to retire or not." That was why, he says, "we thought we should inquire" of the Department of Education about what to do.

16. On March 31, 2005, ten days after his consultation with legal counsel at the Department of Education, Mr Cetus David finally met with Mr Theriault. The reason for the delay after March 21, 2005, is not known, but Mr Theriault and Mr David did work in geographically different offices of the CSAP. When they did meet, Mr David advised Mr Theriault that he could not continue his employment past the end of April. By response to an email of further inquiry from Mr Theriault on or about April 4, 2005, Mr David advised that Mr Theriault would not be paid after April 29, 2005.

17. On April 29, 2005, the CSAP required that Mr Theriault stop working for the CSAP because he had turned 65 years of age during the month of April, 2005. By June 2005, the formal complaint had been filed with the Nova Scotia Human Rights Commission for employment discrimination based on age.

18. So that the factual basis for the decision here is clear, it would appear from the evidence led at the hearing that in the year preceding the forced retirement of Mr Theriault, neither Mr Theriault nor the CSAP spoke directly about their differing understandings about a mandatory or expected retirement date for Mr Theriault. Mr Theriault did not because he did not believe that he had one. The evidence does not explain why the CSAP did not address this issue directly with Mr Theriault prior to March 31, 2005.

19. There was in fact no contractual agreement, in writing or otherwise, that Mr Theriault had a mandatory retirement date. It is my view that what we have before us is an individual whose employer terminated his employment by retirement because the employee reached the age of 65. Mr Theriault, in the words of s.5(d) and (h) of the *Human Rights Act*, was deprived of his employment by reason of his age. That is *prima facie* discriminatory: *e.g.*, *Marcil, supra*, and within the meaning of “discriminatory” set out in s.4 of the *Act*. See also: *University of Alberta v. Alberta (Human Rights Commission)*, 1992 CarswellAlta 119 (S.C.C.), at para.59, per Cory, J.. I believe that this conclusion was common ground among the parties at the hearing of this complaint, but if not, I came to that conclusion based on the evidence presented.

20. Since the discriminatory act against Mr Theriault has been established, the next question to be dealt with in relation to Mr Theriault’s complaint is whether the CSAP is entitled to be excused from its discriminatory act based on the exemptions in either s.6(g) or s.6(h) of the *Human Rights Act*. Those provisions are as follows:

6. 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;

There were submissions at the hearing as to whether the CSAP was proposing to rely upon s.6(g) or upon s.6(h), or both. For completeness sake, I will assess the case in relation to both sections, though I understand that counsel for the CSAP and for the Commission focused their submissions on the view that this is really a s.6(h) case.

21. In the recent decision of *Potash, supra*, the Supreme Court of Canada decided that provisions such as s.6(g) and (h) in the *Act* have the effect of shielding discriminatory acts from redress. If it is found that a pension plan or retirement scheme is “legitimate” or “genuine”, the *Potash* decision says that my inquiry is over and the discriminatory act against Mr Theriault is immunized, or excused, or shielded, from redress under the *Act*. Referring to the New Brunswick legislation in issue, Justice Abella stated at para.33 of the *Potash* decision:

Section 3(6)(a), notably, states that the age discrimination provisions do not apply to the terms or conditions of any “*bona fide* pension plan”. The placement of the words “*bona fide*”, it seems to me, is significant. What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan.

Justice Abella, on behalf of the majority, had already set out the test to apply in assessing whether a pension plan was *bona fide* at para.32 of *Potash, supra*:

I agree with Robertson J.A. too that the *bona fides* test is one with both subjective and objective components. The subjective requirements of “*bona fides*” are not difficult to define — they relate to motives and

intentions. It is more difficult to explain what makes a pension plan, objectively, *bona fide*. In my view, a number of sources direct us to a relatively basic conclusion: a *bona fide* plan is a legitimate or genuine one.

22. In order to assess whether or not the CSAP is entitled to be excused or immunized for its action in relation to Mr Theriault, it is necessary to understand what the exemptions in s.6 cover. In undertaking this analysis, it must be recognized that it has been well-accepted for many years that exemption provisions of the kind found in s.6 of the *Act* are to be construed narrowly: e.g., *Brossard (Ville) c. Québec (Commission des droits de la personne)*, 1988 CarswellQue 154 (S.C.C.), at para.56.

23. Section 6(g) of the *Act* refers to the *operation* of a pension plan based on age criteria. Section 6(g) of the *Act* immunizes such plans from redress for violation of s.5(1)(h) where s.5(1)(h) would “prevent, on account of age, the operation of a *bona fide* . . . pension plan”

24. There was little evidence at the hearing about the *operation* of the pension plan that applied to Mr Theriault. One did exist, operated under the auspices of the Nova Scotia School Boards Association. According to the evidence, it did not require the retirement of a participant at any particular age. It did permit contributions to be made only while a person was employed. No contributions could be made after an employee was 69 years of age.

25. It is my view that this case is not about Mr Theriault’s pension plan, and that this case is not covered by the legislative exemption in s.6(g) of the *Act*. There is nothing that has been put before me that would permit the conclusion that the pension plan operated by the Nova Scotia School Boards Association would be prevented from operating by decisions about when or why specific employees were to end their employment. There is no connection between an age requirement for retirement, and the pension plan’s *operation*.

26. Furthermore, I am of the view that the concepts identified in s.6(g) of the *Act* of a “retirement or pension plan”, and a “group or employee insurance plan”, are similar in nature. All are intended to refer to plans which are designed to provide financial support or benefit to employees or to former employees. This is why s.6(g) focuses on exempting plans which would be prevented from operating by an otherwise discriminatory age requirement. The need for the exemption is due to the fact that actuarial requirements to responsibly operate these kinds of financial benefit plans may necessarily involve consideration of age. In this respect I adopt the thinking expressed on this point by Justice Wilson, albeit in dissent with respect to the result in that case, in *Harrison v. University of British Columbia*, 1990 CarswellBC 279 (S.C.C.), at para.48. I do not agree with the interpretive approach to s.6(g) of the *Act* which would follow the comments of William B. Goss, acting as Board of Inquiry under the New Brunswick *Human Rights Act* in *Kunn v. University of New Brunswick*, 1983 CarswellNB 358 (N.B. Board of Inquiry), at paras.85 – 89. I conclude that the s.6(g) exemption does not apply to immunize CSAP’s action in terminating Mr Theriault’s employment by reason of his age.

27. Retirement plans or schemes or practices that are not linked to employer-arranged, employment-related financial supports are properly evaluated under s.6(h) of the *Act*. Section 6(h) of the *Act* will immunize “a *bona fide* plan, scheme or practice of mandatory retirement”. *Bona fide*, it will be recalled, means legitimate or genuine, not designed to defeat protected rights: *Potash, supra*, at paras.32 – 35. This does not require me to evaluate the justification or justifications that may exist for selecting a particular age in relation to any retirement plan or scheme or practice. I agree with the CSAP that based on the decision in *Potash, supra*, I should not do so.

28. A plan or scheme may be understood as “a method of achieving an end”, “a customary way of doing something”, and in some situations as “a detailed formulation of a program of action”. The words “plan or scheme” suggest an element of forethought, a policy choice as opposed to an *ad hoc* decision. A “practice” may indicate forethought as

well, but more essentially imports as well the idea of consciously habitual, repeated behaviour. In s.6(h) of the *Act*, the use of the words “plan, scheme or practice” together suggests that each should be understood to refer to purposive, intentional behaviour. However, they are different words that do not merely duplicate each other. A “plan or scheme” may be announced and implemented without qualifying as a “practice”. A “practice” may develop over time to create a customary way of doing things in the absence of an announcement. A practice may eventually become sufficiently recognizable to be capable of being described as a “plan or scheme”.

29. The CSAP asserts that it had a consistent practice of mandatory retirement at 65, and that this had become a plan or scheme by the time of Mr Theriault’s termination in April 2005. Evidence was led in relation to retirements of bargaining unit personnel since the CSAP’s inception in 1996 [Exhibit 10]. Other than Mr Theriault, there were 11 retirements between 1996 and June 2008. The first was in 2003. Mr Theriault’s retirement in April 2005 was only the third experienced by a non-teaching CSAP employee. Of more significance to the Board is that none of the other 11 retirements referred to in Exhibit 10 involved non-union, non-bargaining unit employees. Mr Theriault’s situation was unique. He was and is in a different position from the group with whom he is being compared in Exhibit 10.

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. Some examples of this were provided in evidence at the hearing [Exhibits 5, 6, 7, and 8]. 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 [*e.g.*, Exhibit 9]. 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.

31. Teachers employed by CSAP have a negotiated mandatory retirement scheme where they are expected to leave teaching by the end of the school year in which they turn 65. The experience, however, is that none have apparently waited that long to leave teaching employment. There is therefore an agreement or policy – a scheme - that teachers not work past the end of the school year in which they turn 65, but I am not satisfied that there is yet a practice with respect to mandatory retirement at 65 for teachers at CSAP. There can be no practice for something that has never happened.

32. What is relevant and obvious from the evidence is that the scheme, and what is customary with respect to 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. The CSAP, through Mr David, asserted however that there was a *bona fide* plan or scheme of mandatory retirement which included the following two elements:

1. The obligation to cease work at the end of the month in which the employee turned 65; and
2. Acquisition of a “retirement allowance” or “award” calculated on the basis of age and the number of unused sick days to a maximum of 140 days.

Mr David also noted that if retired employees took the initiative to inquire, they should have been entitled to a year of benefits through the federal government's employment insurance program. This information was not generally disseminated to CSAP employees, and can not be considered as part of any retirement "plan or scheme" or even a customary practice relied upon by CSAP. The government-provided employment insurance benefits were not promoted by the CSAP as part of its plan or scheme of mandatory retirement. If there was a plan or scheme, it was limited to the 2 branches set out above.

34. One branch of the asserted plan or scheme, the retirement allowance or award, was written down and available to employees in the 15 page handbook document referred to earlier. The other element of the alleged plan or scheme, the obligation to retire at the end of the month in which the employee turned 65, was not written down. The evidence from Mr David on cross-examination was that this element of the plan or scheme may have "trickled down" from senior management discussions to affected employees.

35. The CSAP did suggest that it endeavoured to extend to non-union staff the benefits that were negotiated from time to time with the bargaining unit personnel. This was expressed as a unilateral, perhaps *ex gratia*, grant of benefits to employees not otherwise represented by a bargaining agent. This approach apparently applied, for example, not only to the secretarial staff in the Direction des finances, but also to managerial personnel such as Mr Theriacult. Employees were informed about these benefits, again according to Mr David, by the "trickle down" method. As counsel for the Commission pointed out through cross-examination, however, the CSAP did not extend benefits such as a grievance procedure to non-bargaining unit personnel. Non-bargaining unit staff did not automatically assume the benefits of any collective agreement negotiated by the CSAP. In addition, Mr David acknowledged to Commission counsel that "mandatory retirement" was not an "advantage".

36. The fact that the CSAP made an effort to make the enjoyment of some employment benefits uniform among the bargaining unit and non-bargaining unit staff, does not allow this Board to conclude that the CSAP had a plan or scheme of mandatory retirement for non-bargaining unit personnel. Just because the CSAP had developed plans or schemes of mandatory retirement for its bargaining unit staff, does not mean that there was a plan or scheme for non-bargaining unit, non-teaching staff. Besides, mandatory retirement is neither a benefit under the *Human Rights Act*, nor was it suggested that it was a negotiated *quid pro quo* in the employment relationship between Mr Theriacult and the CSAP.

37. The question remains whether the two-pronged “plan” described by Mr Cetus David was a *bona fide* plan or scheme of mandatory retirement. If there was a real plan or scheme of mandatory retirement, I would have expected that this would have been communicated to Mr Theriacult at some point during his years of employment with the CSAP in advance of a month before his retirement date. It was not. If Mr Theriacult’s situation was discussed at the senior management level, it did not “trickle down” to Mr Theriacult as a plan or scheme. Mr Theriacult’s pension plan did not require or contemplate a fixed date for retirement. The “retirement award” of unused sick time pay was not tied to a fixed date or age of retirement. Age and years of service figured in the calculation of the value of that award, but not the entitlement of the retiree to get it. For a person at Mr Theriacult’s level of management within the CSAP, there was in my view, as of April 2005, no “plan, scheme or practice of mandatory retirement”.

38. I believe that my conclusion about the non-existence of any plan or scheme for someone in Mr Theriacult’s position is supported by the actions of the CSAP in the weeks leading up to the retirement of Mr Theriacult in April 2005. As related above, the CSAP, and Mr David in particular, did consult with legal counsel at the Nova Scotia Department of Education about Mr Theriacult’s status, and whether he had to be mandatorily retired. It will be recalled, as Mr David stated, “we . . . were not certain whether Mr Theriacult was going to retire or not.” That feeling was what prompted the seeking of advice. The

CSAP was not sure about what to do. Had a plan or scheme existed, it would have at least been communicated to Mr Theriault. The CSAP might then have joined issue with Mr Theriault about whether or not the plan or scheme could be enforced, but that is not the way things happened. As the evidence stands, the inquiry and response of the CSAP appears to have been as much concerned about whether allowing Mr Theriault to continue working could destabilize the CSAP's position on retirement in relation to the other employee groups, as it was about Mr Theriault's situation.

39. The only evidence about the advice received from the Department of Education, which did constitute the justification offered by Mr David on the CSAP's behalf, was that the CSAP had to be "consistent". Mr David says that this was in accord with what he read at one time on the website of the Nova Scotia Human Rights Commission. This Board is not going to venture into commenting on the sufficiency or accuracy of the advice given to Mr David. All the Board can say, based on the evidence presented at the hearing, is that retirement within CSAP was already treated differently between different employee groups: teachers differed, for example, from bus drivers and custodians and cafeteria workers. This differential approach existed not only in terms of their retirement obligations, but the practice of when they would stop working. Consistency within those separate groups might be important, but CSAP provided no evidence of any demonstrable consistency across the board of all employees that would have included Mr Theriault in April 2005.

40. It is my view that the CSAP is not able to rely upon the exemption in s.6(h) of the *Act* to immunize its action in terminating the employment of Mr Theriault on April 29, 2005. There was no plan, scheme or practice with respect to mandatory retirement that applied to Mr Theriault.

41. Even if I had found that there was a plan or scheme for the mandatory retirement of people in Mr Theriault's position, I would be required to find that it was a *bona fide* plan or scheme before the exemption could be applied. I have concluded that the plan or

scheme as articulated at the hearing by the CSAP was not, at the time of Mr Theriault's retirement, a legitimate or genuine plan or scheme of mandatory retirement. I am also concerned based on the evidence that if it was a plan or scheme, that it was designed to defeat protected rights. Those conclusions are supported by several reasons:

1. It is the view of this Board of Inquiry that at a minimum, the concept of "legitimate" within the employment context means something that is in accord with the agreed employment relationship, either by specific agreement or by necessary implication. This follows from the definition of "legitimate" in the legal sense, which involves the concepts of being recognized by law, or done according to law: *e.g.*, *Black's Law Dictionary*. The unilateral assertion by CSAP that Mr Theriault leave his employment at the end of the month that he turned 65 is not "legitimate" within that sense of the term.
2. The imposition by CSAP of a condition on Mr Theriault that was in accord with the employment relationship it had negotiated with *other people/bargaining units after Mr Theriault had been hired*, is of no relevance to the Board and should have been of no relevance to CSAP's dealings with Mr Theriault. It is not permissible in my view for CSAP to discriminate against Mr Theriault by reason of his age because of agreements that it had made with other, unrelated employee groups. That is not a legitimate plan or scheme.
3. While a mandatory retirement policy or program does not need to be in writing (since it could be established simply by practice), in the absence of practice the absence of something in writing acquires significance in terms of assessing legitimacy. The enjoyment of continued employment is a recognized value to be protected under the *Act*. To rely upon age as the core of any scheme that deprives a person of employment, without even granting the employee the respect of some formal, written notification, is not legitimate. It might be added as well that a legitimate plan would be accompanied by a more orderly notification process than is apparent in this case. While the CSAP is new, the evidence shows that "mandatory retirement" notifications were sent to employees sometimes months, but sometimes only days, in advance [Exhibit 10].
4. Finally, the program here was defended in part on the basis, expressed by Mr David, that "those who want to continue working are a minority." He indicated that he is aware that as employees become more senior, there are increased demands for "accommodation". I am not prepared to affirm as "legitimate" a program that is based in part on the fact that discriminatory behaviour will only affect a "minority", or one where part of the rationale is grounded in avoiding the consequences of respecting rights to continue to work. To repeat Justice Abella in *Potash, supra*, at para.32, I also agree with the comment of Justice Robertson in

the New Brunswick Court of Appeal that a plan or scheme is not a *bona fide* plan or scheme if the plan is designed or intended to defeat protected rights under the *Act*.

The CSAP also argued that a compulsion to retire at 65 should not have been a surprise to Mr Theriault because retirement at 65 was one of the accepted age milestones that are part of the social fabric of our society. I cannot agree with that submission. The function of the *Act* is to identify and provide some redress for social behaviours and structures that are discriminatory – not to accept a social fabric that perpetuates social behaviours and structures that are discriminatory.

For these reasons, even if I were to have found that there was a plan or scheme of mandatory retirement that applied to Mr Theriault, I would still find that the exemption in s.6(h) would not apply because it would not be a *bona fide* plan or scheme of mandatory retirement within the meaning of that term as set out in *Potash, supra*.

42. My conclusions in this matter have been reached without giving any weight to the fact that *after* Mr Theriault's forced retirement, the CSAP, on June 24, 2005, gave written notice:

To Whom It May Concern:

Pursuant to union contracts and an unwritten understanding with the non-union group, employees of the Conseil scolaire acadien provincial must retire on the last day of the month of their sixty-fifth birthday.

This policy is indiscriminate and applies to every employee of the CSAP.

[signed]
Doreen Boudreau
Personnel Officer

This was Exhibit 1, Tab 2, final page. The “understanding” referred to in the exhibit simply was not the case in April 2005, which is the time of concern here.

Conclusion

43. The *Human Rights Act*, s.4, defines “discrimination”, in part, as follows:

. . . a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic . . . referred to in clauses (h) . . . of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual . . . not imposed upon others or which withholds or limits access to opportunities . . . available to other individuals

44. The CSAP discriminated against Robert Theriault with respect to his employment on account of age. This was and is a violation of s.5 of the *Act*. The exemptions provided in s.6 of the *Act* do not immunize this behaviour of the CSAP.

45. I reserve jurisdiction to hear and decide the question of appropriate redress for Mr Theriault in the event that the parties are not able to come to mutual agreement.

Dated this day of September, 2008.

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