

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

HR-002-06

IN THE MATTER OF THE *HUMAN RIGHTS ACT*, R.S.N.B., 1973, c. H-1 1

AND IN THE MATTER OF A BOARD OF INQUIRY

BETWEEN:

Eileen Blair, James R. Blair, Elizabeth McIntosh, William Clifford Chatterton, Roger A. Christie, Steven P. Hawkes, James Campbell, K. John Bartlett, Patricia Marie Bourgoin, Kelli Lawson, Timothy Lawson, Brian Thornton, Bill Graham, Sharon Johnson, Richard Johnson, Randall W. McCullough, Brian Myles, Jane MacDonald, Duane F. MacDonald and Joyce M. MacDonald

Complainants

- and -

New Brunswick Human Rights Commission

Commission

- and -

Province of New Brunswick, Office of the Superintendent of Pensions under the Department of Justice and Consumer Affairs

Respondent

BEFORE:

George P. L. Filliter, Chairperson

APPEARANCES:

For the Complainants and Human Rights Commission:

*Kelly VanBuskirk and
Matthew R. Letson*

For the Respondent:

Keith Mullin

DATES OF HEARING:

August 18 - 21 and October 20, 2008

DATE OF DECISION:

December 11, 2008

DECISION OF THE BOARD

I. INTRODUCTION

1. For some time, the economy of the Town of Nackawic was integrally connected to the St. Anne Nackawic Pulp Company Ltd. (“St. Anne”) which operated a pulp and paper mill and various subsidiary operations employing a significant number of people. This all changed on September 14, 2004, when employees were advised that the operations were permanently shutting down that very day. This occurred one day before St. Anne was petitioned into bankruptcy pursuant to the provisions of the *Bankruptcy and Insolvency Act* (“BIA”). Until this time, St. Anne had provided attractive compensation packages to their employees. As a part of this package, St. Anne purported to provide attractive pension plans, one for the salaried employees and one for the hourly paid employees.

2. If September 14, 2004 was a shock for the employees of St. Anne and the citizens of Nackawic, on November 29 and 30, 2004, the employees became aware of the full impact of the closure. Very shortly after the plant closure, the Superintendent of Pensions (“Superintendent”) recognized that the assets of the two pension plans, which until September 14, 2004 had been administered by St. Anne, were no longer being protected as a result of the petition for bankruptcy. As a result, on September 23, 2004, the Superintendent exercised her discretion under section 52 of the *Pension Benefits Act* (“PBA”) and appointed the firm of Morneau Sobeco as administrator for the purposes of winding up both Pension Plans. In this capacity, one of the first things that Morneau Sobeco did was to gather documents and records and generally become familiar with all aspects of both plans. During this process, Morneau Sobeco determined that both Plans were in significant deficit positions.

3. With this information, Morneau Sobeco made some preliminary projections and decided to share these with the member employees on November 29 and 30, 2004. At these meetings, Mike O’Connell, a partner with Morneau Sobeco, advised those gathered of two things. First, he outlined the extent of the deficit positions of both Plans. However, the most significant comments made by Mr. O’Connell and those that lead to the matter before the Board, centered upon the application of

the priorities for distribution provisions found in section 50 of *Regulation 95-195* of the *Pension Benefits Act* (“*PBA*”) (Old Regulation).

4. More will be said later of what section 50 of the Old Regulation means, but suffice it to say at this point that the effect of this Regulation was that under the rules of distribution, only those employees over the age of 55 would be entitled to receive any form of pension benefits. Those under the age of 55 would only be entitled to recover their own contributions plus interest. This differential treatment, without any regard to other factors such as length of service, started a series of events, one of which is the present matter before the Board.

5. At various dates from December 2004 to May 2005, the Complainants filed similarly worded complaints with the Human Rights Commission (“Commission”) in which they claim to have been discriminated against on the basis of age. The Commission investigated the complaints and eventually the Minister of Post-Secondary Education, Training and Labour appointed the Labour and Employment Board (“Board”) as a Board of Inquiry pursuant to the provisions of the *Human Rights Act* (“*HRA*”). Evidence was adduced from August 18 to 21, 2008, the parties exchanged written briefs at various dates in September 2008, and final oral argument was presented on October 20, 2008.

II. ISSUES

6. As will be seen, the relevant facts in this matter are not in dispute. It is to be noted that the Province of New Brunswick amended the *PBA* on December 17, 2004 so as to allow for the eventual retroactive repeal of the Old Regulation and the adoption of *Regulation 2005-510* on December 28, 2005 (“New Regulation”). The effect of the New Regulation was to alter the basis for the distribution of pension assets on winding up, thus allowing all former employees of St. Anne to become entitled to a “pro rata” share of the remaining pension funds. This was a fundamental change in approach from the Old Regulation which, as stated above, when applied to the former employees of St. Anne created a differential distribution model where age was a determining factor. The New Regulation was challenged in court and this challenge failed at trial (December 3, 2006),

and at the Court of Appeal (February 26, 2007). The Supreme Court of Canada eventually denied Leave to Appeal (September 20, 2007).

7. As a consequence of the change in the regulatory scheme under the *PBA*, those members of the plans who were receiving pensions on September 14, 2004, continued to receive 100% of their pensions until February 28, 2006; otherwise, the distribution of pension assets was in accordance with the “pro rata” scheme envisioned in the New Regulation. Accordingly, the issues before this Board of Inquiry can best be outlined as follows:

- A) Who are the Respondents to these complaints?
- B) Were the terms of Regulation 95-195 (Old Regulation), passed pursuant to the *Pension Benefits Act*, discriminatory and in contravention of the *Human Rights Act*?
- C) Did the Province of New Brunswick by virtue of the Office of the Superintendent of Pensions provide a “service” to “the public” under the auspices of the Old Regulation? And if so, was this “service” to the “public” discriminatory?
- D) If there has been a contravention of the *Human Rights Act*, what are the appropriate remedies to be granted in the unique circumstances of this case?

III. ANALYSIS AND FACTS

8. The complainants called evidence; however, at the outset of the hearing the Board was provided with a lengthy agreed statement of facts that stated:

- “1. James Blair was employed by the St. Anne-Nackawic Pulp Company Ltd. (hereinafter the “Bankrupt Company”) at its pulp mill (hereinafter the “Mill”) in Nackawic, New Brunswick for a period of approximately 30 years and was a member of the Pension Plan for Salaried Employees of St. Anne-Nackawic Pulp Company Ltd. (hereinafter the “Salaried Plan”)
- 2. Eileen Blair worked for the Bankrupt Company for a period of approximately 18 years, and was a member of the Salaried Plan. As of September 14, 2004, both James and Eileen Blair were 52 years of age.

3. John Bartlett worked for the Bankrupt Company for a period of approximately 16 years. He was a member of the Salaried Plan, and was 46 years of age as of September 14, 2004.
4. Patricia Bourgoïn worked for the Bankrupt Company for a period of approximately 32 years. She was a member of the Salaried Plan, and was 50 years of age as of September 14, 2004.
5. James Campbell worked for the Bankrupt Company for a period of approximately 28 years. He was a member of the Salaried Plan, and was 50 years of age as of September 14, 2004.
6. Roger Christie worked for the Bankrupt Company for a period of approximately 28 years. He was a member of the Salaried Plan, and was 54 years of age as of September 14, 2004.
7. William Graham worked for the Bankrupt Company for a period of approximately 34 years. He was a member of the Salaried Plan, and was 52 years of age as of September 14, 2004.
8. Steven Hawkes worked for the Bankrupt Company for a period of approximately 34 years. He was a member of the Salaried Plan, and was 53 years of age as of September 14, 2004.
9. Richard Johnson worked for the Bankrupt Company for a period of approximately 31 years. He was a member of the Salaried Plan, and was 51 years of age as of September 14, 2004.
10. Sharon Johnson worked for the Bankrupt Company for a period of approximately 29 years. She was a member of the Salaried Plan, and was 53 years of age as of September 14, 2004.
11. Kelli Lawson worked for the Bankrupt Company for a period of approximately 24 years. She was a member of the Salaried Plan, and was 42 years of age as of September 14, 2004.
12. Timothy Lawson worked for the Bankrupt Company for a period of approximately 24 years. He was a member of the Salaried Plan, and was 45 years of age as of September 14, 2004.
13. Duane MacDonald worked for the Bankrupt Company for a period of approximately 34.5 years. He was a member of the Salaried Plan, and was 54 years of age as of September 14, 2004.
14. Jane MacDonald worked for the Bankrupt Company for a period of approximately 34 years. She was a member of the Salaried Plan, and was 52 years of age as of September 14, 2004.
15. Joyce MacDonald worked for the Bankrupt Company for a period of approximately 11.5 years. She was a member of the Salaried Plan, and was 51 years of age as of September 14, 2004.

16. Randall McCullough worked for the Bankrupt Company for a period of approximately 31 years. He was a member of the Salaried Plan, and was 52 years of age as of September 14, 2004.
17. Elizabeth McIntosh worked for the Bankrupt Company for a period of approximately 17 years. She was a member of the Salaried Plan, and was 51 years of age as of September 14, 2004.
18. Brian Myles worked for the Bankrupt Company for a period of approximately 21 years. He was a member of the Salaried Plan, and was 47 years of age as of September 14, 2004.
19. Brian Thompson worked for the Bankrupt Company for a period of approximately 32 years. He was a member of the Salaried Plan, and was 54 years of age as of September 14, 2004.
20. William Chatterton worked for the Bankrupt Company for a period of approximately 26 years. He was a member of the Pension Plan for Hourly Paid and Clerical Union Employees of St. Anne-Nackawic Pulp Company Ltd. (hereinafter the "Union Plan"), and was 46 years of age as of September 14, 2004.
21. The individuals noted in paragraphs 1 to 20 are Complainants in this matter.
22. The Minister of Justice and Consumer Affairs is responsible, pursuant to Section 91(1) of the *Pension Benefits Act*, for the general administration of the *Act* and may designate persons to act on behalf of the Minister. Pursuant to Section 91(2) of the *Act*, the Minister shall appoint a person employed under the *Civil Service Act* as Superintendent of Pensions (hereinafter the "Superintendent").
23. The Respondent, Morneau Sobeco, is the administrator of the Salaried Plan and the Union Plan pursuant to the *Pension Benefits Act*, S.N.B., 1987, c P-5.1. Morneau Sobeco was statutorily appointed by the Superintendent to administer both the Salaried Plan and the Union Plan after the declaration of bankruptcy by the Bankrupt Company.
24. The complaint against the Bankrupt Company and the Respondent, A.C. Poirier and Associates, has been discontinued pursuant to the provisions of the *Bankruptcy and Insolvency Act*.
25. Throughout their employment at the Mill, the Bankrupt Company, in accordance with the pension plans, made periodic payments into both the Salaried Plan and the Union Plan. From September 1, 2001 until September 14, 2004, the Complainants who were members of the Salaried Plan contributed 4% of their respective salaries into the Salaried Plan. From July 5, 2004 to September 14, 2004, the Complainant who is part of the Union Plan contributed 4.5% of his salary into the Union Plan. The contributions made by the Complainants were in addition to the contributions of the Bankrupt Company.

26. As of September 14, 2004, the Salaried Plan was structured as follows:
- a. normal retirement age for employees was to be 65, with full entitlement to pension;
 - b. early retirement was available without a reduction in pension benefits to employees who retired from active employment in the Mill who were 58 years of age with more than 20 years employment at the Mill;
 - c. early retirement was also available to employees who were 55 years of age who were vested, regardless of years of service, with a reduced pension benefit;
 - d. a deferred pension, payable at any time between age 55 and 65 (subject to an early retirement reduction if started before age 65), was available to those who terminated from the Mill prior to age 55 and were vested. Alternatively, a member could choose to transfer the present value of their deferred pension out of the Plan upon termination of employment; and
 - e. the amount of annual pension, prior to any early retirement reductions, was determined as a) credited service, multiplied by b) 1.75%, multiplied by c) final average 5 years earnings, less d) credited service divided by 70 multiplied by the maximum Canada Pension Plan benefit.

Vesting occurred on the earlier of 2 years after joining the Salaried Plan or 5 years of service with the Mill.

27. The Union Plan was structured similar to the Salaried Plan. While there were some differences between the two Plans, they were similar in broad terms.
28. On September 14, 2004, at approximately 8 am, an emergency meeting was held by the Bankrupt Company management team, including Vince Byrne, Mike Connell and Doug Mercer. The management team advised the employees present to cease operations, and that the owner had ordered the Mill to be closed. As a result, the Complainants' employment at the Mill was terminated.
29. On September 15, 2004, St. Anne-Nackawic Pulp Company Ltd. filed for bankruptcy in Halifax, Nova Scotia. Green Jain Wedlake Inc. was appointed trustee and receiver by Parsons Whittmore, the parent company of St. Anne-Nackawic Pulp Company Ltd.
30. As of September 14, 2004, there were 239 members of the Union Plan and 152 members of the Salaried Plan who were over the age of 55. Conversely, there were 296 members of the Union Plan and 73 members of the Salaried Plan who were under the age of 55. A member can be any one of an employee, pensioner, beneficiary, or former member entitled to a deferred pension. Note that pensioners with a joint survivor pension are counted as one person for purposes of the above.

31. As of September 14, 2004, both the Salaried Plan and the Union Plan had significant unfunded liabilities on a wind-up basis.
32. In the case of the Union Plan, as of September 14, 2004, there were sufficient assets in the plan to pay pensions, to those eligible to receive an immediate pension at the date of only 88% of the amount that would have been payable if the Union Plan had been fully funded. With respect to the Salaried Plan, as of September 14, 2004, there were sufficient assets in the Plan to pay pensions, to those eligible to receive an immediate pension at that date, in the amount of 87% of the amount that would have been payable had the Salaried Plan been fully funded. Those in the Pension Plans who were not yet eligible to receive an immediate pension would receive nothing, other than their own contributions.
33. On September 23, 2004, Angela Mazerolle, the then Acting Superintendent of Pensions for the Province of New Brunswick, appointed Morneau Sobeco as Administrator of the Salaried Plan and the Union Plan, pursuant to section 52 of the *New Brunswick Pension Benefits Act*, S.N.B. 1987, c P-5.1.
34. Morneau Sobeco's task under the *Pension Benefits Act* is to wind-up the Salaried Plan and the Union Plan in accordance with the *Pension Benefits Act* and the Regulations thereunder. This "wind-up" of the Pension Plan is allowed to take place under the *Pension Benefits Act* upon the bankruptcy of a company. Morneau Sobeco is required by the *Pension Benefits Act* to file a wind-up report which documents the distribution of the assets of the pension plans in accordance with rules set out in the *Pension Benefits Act*. The wind-up report cannot be implemented until approved by the Superintendent of Pensions.
35. On October 1, 2004, a meeting of the Creditors of the Bankrupt Company was held at the Delta Fredericton Hotel.
36. On October 25, 2004, the court appointed a new Trustee in Bankruptcy, A.C. Poirier & Associates Inc.
37. On November 29 and November 30, 2004, meetings were held by Morneau Sobeco, as Administrator, at the Nackawic Lions Club Hall to advise members of the Salaried Plan of the process of winding up the Salaried Plan.
38. On November 29 and November 30, 2004, meetings were held by Morneau Sobeco at the Nackawic Lions Club Hall to advise members of the Union Plan of the process of winding up the Union Plan.
39. Morneau Sobeco announced that, based on the estimated financial position of both the Salaried Plan and the Union Plan, and under the rules for distribution of pension plan assets in the event of a plan wind-up set out in the *Pension Benefits Act*, former employees of the Bankrupt Company under the age of 55 would not receive pension benefits. Instead, they would only be receiving their own contributions to the Plan back with interest, as required under the *Pension Benefits Act*. Morneau Sobeco also announced that, as a result of the terms of the *Pension Benefits Act* then in force, those over 55 would receive a 10%-25% reduction in their pension benefits.

40. The Complainants each made a complaint (hereinafter, collectively, the “Complaints”) to the New Brunswick Human Rights Commission (the “Commission”). The Complainants allege that the *Pension Benefits Act* discriminates against them in employment and services on the basis of their age.
41. On December 20, 2004, the Respondents, the Department of Training and Employment Development, Morneau Sobeco, A.C. Poirer & Associates, and the Company, were advised of the receipt of the Complaints and provided an opportunity to respond.
42. The Complaints were forwarded to the parent company the Bankrupt Company, Parsons Whittemore, and it was provided an opportunity to respond to the Complaints.
43. On December 17, 2004, the Legislature of New Brunswick amended the *Pension Benefits Act* by adding Section 100.1, which provides as follows:

100.1(1) A regulation respecting the following pension plans may be made retroactive to December 31, 1991, or any date thereafter:

(a) Pension Plan for Non-Union Salaried Employees of St. Anne-Nackawic Pulp Company Ltd., the registration of which under the Act was acknowledged on August 7, 1997, as amended,

(b) Pension Plan for Hourly Paid and Clerical Union Employees of St. Anne-Nackawic Pulp Company Ltd., as registered with the Superintendent on January 13, 1994, as amended.

100.1(2) Subsection (1) ceases to have effect on June 30, 2008.

100.1(3) A regulation with retroactive effect does not cease to have effect by virtue of the fact that subsection (1) ceases to have effect on June 30, 2008.

100.1(4) A regulation with retroactive effect may affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred by any person under or in respect of the pension plans identified in subsection (1).

100.1(5) No action for damages or other proceedings shall be taken against the Province, the Minister, or a person designated to act on behalf of the Minister with respect to anything done or purported to be done, or with respect to anything omitted in respect of a regulation with retroactive effect, either before or after the coming into force of this section.

44. On or about August 26, 2005, the Court approved the sale of the Mill and the terms of the sale, including the payment of moneys to the Trustee in Bankruptcy.

45. Both the Union Plan and the Salaried Plan are creditors of the Bankrupt Company and have filed proofs of claim with the Trustee in Bankruptcy.
46. On December 28, 2005, the Lieutenant Governor in Council changed the pension regulations specific to the St. Anne-Nackawic pension plans by adopting Regulation 2005-157 (hereinafter the “New Regulation”). The New Regulation changed the asset distribution basis to a pro-rata asset distribution, subject to priority allocations. The effect of the New Regulation is that all former employees including those employees under the age of 55 (of which group the Complainants form part) became entitled to a pro-rata share of the remaining Pension funds. The New Regulation has retroactive effect and was in full force and effect on September 14, 2004.
47. Following the enactment of Regulation 2005-157, the distribution model on the wind-up of the Pension Plans is as set out in s. 7(1) of that Regulation, which calls for funds to be allowed to the following group in the following order of priority:
 - a. all members and former members would be entitled to the return of additional voluntary contributions, together with accrued interest;
 - b. all members and former members in receipt of a pension as of September 14, 2004, would receive payment of 100% of their pension entitlement during the period September 14, 2004 to February 28, 2006;
 - c. all members and former members entitled to benefits but not in receipt of a pension as of September 14, 2004, would then receive any contributions, other than additional voluntary contributions already paid; and
 - d. all members and former members entitled to benefits would then receive the commuted value of their pension.
48. On February 16, 2006, two groups of former St. Anne-Nackawic employees filed a Notice of Action with Statement of Claim Attached seeking to stay the force and effect of the pension regulations under the *Pension Benefits Act* until the issue of the validity and enforceability of the Regulation could be determined, particularly the pro-rata distribution (hereinafter the “Melanson Action”).
49. On December 7, 2006, the New Brunswick Court of Queen’s Bench issued its decision in respect of part of the Melanson Action. The Court of Queen’s Bench dismissed the portion of the Action calling into question the validity of the New Regulation.
50. On February 26, 2007, the New Brunswick Court of Appeal upheld the December 7, 2006 decision of the New Brunswick Court of Queen’s Bench.
51. Leave to Appeal to the Supreme Court of Canada was denied on September 20, 2007.
52. Morneau Sobeco submitted its Wind-Up Report to the Superintendent in or about December 2007.

53. The Wind-Up Report was approved by the Superintendent on January 14, 2008.
54. Morneau Sobeco has begun distributing the assets of the Salaried Plan and the Union Plan to members in accordance with the Wind-Up Report and *Pension Benefits Act*. As of August 1, 2008, all the Complainants have had their benefits paid out in accordance with the Wind-Up Report.

a) Who are the respondents to these complaints?

9. In the original complaints, the named Respondents included the Office of the Superintendent of Pensions, Morneau Sobeco, St. Anne and A.C. Poirier and Associates (the Trustee in Bankruptcy). The Commission and the Complainants consented to the removal of St. Anne and A.C. Poirier and Associates pursuant to the provisions of the *BIA*. In addition, at the hearing the parties entered a two volume booklet of documents by consent and the only named Respondent was “Province of New Brunswick, Office of the Superintendent of Pensions formerly under the Department of Post-Secondary Education, Training and Labour and currently under the Department of Justice and Consumer Affairs.” Consequently, the Board concludes that Morneau Sobeco was removed as a Respondent.

b) Were the terms of Regulation 95-195 passed pursuant to the *Pension Benefits Act* discriminatory and in contravention of the *Human Rights Act*?

10. The *HRA* prohibits a person (including the Crown in the Right of the Province of New Brunswick) from acting directly or indirectly in such a way as to discriminate against a person or class of persons with respect to services available to the public on the basis of age (see sections 5(a) and 9 of the *HRA*). The section of the Old Regulation in question does not specifically mention age as a determining factor in defining the distribution model (see section 50 of the Old Regulation). However, it is conceded by all parties that in the circumstances of this case, the effect of the Old Regulation was that former members under the age of 55 would not be entitled to receive pension benefits (see paragraph 39 of Agreed Statement of Facts). In correspondence dated November 15, 2004 from Morneau Sobeco to the former employees of St. Anne, the order of priorities was described as follows:

“What happens if there is an unfunded liability? What is order of priority?”

The New Brunswick *Pension Benefits Act* establishes an order of priority for disbursement of funds from a registered pension Plan undergoing a windup while an unfunded liability position. The order of priority is as follows:

- a) voluntary and regular contributions made by Plan members with interest;
- b) pensioners, and Plan members who have reached the minimum age (55 as at the September 14, 2004, the date of Plan wind-up) to receive a pension;
- c) Plan members who had the required service to meet the vesting requirements under the Pension Benefits Act (i.e., 2 years of membership in the Plan since January 1, 2001 or 5 years of continuous employment) but not yet eligible to start receiving a pension;
- d) All other Plan members.

It should be noted that all distributions from the pension funds after the windup date are subject to the approval of the Superintendent of Pensions.

11. Additionally, Angela Mazerolle Stephens, the Superintendent of Pensions, swore to an affidavit that was filed with the Court of Queens Bench – Trial Division in response to the challenge of the New Regulation passed pursuant to the *PBA* in December of 2005. In paragraph 2(d) of her affidavit, Ms. Mazerolle Stephens deposed:

“Prior to December 2005, New Brunswick was the only remaining Canadian jurisdiction with a distribution model which differentiated on the basis of age.”

12. It is the view of this Board that the effect or impact of the Old Regulation disallowed those former employees of St. Anne under 55 years of age of the right to receive pension benefits. As acknowledged, the right to receive pension benefits was limited to those former employees over the age of 55. Accordingly, this Board would have had no difficulty in concluding that the Old Regulation treated former employees differently and this “differential treatment” was based upon age (see generally *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497).

13. However, in the view of the Board this conclusion is not determinative. The New Brunswick Court of Appeal recently determined that for differential treatment based upon age to be contrary to the provisions of the *Human Rights Act*, it must deny “human dignity”. The court adopted what they referred to as a “contextual analysis” and set out a four point test to determine if “human dignity” has been denied. These four factors, although not exhaustive, were listed as, “...(1) pre-existing disadvantage; (2) correspondence between the ground of distinction and the actual needs and circumstances of the affected group; (3) the ameliorative purpose or effect of the impugned measure; and (4) the nature and scope of the interests affected” (see *Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2007] N.B.J. No 30).

14. In outlining the test set forth above, the New Brunswick Court of Appeal served warning that “group based distinctions” must not be premised on stereotypes but rather factually based (see *Laronde, supra* at paragraph 7). This Board concludes that the submissions of the Respondent, as made orally and in writing, in fact stereotype workers in the age bracket of 42 to 55. The submissions suggest this group does not suffer from “historic disadvantages” on the basis of age. This submission was made without any evidence to support it. In fact, the evidence this Board, heard from all 20 Complainants was that they were no more “employable” than the former employees of St. Anne who happened to be over the age of 55 on September 14, 2004. In particular, the Respondent at paragraph 30 of its Brief states “...older workers, those over 55 are a more disadvantaged group than those under 55.” This statement was unsubstantiated and this Board does not accept or adopt such a blanket submission, especially in terms of the Pulp and Paper industry which has been suffering over recent times due to a downturn in the economy.

15. Accordingly, this Board concludes that the Old Regulation, in the circumstances of this case, not only differentiates on the basis of age, it is discriminatory in nature. Therefore, had it not been for the fact that this Old Regulation was repealed, this Board would have concluded that it was in contravention of the *Human Rights Act*. In drawing this conclusion, this Board put no credence in the submission of the Complainants that the promulgation of the new regulatory scheme, which eliminated the age based differentiation, was in any way an acknowledgment or admission of the discriminatory nature of the old regulatory scheme.

- c) **Did the Province of New Brunswick, by virtue of the office of the Superintendent of Pensions provide a “service” to “the public” under the auspices of the Old Regulation? And if so, was the “service” offered to “the public” discriminatory?**

16. Put another way, this Board must determine if the actions as described in paragraphs 33, 34, 37, 38 and 39 of the Agreed Statement of Facts (see paragraph 8 above) were a service available to the public. This determination is important given the wording of section 5(1)(b) of the *Human Rights Act*.

17. It is clear that due to the fact that the Old Regulation was repealed and the New Regulation came into effect on December 28, 2005, the distribution model that differentiated on the basis of age was not implemented. However, what is equally clear is that from September 23, 2004 until the New Regulation took effect, Morneau Sobeco acted as if the Old Regulation would be implemented. The evidence of Mr. O’Connell was that Morneau Sobeco, after being appointed as administrator of the Plan on September 23, 2004, took action to preserve the assets of the Plans and began to develop a system to wind-up the Plans and disburse the assets in accordance with the existing regulatory scheme. Throughout this process, Morneau Sobeco, quite properly, felt obligated to keep the members advised of the status. Towards this end, the evidence before this Board was that on October 6, 2004; November 15, 2004; September 27, 2005; and October 21, 2005 (see Exhibit #1 Tabs 27, 28, 37 & 38), correspondence was sent to the members of the Plan providing both status reports and proposing distribution of assets.

18. Additionally, there were the meetings of November 29 and 30, 2004 which, according to the uncontradicted evidence of all the Complainants, caused such angst. It was at these meetings that Morneau Sobeco representatives and perhaps even the responsible Minister of the day, attended and brought the news that not only were the Plans in a deficit position, but the distribution model envisioned by the existing regulating scheme had the effect of differentiating on the basis of age.

19. Given the findings of this Board that in the circumstances of this case the Old Regulation was discriminatory in nature, had the Superintendent of Pensions approved a distribution model on wind-up for these plans, remedial action would have resulted. However, as is known, this case is

unique in that although, at the very least, preliminary actions were taken by Morneau Sobeco to implement the distribution model in accordance with the Old Regulation, before this plan could be implemented a new regulatory scheme came into effect which removed the discrimination based upon age. So the question for this Board is to determine whether the discriminatory regulatory scheme was acted upon. In other words, was the conduct of Morneau Sobeco during the time frame from September 23, 2004 and December 28, 2005 “acts done pursuant to the” regulatory scheme?

20. Both parties presented cogent arguments on this issue. Without trying to be simplistic, the essence of the position of the Respondent is that without an action being done, *i.e.*, a factual incident, there can be no discrimination. The Respondent submits that therefore section 5(1) of the *Human Rights Act* does not apply. On the other hand, the Commission and the Complainants submit that the Respondent’s view of “service provided” is too narrow and that this Board can consider the effect of the impugned legislation on its own. Even though the wind-up report was eventually approved pursuant to the New Regulation, this does not alleviate the discriminatory effect on the Complainants resulting from the anticipation of the implementation of the Old Regulation. Both parties conceded that this fact situation was unique and as a consequence no case “on point” was provided to assist this Board, and by it’s own research this author was not able to find any case law.

21. In 2004, a Board of Inquiry in New Brunswick concluded that discrimination is rooted in the “delivery of services which flow directly from the legislation” (see *A. A. v. New Brunswick Department of Family and Community Services* [2004] N.B.H.R.B.I.D. No. 4). Additionally, in Ontario, the Human Rights Commission determined that it would not appoint a Board of Inquiry to review a potentially discriminatory piece of legislation unless there was a factual basis or incident to consider. On Judicial Review, the Ontario Divisional Court concluded that a Board of Inquiry does not have the power to amend legislation and thus refused to interfere in the Commission’s determination not to appoint a Board of Inquiry (see *Malkowski v. Ontario (Human Rights Commission)* [2006] O.J. No. 5140). However, a Board of Inquiry in Ontario, chaired by Cory J., suggested that a Board of Inquiry can rule on whether legislation offends the *Human Rights Act*, and if it does, it has the power to rule that the offending legislation not be applied (see *Braithwaite v. Ontario (Human Rights Commission)* (2005) 54 C.H.R.R. 116).

22. In the view of this Board, the conduct of Morneau Sobeco, acting as Administrator of the two plans, was directed towards the eventual implementation of a distribution of assets under the Old Regulation, until such time as it was repealed and replaced. This conclusion is entirely consistent with the evidence of Mr. O’Connell and the documentary evidence adduced. If the Old Regulation had not been repealed and replaced, it would not have been contested that this conduct amounted to the provision of a “service available to the public”. As will be discussed later, this conduct did impact the Complainants in a negative fashion. Therefore, this Board concludes that this conduct should be considered a service, in other words, an incident for the purposes of this complaint. Accordingly, this Board concludes that the actions of the Superintendent of Pensions, through its appointed administrator (Morneau Sobeco), in preparing to implement the impugned regulatory scheme that differentiated on the basis of age was discriminatory. As pointed out by the Respondent in their brief on law when citing the *A. (A)*, *supra* case, this was a “delivery of services which flows directly from the legislation”.

(d) If there is a violation of the Human Rights Act, what are the appropriate remedies to be granted in the unique circumstances of this case?

23. At the outset of the analysis on this issue, the Board must point out two significant factors. The first one is that the Superintendent and the representatives of Morneau Sobeco in no way acted with any malicious intent. Although this was not alleged, it is important to note that in both cases they were simply administering an existing regulatory scheme. The second point of significance is that the root cause of the financial impact on the Complainants, and indeed to those over the age of 55, have nothing to do with the existence of the old regulatory scheme. The root of all this lies with the inadequate funding of the two pensions plans by the former employer (St. Anne) who left both plans in deficit positions.

24. The remedial claim of the Complainants can be divided into three categories which will be discussed. Generally speaking, the Complainants request that pursuant to the *Human Rights Act* (see section 20(6.2)), this Board order Special Damages, General Damages and Interest. The Board will discuss each claim under a separate heading.

(i) **Special Damages**

25. It is the submission of the Complainants that they incurred legal fees in the court challenge respecting the New Regulation; during their employment they were limited in the ability to contribute to their personal RRSPs; there were extra fees paid to Morneau Sobeco for the continued administration required during the longer period of time, thus reducing the overall asset base of the Plans for eventual distribution; and some members were required to increase their debt load in order to survive.

26. It is the view of this Board that the claim for special damages caused as a result of the Complainants' limited ability to contribute to their personal RRSPs must fail. In the first place, there was no evidence as to the actual amount these employees were unable to contribute. Furthermore, Mr. O'Connell testified that after all of the claims made by Morneau Sobeco with the Trustees in Bankruptcy have been resolved. Canada Revenue Agency will provide each employee with a recalculation and an opportunity to "top up" their RRSPs. But the most important reason for this conclusion is that if there is a loss that is identifiable in the first place, in the view of this Board it is not related in any way to the existence of the Old Regulation. The unfortunate reality that cannot be overlooked is that the resulting loss is as because of the deficit position the Plans were left in by St. Anne. The impact with respect to this aspect of the claim would have been the same, whether or not the Old Regulation was in place on September 14, 2004. For these reasons, the Board dismisses the claim for damages resulting from the limited ability of members to contribute to their RRSPs while employed. In support of this, the evidence of virtually all the employees was that their decision to not contribute to their personal RRSPs was impacted by what they thought was a "cadillac plan", not because of the existence of the Old Regulation.

27. The Complainants also claim that the fees paid to Morneau Sobeco were increased due to the increased amount of time required to administer the Plans. Directly related to this was the assertion of the Complainants that this increased time was directly caused by the government's decision to amend the regulatory scheme and the resulting court challenge. While it is true that this extra period of administration time may have been avoided if the new regulatory scheme was in place on September 14, 2004, there was no evidence adduced that would allow this Board to

determine whether the extra administration fees were offset by investment income or not. Furthermore, even if there was proof of a finite loss, if the Board were inclined to order Special Damages, this would have to be distributed amongst all members, not simply the Complainants. Simply put, this is a claim which has not been substantiated by any evidence so the Board has no alternative but to dismiss it.

28. In similar fashion, the evidence of a few of the Complainants was that for the period of time between 2004 and 2007 when they thought that they may only be entitled to their contributions plus interest, they incurred certain debts in order to survive. The Board is of the view that this portion of the claim must also fail. First of all, there was no evidence that these employees would not have had to incur these debts if the New Regulation had been in effect on September 14, 2004. In other words, it is the view of this Board that any costs of re-financing were sadly attributable to the deficit position of the plans and not to the old regulatory scheme.

29. Finally, some of the Complainants testified that they made contributions to a legal fund formed to appear in court to represent their position in the challenge against the validity of the New Regulation commenced by the “over 55” members. This was a choice made by some of the Complainants. As stated by counsel for the Complainants in his lengthy brief as he reviewed the evidence of James Campbell, “James testified that they felt that they needed to intervene in order to protect their interests ...”. While this choice may have been a good choice, it was a choice. After all, this challenge was against the Attorney General *at al* and the Province of New Brunswick and was specifically designed to strike down the new regulatory scheme. Although there was evidence that the trial judge wondered if he should proceed without representation from the “under 55” group, and he may even have adjourned the original hearing, there was no evidence of the court ordering their participation. Thus, although some of the Complainants did incur significant legal costs, the Board is of the view that this was a choice of the individual and not a proper claim of relief.

30. For all of the reasons enumerated above, this Board concludes that no special damage claim has been established.

ii) **General Damages**

31. In considering this portion of the remedial claim, the Board would be remiss if it did not express how compelling the evidence of each of the Complainants was. Their evidence was for the most part unchallenged by the Respondent in cross-examination. It is clear that each of the Complainants, in their own unique way, was very much impacted by the fact that on November 29 or 30, 2004, they were told that their “cadillac plan” was under-funded and as a result of the Old Regulatory scheme, they would only be receiving their contributions plus interest. This was particularly devastating to those under the age of 55 in the Salaried Plan as they only commenced contributing to the Plan on September 1, 2001. Previously the contributions had been entirely by the employer. The evidence of each of the Complainants, although different due to their unique circumstances, told a tale of anger, frustration, stress and division both within family members and the community at large.

32. However, it cannot be overlooked by this Board that although the evidence of each of the Complainants expressed anger, angst and stress, these emotions resulted from both the fact that on September 14, 2004 they were no longer employed and, of course, learning of the significant deficit position of both Plans. Several of the witnesses alluded to their level of frustration upon learning that what their employer had assured them was the “best plan in Canada” was in fact under-funded. Not surprisingly, there was no evidence that apportioned the feelings of anger, frustration, stress and angst between the loss of their job, the knowledge that their pension plan was under-funded and the concern associated with learning that those under 55 would only receive their contributions plus interest. As difficult as it would have been for any of the witnesses to testify to this, it is more difficult for this Board to come to such a conclusion. Clearly, some of the overall sense of loss of worth of these Complainants is associated with the anticipated implementation of the Old Regulatory Scheme, but the Board cannot lose site of the fact that both the loss of a job and the concern that the Plans were under-funded are also significant factors contributing to the state of mind of the Complainants. This conclusion was certainly supported by the evidence of many of the Complainants.

33. The Board has concluded that when considering the amount of general damages to award, it should not be so low as to in essence be a “license fee”. Any such award should be high enough to provide “real redress” and to “encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society” (see *Steeves v. Woody’s Place* 2007 CanLII 49161 (NBLEB)).

34. The Board could review the evidence of each Complainant and attempt to determine the level of damages to be awarded on an individual basis. However, in the view of the Board such a process would be arbitrary and would most likely lead to even more divisiveness. It is trite law that the award of general damages is not to be implemented in an arbitrary fashion so for this reason, the Board has concluded that as each Complainant has suffered a loss of dignity and self respect caused in part by the angst associated with the fear of the Old Regulatory Scheme, a general damage award should result. However, although each Complainant suffered in their own unique way, it is virtually impossible to articulate reasons to distinguish between them. As a result, this Board orders that each Complainant receive \$3,000.00 in general damages from the Respondent. It is to be noted that this amount is not designed to “fix” the problem or fully compensate the employees. This Board also takes into account the fact that part of the loss of dignity and self-respect described by the Complainants is related to both the loss of a job and the determination that the Pension Plans were so under-funded.

35. For all of the reasons noted above, the Board hereby orders the Respondent, Province of New Brunswick, to pay \$3,000.00 to each of the named Complainants, as general damages. Unfortunately, between the time of filing of these complaints and the date of hearing, Eileen Blair passed away. This Board will remain seized of this matter if the parties are unable to agree on the distribution of general damages to her estate.

Issued at Fredericton, New Brunswick, this _____ day of December, 2008.

**GEORGE P. L. FILLITER
CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD**