NOVA SCOTIA COURT OF APPEAL

Citation: *Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 2

Date: 20150115
Docket: CA 423496
Registry: Halifax

Between:

TRI-COUNTY REGIONAL SCHOOL BOARD

Appellant

v.

NOVA SCOTIA BOARD OF INQUIRY UNDER THE HUMAN RIGHTS ACT, THE NOVA SCOTIA HUMAN RIGHTS COMMISSION, JAMES HOLLAND, THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 964, AND THE ATTORNEY GENERAL OF NOVA SCOTIA

Respondent

Judges:	Bryson, Hamilton, and Scanlan, JJ.A.
Appeal Heard:	November 26, 2014, in Halifax, Nova Scotia
Written Release:	January 15, 2015
Held:	Appeal allowed and the decision of the Board set aside, per reasons for judgment of Bryson, J.A.; Hamilton and Scanlan, JJ.A. concurring;
Counsel:	John C. MacPherson, Q.C., and Kiersten Amos for the appellant John Merrick, Q.C., for the respondent Human Rights Commission Susan D. Coen for the respondent Canadian Union of Public Employees, Local 964 Edward Gores, Q.C. for the Attorney General of Nova Scotia (not participating) James Holland, respondent (not participating)

Reasons for judgment:

Introduction

[1] For many years, James Holland drove a school bus for the Tri-County Regional School Board. He was a member of the CUPE (Local 964) staff pension plan which required him to retire at the end of the school year in which he turned 65. But when the time came for his retirement, Mr. Holland demurred. He asked to stay on. The School Board declined any extension beyond the school year. So Mr. Holland complained to the Human Rights Commission.

[2] Sitting in her capacity as a Board of Inquiry Chair under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, Marion S. Hill decided that Mr. Holland's retirement constituted discriminatory conduct which was not saved by the exceptions provided for by the *Human Rights Act*. Tri-County appealed, supported by the Respondent, CUPE.

[3] For reasons that follow, the appeal should be allowed.

The Human Rights Act

[4] Until July 1, 2009 s. 5(1) of the *Human Rights Act* prohibited discrimination on account of age with certain exceptions:

> 5(1) No person shall in respect of … (d) employment … discriminate against an individual or class of individuals on account of … (h) age;
>
> **Exceptions**
>
> 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;

[5] *An Act Respecting the Elimination of Mandatory Retirement*, S.N.S. 2007, c. 11 repealed s. 6(h) of the *Human Rights Act* and removed the words "retirement or" from s. 6(g) of that *Act* so that s. 6(g) now reads:

> Section (1) of Section 5 does not apply:
>
> > (g) to prevent, on account of age, the operation of a *bona fide* pension plan or the terms or conditions of a *bona fide* group or employee insurance plan.

[6] The effect of the foregoing amendment was to retain the exception for age discrimination arising from the operation of a *bona fide* pension plan or group or employee insurance plan.

The Pension Plan

[7] The Pension Plan is registered with the Superintendent of Pensions in accordance with the Nova Scotia *Pension Benefits Act*, R.S.N.S. 1989, c. 340, and is also registered under the *Income Tax Act*, R.S.C. 1985, c. 1. The Pension Plan addresses retirement in this way:

> **SECTION 6 – RETIREMENT DATES**
>
> 6.01 Normal Retirement
>
> A member shall retire on his Normal Retirement Date except as otherwise provided in this Section…
>
> 6.03 Postponed Retirement
>
> A Member may postpone retirement on a year-to-year basis provided the Member receives the written agreement of the Employer. In no event may such retirement, for purposes of the Plan, be postponed beyond the end of the calendar year in which the Member reaches age 71. In the event of postponed retirement, the Member shall continue to make contributions and to earn pension benefits in the regular manner until the date of the Member's actual retirement under the Plan. Upon actual retirement, the amount of pension will be the benefit payable at age 65 which the member had earned up to the date of actual retirement in accordance with Section 8.

[8] The Plan defines Normal Retirement Date as the first day of the month following the month in which the member of the Plan turns 65 (Section 2.23).

[9] The Collective Agreement between CUPE and Tri-County requires employees to be members of the Pension Plan (Article 28.2) and also requires retirement in the school year in which they turn 65 (Article 36).

Issue

[10] Although the parties characterise this differently, the real issue is whether the Board unreasonably concluded that the pension plan exception permitting discrimination based on age, did not apply to Mr. Holland. Because the appeal should be allowed, it is unnecessary to consider Tri-County's appeal that any liability be joint with CUPE.

Standard of Review

[11] Justice Saunders described the standard of review respecting a decision by Human Rights Boards of Inquiry in *C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia,* (Human Rights Board of Inquiry), 2008 NSCA 38.

> [19] In *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission,* 2006 NSCA 63, this Court considered the appropriate standard of review in matters involving complaints launched pursuant to the *Human Rights Act*. We observed:
>
> > [50] Accordingly, different aspects of the Board's decision in this case will be subject to different standards of review. If the nature of the problem is a strict matter of law, or statutory interpretation, the standard of review will be one of correctness. If, on the other hand, the issue arises as a result of the Board's findings of fact, I will apply a standard of review of reasonableness. If the issue triggers a question of mixed fact and law, my analysis will call for greater deference if the question is fact-intensive, and less deference if it is law-intensive. Finally, if the issue concerns the Board's application of law to its findings of fact, I will apply a reasonableness standard of review. (Authorities omitted)
>
> […]
>
> [26] In respect of the matters before the Board of Inquiry appointed to consider Mr. Gough's complaint, if the nature of the problem being considered by the Board was strictly a matter of law, the required analysis will attract a standard of correctness. On the other hand, if the issue arises as a result of the Board's findings of fact, or inferences drawn from those facts, we will recognize the appropriate deference and margin of appreciation that is to be accorded such decisions and will apply a standard of reasonableness in our review.

[12] *Falkenham* must now be read in light of a series of Supreme Court decisions that apply a reasonableness standard of review to questions of law involving interpretation of a tribunal's home statute or statutes closely related: *Alberta*

(Information and Privacy Commissioner) v. Alberta Teacher's Association, 2011 SCC 61, (¶34, 39, 41); *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67. Nevertheless, a reasonableness standard may be rebutted if that is inconsistent with legislative intent: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (¶15). *Rogers* was recently applied by the Federal Court of Appeal in *Johnstone v. Canada (Border Services)*, 2014 FCA 110.

[13] For purposes of this case where the Board is primarily interpreting and applying the *Human Rights Act*, a reasonableness standard of review is appropriate.

[14] In *Izzak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, this Court summarized Supreme Court descriptions of the reasonableness standard of review:

> 14 Reasonableness is "... concerned mostly with the existence of jurisdiction, transparency and intelligibility within the decision making process. But it is also concerned with whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, para. 47). The reviewing court should not conduct two separate analyses -- one for reasons and another for result. Rather the exercise is "organic"; the "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes, (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 14).

Board Decision

[15] The pension plan exception to age discrimination has previously been considered by the Supreme Court of Canada and was ostensibly relied upon by the Board in this case. In *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 Justice Abella, speaking for the majority, described what "*bona fide* pension plan" meant in the context of New Brunswick legislation similar to the *Nova Scotia Human Rights Act*:

> [33] Section 3(6)(a), notably, states that the age discrimination provisions do not apply to the terms or conditions of any "*bona fide* pension plan". The placement of the words "*bona fide*", it seems to me, is significant. What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. ***It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what***

> ***the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements.*** This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. ***But the inquiry is into the overall bona fides of the plan, not of its constituent components***.
>
> [Emphasis added]

[16] The Board recognized *Potash* as the leading authority on the question of whether a pension plan is *bona fide* and thus exempts otherwise discriminatory mandatory retirement. But curiously, after citing ¶33 of *Potash* the Board commented:

> [16] …Therefore, once the threshold for *bona fide* is established as set out in *Potash*, the question for determination when there is a conflict between the terms and conditions of the Pension Plan and any associated document, is the legitimacy of the overall Pension Plan and its application thereof. I find that the *Potash* decision leaves open, once the threshold of *bona fide* is established as a whole, a further analysis of the overall legitimacy of the Pension Plan in the application thereof.

[17] With respect, *Potash* does no such thing. It does the opposite. Once a pension plan has been found *bona fide*, that is the end of the analysis, as we shall see.

[18] The Board clearly felt that the Pension Plan was tainted because of the discretion granted to the Employer in s. 6.03 (¶7 above):

> [29] The evidence indicates that Tri-County made a determination regarding not extending Mr. Holland's employment due to their understanding of the two (2) previous sections of the Pension Plan read in association with the terms and conditions contained in the Collective Agreement. Tri-County applied the limiting terms contained in the Collective Agreement and did not use their discretion to extend Mr. Holland's employment pursuant to Section 6.03 of the Pension Plan. The terms of the Collective Agreement was Tri-County's main consideration when determining not to use their discretion to extend Mr. Holland's employment. Therefore, this interpretation of the Pension Plan and Collective Agreement was an error in the application of the terms and conditions contained in the Pension Plan and lack of clear direction in the Pension Plan itself as to the application of the use of such discretion in the hands of the Employer envisioned at Section 6.01 and 6.03 of the Pension Plan. Additionally, the limitations on extending employment past the normal retirement date as outlined in the Collective Agreement had a limiting effect not mirrored in the Pension Plan itself. Therefore, the terms and conditions of the Pension Plan and the Collective

> Agreement were in conflict, the terms and conditions of the Pension Plan should prevail pursuant to the current limitations suggested at Section 6(g) of the *Human Rights Act*.

[19] The Board faulted Tri-County for not exercising its discretion to extend Mr. Holland's employment beyond 65 in accordance with s. 6.03 of the Pension Plan. The Board went on to find that there was "dissonance" and "contradiction", between the Collective Agreement and the Pension Plan, because the latter provided discretion to the Employer to extend employment while the Collective Agreement did not. Therefore, the Board found that although initially *bona fide*, the Plan really wasn't *bona fide* "…due to lack of legitimacy in the application of the terms and conditions of the Pension Plan as a whole."

[20] With respect, the Board's decision is confused and confusing. There is no explanation of what is meant by "lack of legitimacy in the application of the terms and conditions of the Pension Plan." Nor is it clear why the Board thought any alleged "dissonance" and/or a "contradiction" between the Pension Plan and the Collective Agreement mattered. The question is whether Mr. Holland was required to retire under the Pension Plan. If the Pension Plan has such a term – which 6.01 is – then that is an end to it.

[21] Mr. Holland was required to retire pursuant to the Pension Plan which the Board found to be *bona fide*. A *bona fide* plan does not cease to be *bona fide* because it confers an unexercised discretion on the employer to defer retirement. The Board's subsequent attempt to find the Plan "illegitimate" is neither supported by the language of the Plan, nor the jurisprudence on which the Board claimed to rely. In particular, and to repeat, Justice Abella in *Potash* cautioned against such a "piecemeal" approach:

> [33] …It is the ***plan itself*** that is evaluated, ***not the actuarial details or mechanics of the terms and conditions of the plan***. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements…***the inquiry is into the overall bona fides of the plan, not of its constituent components.***
>
> [Emphasis added]

Potash

[22] The Board's confusion about *Potash* is exemplified by this observation:

> [19] Upon review of the *Potash* decision, it is clear that such sets the standard, test and framework to be applied when considering whether a Pension Plan is *bona fide*. I find that the main issue in this case is not whether the Pension Plan is *bona fide*, but rather the main analysis for consideration should be on the legitimacy and application of the terms and conditions of the Pension Plan as a whole and whether there was discriminatory conduct pursuant to Section 5 of the *Human Rights Act*.

[23] In *Potash*, the Supreme Court did not treat the "*bona fides*" of a pension separately from its legitimacy, as the Board here suggests. Rather, the two are inextricably linked. A lack of legitimacy constitutes a lack of *bona fides* and *vice versa*.

[24] In *Potash* Justice Abella notes that the exception for discriminating on account of age need not be reasonable to be *bona fide* (*Potash* ¶29 and 30). But, Justice Abella recognizes that *bona fides* has subjective and objective components. The subjective component relates to "motives and intentions"; the objective relates to legitimacy or genuineness. The two co-exist: "…a *bona fide* plan is a legitimate or genuine one." (¶32)

[25] Indicia of the *bona fides* of a plan include (as here) registration under applicable provincial and federal legislation (¶37 and 39). In the income tax context, the Supreme Court placed reliance on the concept of avoiding a "sham":

> [40] In the income tax context, the courts have had to determine ***whether a pension plan is bona fide or merely set up as a "sham" for the purpose of achieving a tax advantage***. For example, in *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 408, Gibson J. found that the company's pension plan was a masquerade, and that the parties and the trustee of the plan "never intended that it be a document that the parties would act upon" (p. 418). He relied on *Snook v. London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 (C.A.), where Lord Diplock said:
>
> > As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, ***it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to***

> ***the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create***. [p. 528]
>
> [Emphasis added]

[26] In *Potash* (¶30), the Supreme Court approved the definition of *bona fides* cited by the Court in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321:

> [30] …In order to meet the test of "*bona fides*", the practice must be one that was adopted honestly, in the interests of sound and accepted business practice and not for the purpose of defeating the rights protected under the Code.

[27] In *Potash*, the Court concluded:

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

[28] There is a conspicuous absence of any *Potash* discussion of *bona fides* in the Board's decision. Clearly the Supreme Court incorporates legitimacy within its analysis of good faith. The Board's separation of the two is a misinterpretation of *Potash*. Not only did the Board misinterpret *Potash*, it failed to apply the relevant principles of statutory interpretation.

Statutory Principles of Interpretation

[29] The principles to be applied are well settled. In *Killam*, this Court referred to the appropriate inquiry in light of the standard of review:

> [22] How this Court should approach a "reasonableness" review of a tribunal's interpretation of human rights legislation is described by the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53:
>
> > [33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues

> fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. **However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.**
>
> [Original Emphasis]

[30] Again, citing the Supreme Court, this Court observed in *Killam*:

> [15] If application of principles of statutory interpretation yield only one reasonable interpretation, an administrative decision maker must adopt it. As *McLean* emphasized:
>
> > [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. ***Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable*** — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.
> >
> > [Original Emphasis]

[31] The Board's analysis was coloured by its assumption that the elimination of retirement plans as an exception to age discrimination also affected the exempt status of pension plans:

> [24] In light of the legislation respecting the *Act Respecting the Elimination of Mandatory Retirement* in force and effect at the time this complaint was initiated, the application of the *Act Respecting the Elimination of Mandatory Retirement* should have been a consideration at the time of Mr. Holland's termination of employment. Therefore, after a *prima facie* case of discrimination is made out, the Employer has an obligation to apply their own Pension Plan in a clear, unambiguous and non-discriminatory manner. There being certainty in terms and due regard given to the application of any legislation and law impacting on such issue. ***Both Tri-County and CUPE argued that there was no such limiting effect and the legislation had no impact on the application of the Pension Plan to the case in point. I do not accept this argument, as to accept such argument would make the legislation and purpose redundant and useless.***
>
> [Emphasis added]

The Board failed to explain how deletion of retirement plans as an exempted form of age discrimination affected the preserved exemption of pension plans relevant here. How does removal of "retirement plans" weaken the pension plan exception? How does such an interpretation render the legislation "redundant and useless"? The Board does not tell us.

[32] The Board's failure to address or apply principles of statutory interpretation infected its analysis of *Potash*:

> [31] Clearly, the amending legislation was intended as a limitation to the exceptions to mandatory retirement ***and as an interpretive tool in determining whether a Pension Plan, though determined to be bona fide pursuant to the Potash analysis, can prove to be not bona fide in terms of the application of the terms and conditions of the Pension Plan as a whole***. In light of considerations in *Potash* and the *Act Respecting the Elimination of Mandatory Retirement* amending the *Human Rights Act*, application of the *Potash* analysis opened up a further analysis in the legitimacy of the overall Pension Plan…
>
> [Emphasis added]

Here the Board purports to augment *Potash* with amendments to the *Human Rights Act* without explaining the claimed relation between them. There is no apparent relation. A retirement plan is not a pension plan, and they are not equated in the legislation.

[33] The Board then appropriates an unfettered authority, beyond the competency of any court:

> [33] …My decision follows the *Potash* decision establishing the Pension Plan to be *bona fide* and further interpreting *Potash* and extending such analysis of the legitimacy of the Pension Plan in application. As Board of Inquiry Chair, although *stare decisis* is a consideration, I have a broader application of the law to apply to effect the principles of natural justice applied to effect a personal remedy and move the law in the direction of non-tolerance of discriminatory conduct pursuant to the *Human Rights Act*, such being clearly in the public interest. It is clear that the public interest is moving toward eliminating/narrowing exceptions to Mandatory Retirement as witnessed by the *Act Respecting the Elimination of Mandatory Retirement*…

No explanation is offered for "the principles of natural justice…to effect a personal remedy" or why the Board considers itself the voice of a hitherto undeclared

"public interest". The Board has no authority to implement "…what it considered to be a beneficial policy outcome rather than engage in an interpretive process taking account of the text, context and purpose of the provisions in issue." (*Canada (Canadian Human Rights Commission) and v. Canada (Attorney General)*, 2011 SCC 53, ¶64)

[34] Finally, having ostensibly applied *Potash*, the Board distinguishes it:

> [34] … Effectively, the *Potash* decision suggests that although a Pension Plan may be considered initially *bona fide*, the terms and conditions therein, when in conflict may raise issues of the Pension Plan's overall legitimacy in application. I would distinguish the *Potash* decision on the basis of the conflict in terms, being ambiguous and enabling discretion in the Pension Plan, while restricting discretion in the Collective Agreement.

Whatever this means it neither applies *Potash*, nor justifies how it is distinguished once a pension plan is found *bona fide*.

[35] The Board has misconstrued its role and the principles which should animate its exercise of judgment. Neither its choice of principles nor its analysis is reasonable. The importance of Human Rights legislation is not a license to rewrite that legislation as the tribunal might like. As Justice Abella reiterated in *Potash*:

> [19] 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.*** I agree with L'Heureux-Dubé J.'s observation that "where legislation provides tribunals with a specific test for discriminatory justifications, the tribunals should apply that test" (*Dickason*, at p. 1157).
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> […]
>
> [31] Unlike s. 3(6)(a), the Ontario legislation speaks of a distinction based "on reasonable and *bona fide* grounds" (s. 21). Section 3(6)(a) of New Brunswick's Code speaks only of *bona fides*. I return to McLachlin J.'s admonition in *Meiorin* that ***"in the absence of a constitutional challenge, this Court must interpret [human rights statutes] according to their terms"*** (para. 43). Since s. 3(6)(a) does not use the word "reasonable", it need not be imported.
>
> [Emphasis added]

[36] In this case, it is not only the statutory purposes of the *Human Rights Act* that are at play, but also, at least by implication, those of the *Pension Benefits Act*. In *Potash*, the Supreme Court identifies the competing interests involved:

> [24] What the legislature was seeking to do in enacting s. 3(6)(a) was to confirm the financial protection available to employees under a genuine pension plan, while at the same time ensuring that they were not arbitrarily deprived of their employment rights pursuant to a sham. In New Brunswick, the pension plan exemption in s. 3(6)(a) was introduced in 1973, at the same time that "age" was added as a prohibited ground of discrimination to s. 3(1) (*An Act to Amend the Human Rights Act*, S.N.B. 1973, c. 45, ss. 3(1) and 3(3)). This was the way the Province, in its human rights legislation, sought to address the concern that age discrimination claims might make benefits available under *bona fide* pension plans vulnerable to being destabilized unless protected by legislation.

[37] The Board's focus on s. 6.03 of the Pension Plan and the discretion granted to the Employer in that Section is precisely what Justice Abella eschews in *Potash*. As previously described, it is the piecemeal analysis which courts are directed to avoid. A *bona fide* plan cannot be defeated by a discretion granted to an employer which may or may not be exercised in any particular case.

[38] The plain language of the *Human Rights Act*, as amended, preserves a *bona fide* pension plan as an exception to age discrimination. What that means is described in *Potash*. That exceptional status is not diminished by the disappearance of retirement plans as permitted exceptions. Arguably it emphasises the importance of the remaining pension plan exception. It is not reasonable to constrain the meaning of a "*bona fide* pension plan" whose exempt status endures simply because retirement plans are no longer exempt.

[39] Nor does the Board's decision accord with the obvious legislative purposes of balancing age discrimination against preserving the integrity of *bona fide* pension plans, as Justice Abella reminds us in *Potash*, (¶36 above).

[40] There is no indication in this case that the Pension Plan was anything other than a plan to provide for the retirement support of its members. Put otherwise, there is nothing in the record that suggests its purpose was a sham, intended to defeat protected rights of any kind. Neither the Board's analysis nor its conclusions are reasonable.

[41] I would allow the appeal and set aside the decision of the Board. No costs were claimed. None are awarded.

Bryson, J.A.

Concurred in:

Hamilton, J.A.

Scanlan, J.A.