In the Matter of An Arbitration

BETWEEN:

ONTARIO NURSES' ASSOCIATION

(the "Association")
(or "Union")

-and-

MUNICIPALITY OF CHATHAM-KENT

(the "Employer")

-and-

THE ATTORNEY GENERAL OF ONTARIO

(the "Intervenor")

RE:	Union Grievance & Individual Grievances of Pat O'Brien and Marilyn Hubbard dated June 2, 2008 - Failure to provide benefits for employees aged 65+
DATE AND LOCATION OF HEARING:	November 28 and December 16, 2008, March 5, 26, May 11, August 13, and December 4, 2009, Chatham, Ontario.
SOLE ARBITRATOR:	Brian Etherington
APPEARANCES FOR THE UNION:	Elizabeth McIntyre, Counsel Claudia Vicencio, Lab. Rel. Officer Philip Sarides, Lab. Rel. Officer Kathy Tomecek, Bargaining Unit President Jill Allingham, Lab. Rel. Assist. Marilyn Hubbard, Grievor Pat O'Brien, Grievor
APPEARANCES FOR THE EMPLOYER:	Barry Brown, Counsel Georgina Feys, Manager, Labour Relations Cathy Hoffman April Reidtyk
APPEARANCES FOR THE INTERVENOR:	Robert Charney, Counsel Matthew Horner, Counsel

AWARD

Introduction

This arbitration deals with a union grievance and two individual grievances filed by the Association on June 2, 2008. They allege that the Employer has violated the collective agreement, the *Employment Standards Act 2000* (hereinafter ESA), the Ontario *Human Rights Code* (*Code*), and the *Canadian Charter of Rights and Freedoms (Charter)*by discriminating against employees who are age 65 or older in the provision of benefits. A preliminary award to deal with the Association's request for an order for production and particulars was issued on December 3, 2008. The Attorney General of Ontario responded to the Association's Notice of Constitutional Question by indicating that it intended to intervene to address the constitutional question raised by this grievance. It chose not to participate in arguments on the preliminary production and particulars issues on the first day of hearing but participated fully in all other aspects of these proceedings and also made arrangements for a court reporter to take a transcript of all days other than the first day of hearing.

The June 2008 collective agreement between the parties includes provisions which differentiate between employees aged 65 and over and those under 65 in the provision of several benefits. Article 13.08 (b) of the new agreement provides that a nurse aged 65 or over can claim a maximum of 60 days paid sick leave, while a nurse under age 65 can claim up to 119 days. As well, a nurse aged 65 and over has a limit of 60 days on the number of days of unused sick leave which

she can accumulate, while a nurse under age 65 has no ceiling on the number of sick leave days that can be accrued for future use. Article 13.11 of the new agreement provides that nurses aged 65 or over have $5,000.00 in life insurance benefits as compared to a benefit of two times the employee's annual salary for nurses who are under age 65. Article 13.11 also provides that nurses who are age 65 or older are denied the LTD and AD&D coverage that is provided to nurses who are under 65. It also confirms the cap of 60 days for accumulation of unused sick leave to be used for extended sick leave as set out in Article 13.08(b).

The Association asserts that these provisions make distinctions in the provision of benefits on the basis of age and that these distinctions are disadvantageous and prejudicial on the basis of age. It notes that the Ontario government passed amendments to the *Human Rights Code,* effective December 12, 2006, which removed protection for mandatory retirement at age 65 or greater. The amendments changed the definition of age in the *Code* so that, in general, discrimination against employees aged 65 or older is no longer permitted. However, at the same time the *Code* was amended to include sections 25(2.1) to (2.3) to create an exception to the new general prohibition on discrimination against those aged 65 or older. Those sections provide that the right to equal treatment without discrimination on the basis of age is not infringed by benefit, pension, superannuation or group insurance plans or funds that comply with the ESA and the regulations thereunder. Section 44(1) of the ESA states that "except as prescribed", no employer shall provide, offer or arrange for a benefit plan that treats employees differently because of age. However, the Regulation on Benefit Plans (O. Reg. 286/01) permits age-based discrimination over age 65 because age is defined as any age 18 years or more and less than 65 years. Sections 7 and 8 of the Regulation also permit age-based distinctions with respect to life insurance plans and short and long term

disability plans. The combined effect of sections 25(2.1) to (2.3) of the *Human Rights Code,* the ESA provisions, and Regulation 286 on Benefit Plans is that employee life insurance plans and short and long term disability plans that provide differential and prejudicial treatment for workers aged 65 and over are deemed to not violate the *Human Rights Code*. The Association asserts that these provisions permit differential treatment of employees aged 65 and over in the provision of employee life insurance and disability plans and thus violate s. 15 of the *Charter of Rights and Freedoms* because they discriminate on the basis of age. The Association further contends that these alleged violations of s. 15 cannot be saved as reasonable limits that are justifiable under s. 1 of the *Charter*.

As an alternative argument, the Association asserts that even if the challenged provisions of *Human Rights Code*, ESA and Benefit Plan Regulation are found to be constitutional, the post 65 benefit provisions of the collective agreement are contrary to s. 5(1) of the *Human Rights Code* because they discriminate on the basis of age. It contends that benefits are clearly part of an employee's overall compensation package, and because nurses aged 65 and over are entitled to less benefits than those who are under 65, they are receiving less overall compensation for their work than nurses who are less than 65. The Association argues that even if the law permits the Employer to restrict certain benefits based on age, in order to avoid discrimination on the basis of age that is contrary to s. 5(1) of the Code, it is required to provide nurses aged 65 and older with overall compensation that is equivalent to nurses who are under age 65. On this alternative argument, the Association also contends that if the Employer seeks to have such differential treatment in terms of overall compensation upheld it must satisfy the criteria for a bona fide occupational qualification (BFOQ) and satisfy its duty to accommodate to the point of undue hardship.

Facts

The Association and Employer agreed to a brief statement of Agreed Facts with Respect to Bargaining History. It states the following:

1. The parties were subject to a collective agreement with an expiry of December 31, 2006; this document is found at Tab 3 of the Union's Book of Documents.

2. The parties engaged in negotiations for a renewal collective agreement commencing in the Spring of 2007; there remained issues in dispute and after several bargaining sessions, the Union applied for conciliation.

3. Conciliation was held on January 31, 2008; the positions of the parties on the issues in dispute at the time of conciliation are set out in the document found at Tab 4 of the Union's Book of Documents.

4. A mediation session was held between the parties on February 19, 2008 at which it was agreed by the parties that the Employer's final proposal, together with the agreed to items, would be put to the members for a ratification vote.

5. The Employer's final proposal which is found at Tab 5 of the Union's Book of Documents was accepted by a majority of members voting at a ratification meeting held on February 20, 2008.

6. Following ratification, the parties entered into the collective agreement, attached hereto, signed June 3rd, 2008.

The Employer's final proposal that was approved by a majority vote of members on February 20/08 contained all of the provisions which differentiate between employees aged 65 and over and those under 65 in the provision of benefits which are impugned herein.

The circumstances of the two individual grievors are as follows.

Ms Patricia O'Brien turned 65 years of age on January 17, 2008. Following her graduation from high school with a commercial diploma in 1961 she worked at a variety of jobs before staying at home to raise her 4 children from 1970 to 1982. At that point she decided to upgrade her

education so that she could get a better job to help pay for her children's post secondary education when that time came. She took some university courses at night in 1982 and 1983 and then enrolled in a night school program at St Clair College from 1986 to 1990 to acquire an Aesthetician's Certificate. After graduation she was confronted by a downturn in the economy but heard there was a demand for nurses so decided to upgrade her education by taking courses on biology and chemistry at St Clair so that she could get into a nursing program. From 1991 to 1994 she completed the three year program in nursing at St Clair College and became a registered nurse in August of 1994 at the age of 51. Ms O'Brien acquired contract work as a nurse for the Employer in 1994 and 1995 and obtained full time employment with the Health Unit in 1996 as a public health nurse. She has worked in several programs for the Employer since that time and was working in a cancer risk reduction program for the Health Unit at the time of the hearing. In carrying our her role of educating members of the public on the importance of screening for illness and taking responsibility for their own health, she works closely with the South West Public Health Nurses Association, which has representatives from eight health units. Her most recent performance assessments by her Employer (December 2008) indicated that she has been performing all of her duties at a proficient or commendable level and there was no expression of concern with her level of performance.

After beginning employment on a contract basis for the Employer in 1994, Ms O'Brien learned that she needed a Diploma in Public Health Nursing to get full time employment with the Health Unit so she took courses at the University of Windsor and obtained the requisite Diploma in June of 1996. Nevertheless she went on to enroll in night courses at the University of Windsor until she was successful in obtaining her Bachelor of Science in Nursing degree in June of 1998. Ms O'Brien received the benefits of all other full time nurses at the Health Unit in January of 2008.

However, when she turned 65 in January of 2008 she received a letter from the Employer which stated that she would continue to get all full time benefits until the new collective agreement was signed. On April 25/08 the Employer sent Ms O'Brien a letter telling her that pursuant to the new collective agreement several of her benefit coverages would be changing immediately. The changes referred to above for employees who were 65 or older were then listed in the letter (tab 13(b) in union book of documents - "UBD"). Effective immediately her life insurance benefit was reduced from two times her annual salary (approximately $140,000) to $5,000.00. She no longer had any AD&D coverage. Her LTD coverage was terminated and her STD coverage was limited to a total of 60 days with no accrual beyond 60 days, unlike the ability of younger employees to accrue STD without any cap on accrual.

Ms O'Brien gave the following reasons for working past age 65. She had no significant pension because she had stayed at home to raise her children for many years and only started working full time and building a pension much later than most of her co-workers. The longer she works the greater her pension entitlement. She is in good health. She has 4 married children who are in various stages of getting jobs and having their own families and they require her financial assitance from time to time. Last but not least, she really loves her work and came to it later in her life and really wants to keep on doing it. She testified that when she received the April 25/08 letter informing her of her reduced and eliminated benefits she felt angry and humiliated and for some time felt that she did not care if she went to work or not. She felt a significant loss of self esteem and self worth in terms of her contribution as an employee. She said she also felt like she was a hostage in a situation where the Employer was able so say, "okay you can continue to work but this is what we can do to you." She also testified that it did not seem to make any sense given the fact she kept hearing about

the need for the health care system to recruit and retain nurses and the need for senior nurses to mentor their junior colleagues. She also felt like this reduction in benefits was taking away the pride she had in nursing and her achievements that had enabled her to get the job she now held.

Ms O'Brien said the life insurance reduction was important because $5,000 would not pay for a funeral and this was the only life insurance policy she had and her children could not afford to buy her one. She has followed the advice given at a retirement planning seminar and made prearrangements for her funeral while still working so she can pay for it and has learned it will cost her approximately $12,000 if paid over a one year period and $18 - 19,000 if paid over a five year period. Ms O'Brien also expressed great concern about the loss of AD&D and LTD coverage due to the fact that she has to travel a lot to regional meetings in London for her job and is quite concerned that if anything happened to her she would have no income protection once her STD coverage had run out and would have no coverage to pay for assistive devices or rehabilitation if that should be required. She indicated that this loss of coverage has actually made her fearful of being on the road for her job, especially in bad weather.

Ms O'Brien admitted that she was made aware by the Employer and her ONA representative that her benefits under the collective agreement could be affected by the outcome of collective bargaining in the winter of 2008 and she followed the negotiations and attended the ratification meeting on February 19/08. She was aware that Employer's proposal on benefits would reduce benefits for workers like her who were 65 or older. She said the vote was close but a majority of members voted to accept the Employer proposal on February 19/08 and it contained the reduction in benefits that was contained in the Employer's letter of April 25/08. She said she was shocked when she received the April 25th letter despite her prior awareness of the reduction because it was

the first time she had seen the actual reductions spelled out in writing as they would apply to her.

Ms O'Brien also expressed the view that the ratification vote was approved at least in part to ensure higher starting rates for new hires at the Health Unit to help with recruitment and retention concerns. She said the ONA representatives expressed the view that it was important to increase the starting wage at the Employer to deal with those issues. She testified that she felt that this objective was obtained despite the fact she personally lost out on wages and on benefits.

The other grievor was Marilyn Hubbard. She was born Dec. 13, 1941 and has worked in nursing since graduating from St Joseph's School of Nursing in London in 1962. She worked in the emergency department at St Joseph's Hospital in London from 1962-70. In 1970 she started to work in St Joseph's Family Medicine Centre as a family practice nurse. She continued her education by studying in a Nurse Practitioner program at McMaster University from 1970-74 and from 1974 to 1985 worked as a full time Nurse Practitioner at the South West Middlesex Health Centre. In 1982 and 1983 she studied at the University of Windsor to obtain a diploma in Public Health Nursing. In 1985 she became a nursing supervisor at VON Canada in its Strathroy office. It was a home nursing program that covered a large caseload over a broad geographic area. In 1989 she completed her Bachelor of Nursing Science degree at the University of Windsor after studying part time for several years.

From 1989 to 1999 Ms Hubbard worked as a Public Health nurse for the Elgin St. Thomas Health Unit. She worked as a clinical coordinator for the Elgin Community Health Centre from 1999 to 2001 before becoming a full time public health nurse for the Chatham Kent Public Health Unit in 2001. At the time of the hearing she was working full time in the Healthy Babies/Healthy Children Program. In that program she visits new mothers and babies in their homes with other

Health Unit employees and also provides training in pre-natal parenting classes. She also provides services to residents in women's shelters. Ms Hubbard's most recent performance evaluation was completed at the end of November, 2008 and it contained a positive evaluation and strong praise from her direct supervisor (Exh 22). Ms Hubbard turned 65 on December 13, 2006, one day after the amendments to the Human Rights Code was amended to prohibit mandatory retirement.

Ms Hubbard stated that she continued to work past age 65 because it was "hard to retire when you work for 47 years at a job you love." She also said she had financial reasons for continuing to work because she lived in an old house that required renovation, and she was trying to help one of her sons who had gone back to school and has a wife who has multiple sclerosis. Ms Hubbard also indicated that they had no pension plan for nurses when she started working in 1963 and it was not put in place until 1973, so she was only able to begin contributing to her pension at that time. She was not able to transfer her pension when she moved to the South West Middlesex Health Centre in 1974, but was able to transfer it when she moved to the VON. In 1999 she became enrolled in the OMERS plan when she became employed at the Elgin St Thomas Health Unit. Her prior pension could not be transferred into OMERS so it was invested separately and her sole pension now is OMERS, with only 18 years contribution by 2008. Ms Hubbard indicated that her limited pension plan entitlement also influenced her decision to continue to work after turning 65 to enhance her pension.

Ms Hubbard was also aware that the Employer's final proposal contained reductions in benefits for senior workers when she attended the ratification meeting in February of 2008. She testified that she felt really hurt by the reduction of her benefits. She explained that she had contributed a lot of years and effort and caring to nursing and felt like an old shoe that could simply

be tossed out due to the reduction of benefits. She felt her self-esteem was undermined. It made her think of all the years she had fought against discrimination against young mothers, persons with little education, immigrants, persons with disabilities and the elderly. She thought she knew what it was like to be discriminated against but realized she had no idea until this happened to her. She said she was also concerned it may set a precedent that could allow benefits to be reduced for younger workers as well.

Ms Hubbard also had serious concerns with the loss of specific benefits. Her employment life insurance was all that she had so she went from approximately $140,000 coverage to $5,000 coverage literally overnight. Because she drives approximately 1,000 to 1,200 km a month for the Employer she is quite concerned to have only minimal life insurance and no AD&D protection. The reduction to a maximum of 60 days accumulation on sick leave caused her to lose 7 or 8 banked days of sick leave on April 25/08 and it has probably prevented her from accumulating more days since then. The loss of LTD coverage has caused her to feel not very safe since that time and has caused her to feel stress and worry about it when she is no the road.

The remaining witnesses were all presented by the parties as expert witnesses and their evidence in chief was presented by the filing of written affidavits which were then subject to cross examination by the other parties. The Union presented one expert witness as part of its case in chief and one witness as part of its case in reply. The Employer and the Attorney-General each presented one expert witness (both with actuarial expertise) to counter the Union's prima facie case on discrimination and support their section 1 arguments.

The Union's first expert witness was Ms Mariana Markovic. At the time of her testimony she was a Professional Practice Specialist and Labour Relations Officer with ONA. She possesses

a Master of Nursing (2008), a Bachelor of Science in Nursing (1999), her RN designation (1984) and was in the process of completing a Masters of Health Science at the University of Toronto at the time of the hearing. The Masters in Health Science is in the area of Health Administration so it focuses on the management and administrative aspects of nursing in the provision of health care services. She also acquired an Industrial Relations Certificate from Queen's University in 2007. Although she is not an expert in statistics she has taken several courses in statistics, including an introductory course in 2003 for her Masters in Nursing at McMaster University and a more extensive 6 credit statistics course at the University of Toronto for her Masters of Health Science Administration program.

Ms Markovic's affidavit was largely composed of summaries of 8 reports done on Canada's nursing needs and human resources issues arising from those needs and the demographics of the nursing profession. The reports were published by various research organizations from 1999 to 2006. Relying on those reports, Ms Markovic painted a picture of a shortage of nurses in Canada and Ontario that is likely to continue to worsen in the decade to come. The likely worsening of the shortage is caused by the increasing health needs of an aging population combined with the aging of practitioners of nursing. For example, a 2006 study entitled, What's Ailing our Nurses? A Discussion of the Major Issues Affecting Nursing Human Resources in Canada, authored by A. Priest and published by the Canadian Health Services Research Foundation, projected that Canada could lose up to 64,000 practising registered nurses based on an average retirement age of 55 for registered nurses. The age of 55 or 56 as an average retirement age for nurses was common to a number of the studies relied upon in the affidavit. A 2008 study entitled, A Renewed Call for Action: a Synthesis Report on the Nursing Shortage in Canada, was done by V. Maddalena and A. Crupi for the

Canadian Federation of Nurses Unions (hereinafter CNFU). It found that in 2006, 20.8 % of Canada's nurses were over the age of 55, while 8% were over the age of 60 and 1.9% were over the age of 65. It also found that the average age of nurses in 2006 had increased to 45 and there were more registered nurses (RN's) aged 55-59 years in 2006 than RN's aged 30-34.

Ms Markovic's affidavit also spoke more specifically to concerns with a shortage of nurses in the public health and community health sectors. It cited a 2005 study entitled, Building the Public Health Workforce for the 21st Century: A Pan-Canadian Framework for Public Health Human Resources Planning, done by the Public Health Agency of Canada Joint Task Force on Public Health Human Resources. That report concluded that public health resource planning must aim at improving the capacity of all jurisdictions to recruit and retain public health care workers. Another report, sponsored by the Ontario Government Nursing Health Services Research Unit (published by Andrea Baumann et al., in November of 2006), provides data concerning prospects for an increasing nursing shortage in the area of Public Health. In addition in 2004 the Ontario Government's Capacity Review Committee did a review of the capacity of Ontario's 36 public health units and issued the report, Revitalizing Ontario's Public Health Capacity, in June of 2006. It expressed concerns with difficulties in recruiting and retaining staff and ensuring the right mix of skills and professions and some staff feeling their contributions were not adequately valued. It also expressed concern that there was a perception that public health salaries are not competitive with those in other health care sectors. It recommended revitalization of the public health work force by developing a human resource strategy to enhance the training, recruitment and retention of public health workers. It also recommended that the province work with professional bodies to develop a fair, equitable and comprehensive salary strategy. The affidavit of Ms Markovic concluded with the following summary

of the themes that are common to the reports relied upon in the affidavit:

> The reports identified above are representative and consistent in identifying an on-going nursing shortage in Canada generally, in Ontario in particular, and in Ontario's public health sector specifically. This shortage is exacerbated by an aging nursing workforce, with increasing numbers teetering on the edge of retirement. Concurrent with this shortage are growing public health challenges, including: an aging population, greater needs for at-risk groups, a trend to shift access to health care from hospital- based care to community-based care, and expected healthcare crises such as the SARS epidemic. Human resource recruitment and retention strategies are necessary to address the nursing shortage. The studies generally concur that such strategies must consider fair wages and benefits compensation, including incentives for nurses to move into or remain working in the public health sector. (P.9)

On cross-examination Ms Markovic agreed that some of the studies referred to in her affidavit (i.e. What's Ailing our Nurses (2006)) predated the abolition of mandatory retirement and focused on what was necessary to keep nurses working past age 55, which was the average age of retirement for nurses. She also admitted that she had no statistics to show how many nurses continued working past 65 either prior to the December 2006 amendments of the Human Rights Code or subsequent to those amendments. Nor did she have information on the effect of the changes on the average age of retirement of nurses. Nor was she aware of any studies that show factors that might induce nurses to continue working past age 65 or encourage them to retire at or before age 65. She also agreed that the "What's Ailing our Nurses" (2006) study identified the stressful conditions of a nurse's work environment (workload, schedules, safety of workplace, scope of practice and management) as the key factor influencing a nurse's decision to retire or continue working. These are the factors the study identified as key in retaining nurses over age 55. It was also noted that the same study identified a program in New Brunswick that allows older nurses to reduce hours and use their pension to supplement income as the most notable accomplishment in terms of improving retention of older nurses in their fifties. Three other provinces are planning to introduce similar

measures through collective bargaining and Ms Markovic agreed that addressing these issues through collective bargaining was one way of addressing retention issues. Ms Markovic also admitted on cross examination that recruitment of younger nurses is a very serious issue as well because they have many choices for different careers today. She also agreed that a 1999 Report of Nursing Task Force entitled, Good Nursing, Good Health: An Investment for the 21st Century, in its recommendation to deal with a shortage of nurses in the future, focussed on recruitment of nursing students, establishing a flexible work environment, professional satisfaction for nurses and dealing with inequities in remuneration between hospital nurses and nurses working in a community or home nursing setting.

References in page 5 of Ms Markovic's affidavit to conclusions concerning gross disparities in financial compensation and benefits contributing to lack of confidence (relying upon a Canadian Policy Research Networks 2008 study, Caring For Nurses in Public Health Emergencies), failed to reveal that the report relied upon actually referred to gross disparities in financial compensation and benefits between casual and permanent employees and between publicly and privately employed workers. Ms Markovic agreed with the suggestion that such disparities could be addressed through the collective bargaining process. She also agreed that the 2006 study done by the Canadian Federation of Nurses Unions (exh F to affidavit) focused on the retention of nurses who were 45 or older given that the largest number of nurses were in the 50 to 55 age group and (given the normal retirement age of 55 or 56) were on the brink of retirement. That study also identified flexible work practices, retirement options, reduction of hours of work, professional development and transfer of knowledge, participation in decision making, and nursing and patient safety as important factors in retention. Ms Markovic also agreed that collective bargaining was one method for achieving

flexible work practices and retirement options and reduction of hours of work and she agreed that the report spoke to the importance of flexibility at the local level to allow for collective agreements that provide for the needs of nurses at the local and global level. She also agreed with the suggestion that if the terms of a collective agreement led to a reduction in benefits for nurses aged 50 to 54 that could result in a significant retention problem for a large number of nurses. She further agreed with the CFNU report conclusion that working environment and work practice issues are the key issue in sources of discontentment for nurses and as key issues for the retention of experienced nurses.

On the 2006 Report on Community Health Nursing in Ontario (exh H to affidavit), Ms Markovic's summary of the concerns about a nursing shortage in that sector had left out a sentence indicating that, in contrast to other sectors, in recent years the public health sector had increased its cohort of nurses in the 18 to 34 age group from 17% in 1999 to 23% in 2004, which could indicate the concern about the number of nurses about to retire is lower in the public health sector than other sectors. This report also indicated that while the number of community health nurses declined from 1999 to 2004, the number of public health nurses in that same period grew by 12.5% due to the expansion of the Communicable Diseases Program and introduction of the Health Babies Healthy Children Program in 1997. Ms Markovic agreed that this had come about due to a shift in resources from one area of practice - home care agencies and physician's offices - to another area of practice in programs in public health units. The Report does not speak to whether there was any difficulty in recruiting this increased cohort of public health care nurses and Ms Markovic had no direct knowledge or information concerning the experience of the Employer in this case in recruiting or retaining public health care nurses.

In re-direct Ms Markovic indicated that she had no expertise or experience in collective bargaining. She agreed that most of the studies referred to in her affidavit focused on factors in the retention of nurses in the 50-55 age group but stated that there was nothing in the literature to indicate that the factors impacting on retention of that group would be any different than for those nurses who are over the age of 55. She also said she was not aware of any differences in things that impact retention of any of the age groups including those over 65, but did indicate that the Ministry of Health and the Nursing Secretariat had given hospitals additional funding to help retain nurses who were 55 and older. She was also asked what she understood about the references in the CFNU report (exh F) to collective bargaining allowing for flexibility. She answered that she believed it was referring to nurses making individual choices and having opportunities to continue working in the manner best suited to their lifestyles and economic needs. Ms Markovic also said that she would be concerned about the impact on retention of a reduction in benefits for any aged group of nurses, whether 50-54 or 55- 65 or over 65.

Actuarial Evidence

The Attorney-General called Mr John Melvin Norton, F.S.A. to provide expert evidence on the design and provision of employee benefit and pension plans. While the Union accepted that he possessed significant experience and expertise in actuarial matters, it objected to his qualifications as an expert with regard to certain statements made in his affidavit concerning collective bargaining and labour relations matters. However, the Union was content to allow Mr Norton's affidavit to be admitted and cross examine him on all of its contents and make submissions later on whether some of the statements therein should be disregarded altogether or given little weight because he failed to

meet the standard of expert witness on certain subjects on which he commented. In return the Attorney-General stipulated that it viewed his expertise as follows:

> Professional actuary with expertise in the design and cost or funding of pension plans and employee benefit programs, principally benefits on death, disability and for health care and dental expenses. He has advised both unions and management on pension and benefit programs whether collectively bargained or otherwise.

Mr Norton has approximately 40 years of experience in the employee benefits and pensions business and described his own experience as having designed employee benefit and pension plans and determining the provisions of plans to be offered under Group Insurance contracts, both from the perspective of insurance companies and as a consultant to buyers of such benefits. In 2006 he left a position with a large consulting firm in Toronto to begin his own consulting business where he now provides principally individual services related to valuing pensions on marriage breakdown, quantifying losses on wrongful death, disability or dismissal, advising clients on electing pension options on termination of plan membership and providing ancillary services to the legal profession as an expert witness. He is a Fellow of the Society of Actuaries but gave up his Fellowship in the Canadian Institute of Actuaries in 2008 after 33 years. The latter designation is required to sign Insurance Company and Pension Plan valuations to be filed with federal and provincial regulatory bodies and after reaching the age of 65 Mr Norton decided he would no longer partake in that activity.

Mr Norton had no direct involvement in, or knowledge of the collective bargaining that resulted in the current collective agreement and the benefit plans that are in issue in this arbitration. However, he was provided with the affidavit of the actuary called by the Employer and the collective agreement and some other documents from Statistics Canada and OMERS and relevant legislation

prior to testifying. Mr Norton did not appear to have any educational background or speaking engagements in the area of collective bargaining or labour relations. However, he had experience in negotiating collective agreements as a consultant to employers and unions and he has spoken about group employee benefit plans in a collective bargaining context.

His experience working for a major insurer required him to undertake increasing responsibility for the underwriting, pricing and reviewing of group plans providing death, disability and health and dental benefits. In that role he became aware of how insurance companies price products and develop underwriting criteria and gained a general awareness of dollar and duration limits that an insurance company will not exceed in providing benefits.

Mr Norton was asked by the Attorney-General to provide an opinion, based on his actuarial education, training and experience, whether such different benefits for workers aged 65 or older as are provided in this collective agreement are reasonable and appropriate within the collective bargaining context. The Association objected to his qualifications to provide an expert opinion on this subject, mainly due to his lack of experience with collective bargaining. While his many years of experience working on pricing and the development of underwriting criteria for group insurance benefit plans and his experience acting as a consultant to both unions and management on pensions and group insurance benefits in both collective bargaining and non collective bargaining contexts suggest he was qualified to provide such an opinion, I find it unnecessary to rule on the issue. This is because I have placed no reliance on Mr Norton's opinion on the question referred to above in my rulings on the four legal issues set out below.

Mr Norton began by noting that federal income tax law and Ontario pension law require all employee pension plans to include a Normal Retirement Date (NRD), which is the date at which a

vested member is entitled to retire and receive his accrued pension without reduction for early retirement. That NRD cannot be later than the end of the year in with the member attains the age of 65. Under the OMERS plan which covers the employees in this case the NRD is the end of the month on which they become age 65. OMERS is a statutory plan which cannot be amended by collective bargaining, while employee benefit plans covering group term life insurance or AD&D and LTD and sick leave are governed by collective bargaining. While short tem disability or sick leave benefits are often provided directly by employers, benefits such as group life, LTD and AD&D are almost always provided by insurance companies under group insurance contracts. Thus collective bargaining generally recognizes that these benefits must provide for risks that an insurance company will be prepared to underwrite and that different benefits and terms will have different costs that must be born by the employer or the parties. Although sick leave benefits have been funded and administered directly by the Employer in this case, the other benefits at issue have always been provided by group insurance with costs paid by the Employer. Mr Norton noted that the cost of any employee benefit is determined by insurance corporations from available statistics and past experience of groups of employees. He made the assumption that the collective bargaining process for the most recent agreement resulted in a schedule of benefits for which an insurance corporation was willing to underwrite and for which the Employer was aware of and agreed upon its cost. This was an assumption based on his years of experience in the industry in which employers generally are aware of the costs of benefit plans they agree to, and the fact that the parties agreed to the schedule of benefits found in the agreement. However, while he said that in his experience employers are always aware of the costs of various benefits plans when negotiating collective agreements, he agreed with the suggestion of union counsel that the actual cost of providing particular benefits can fluctuate

from year to year during the term of the collective agreement based on changes in demographics and claims experience from year to year.

Mr Norton also expressed the opinion that at least some of the benefits sought for workers 65 and older through this grievance would not be available from an insurance company in that insurance companies would simply decline to underwrite such provisions at any cost. Any provisions for the benefits sought in this grievance beyond those now in the agreement, whether available from an insurance company or not, would increase the cost to the Employer.

Mr Norton also noted that municipalities are precluded by section 278 of the *Municipal Act, 2001* from providing group life insurance, group accident insurance, and LTD other than through a contract with an insurer licensed under the *Insurance Act* or an association registered under the *Prepaid Hospital and Medical Services Act*. He was of the opinion that insurance companies would be willing to underwrite simple life insurance without any age restriction at an additional cost but would not be willing to underwrite waiver of premium or 'conversion to an individual policy on termination' benefits for workers 65 and older. He indicated that such refusal would arise from too much uncertainty as to when a benefit would be payable and the absence of reliable data to project the cost of potential claims. In explaining those conclusions Mr Norton relied upon mortality tables from Statistics Canada and the Canada Pension Plan. They show death rates increasing in a monotonic fashion with advancing age so that the mortality rate at age 65 for females is 10 times the mortality rate for 40 year old females. This results in the cost of providing each $1000 of life insurance for the 65 and older group being 10 times the cost of providing each $1000 of life insurance to the youger group, which has an average age of 45. Under the OMERS mortality tables the mortality rate for a group of 65 plus aged female workers with an average age of 65 is 15 times

that of a sub 65 group with an average age of 40 and so the cost of life insurance for the older group would be 15 times greater.

Mr Norton also made the assumption, based on his experience in the industry (because he lacked any direct knowledge of negotiations), that alternative benefit schedules could have been negotiated for the simple life insurance benefit with no limitation on age that would be cost neutral to the Employer. He suggested one hypothetical example of how this could have been done would be a schedule providing for life insurance of 185% (rather than 200%) of annual salary for all members regardless of age. His view was that an insurance company would have been prepared to underwrite such a policy and the cost would be equal to the current schedule of 200% of annual salary for sub 65 workers and $5000 for 65 plus workers. Providing the same level of coverage of life insurance for all workers without age limit would both increase basic rates for coverage and also expose the entire group of employees to adverse experience rate increases and increase the taxable benefit attributed to sub 65 employees based on the increased premiums paid by the Employer. He also felt that if the parties were to extend life insurance benefits for active employees 65 and older the cost per $1000 of AD&D coverage (which he described as double indemnity coverage) should increase only minimally for such workers. This is due in part to the fact that accidental death increases with aging but at a rate that is far less than the increase in death rates from all causes.

Typical LTD policies provide income replacement benefits to an employee who is qualifying disabled by a non occupational injury or illness beyond a STD qualifying period (often 90 to 120 days). To be qualifying disabled usually requires that the employee be unable to perform the key functions of his own job for an initial period (usually 2 years) and thereafter unable to perform the key functions of any job for which the employee has the education, training and experience. The

level of replaced income is a percentage of her pre-disability salary (70% in this case). Typically LTD policies require that income from all sources during disability do not exceed 85% of regular take home pay and all other income paid to disabled employees related to employment is offset against LTD. These measures are required by insurance companies to avoid over-insurance and provide incentive to workers to recover and return to work.

Mr Norton noted that LTD policies have long been designed to terminate all payments upon attaining a limiting age, almost always being at or about age 65 when retirement at an unreduced pension is available. In this case with a 119 day waiting period, eligibility for LTD benefits that cease at age 65 will effectively cease at age 64 years and 8 months. Mr Norton's opinion was that insurance companies are likely not willing to underwrite LTD benefits that provide eligibility or payments beyond age 65, or materially beyond age 65, and additional costs would apply if any such extension were available. Mr Norton noted that the *Workplace Safety and Insurance Act* (WSIA) provides that workers cease to be eligible for compensation for loss of future earnings when the worker reaches 65 years of age. At that age compensation for loss of earnings is replaced by benefits for loss of retirement income. This system is consistent with the observations of Paul Weiler in his 1986 Report to the Minister of Labour for Ontario entitled, "Permanent Partial Disability: Alternate Model for Compensation", where he stated:

> ... one could not justify paying such a wage loss benefit for the entire life of the injured worker, because typically he would not actually lose wages for the rest of his life. The vast majority of non-disabled workers retire when they reach a certain age - typically at or around age 65, which is when most public and private pension plans start to pay retirement benefits. As of that time, then, the loss of wages benefit would come to an end, to be replaced by a loss of pension benefits which the WCB would make up the retirement income lost by workers as a result of their disability.

Mr Norton expressed the view that those comments remain true today, and noted that the tort system uses actuarial principles to quantify the present value of future income losses that only address loss of income to age 65.

Mr Norton testified that he was not aware of any significant LTD scheme in Canada in which benefits are available with out age limit. In his experience all or virtually all provide coverage only to employees who have not attained the age of 65. However he is aware of one self funded scheme that did provide for benefits for up to 5 years for employees injured between age 60 and 65 and up to age 70 for employees injured after age 65. However, meaningful data on expected rates of disability and duration of disability beyond age 65 are not available. Available statistics for workers under age 65 show disability incidence rates increase with advancing age. He noted that termination rates vary significantly by occupational group and rates of recovery decline as age advances if the impact of limiting age and pension entitlements are disregarded. For example, Canada Pension Plan Actuarial Valuation Reports show that the incidence of disability for females at age 60 is approximately 4 times the incidence of disability for female workers at age 40. Mr Norton concluded that the true incidence of disability at age 65 should be materially higher and the possibility of recovery materially lower and thus the costs of providing LTD to the older group should be materially higher than the cost of providing it to the younger employee group. Similarly, experience in the Public Service Superannuation Plan for federal civil servants showed the incidence of disability for female workers at age 55 was approximately 4 times the incidence of disability at age 40. Again he concluded that the true incidence of disability at age 65 should be materially higher and the possibility of recovery materially lower.

Mr Norton also noted that another reason why LTD policies have been designed to cease

benefit coverage and payments at age 65 is because they have been designed to integrate with pension plans whose normal retirement date is usually at or about the age of 65 (which is the case for OMERS which covers these employees). Further, he noted that any change to provide LTD benefits to active employees aged 65 or older, in the unlikely event that such benefits could be available from an insurance company, would increase the cost of benefits negotiated by the Employer and union and depending on the change could have significant cost. Mr Norton also took the view that there would be no possibility of changing the level of income replacement (i.e 70% to 50%) to try to keep the cost the same for the parties, unlike the life insurance alternate schedules suggested in his earlier testimony. His reason why alternate schemes at the same cost for LTD for 65 plus workers would not be generally available was that such benefits are payable where an employee is prevented from working solely due to injury or illness. Retirement benefits are provided from pension plans and not from LTD funds. At older ages where a member has incurred illness or injury, it may be difficult or even impossible to determine whether the worker is unable or unwilling to work solely due to disability or, at least in part, due to retirement. Mr Norton testified at length during cross examination about the difficulty of making this determination for older workers, even within an adjudication process. He insisted that the question of disability rendering someone unable to perform the duties of their work is a factual matter that becomes much harder to determine as people get older. It is simply for more difficult to ascertain for older workers who are at or near normal retirement age than for younger people. The fact that medical evidence is required does not make that determination any easier because two doctors will often provide two different opinions. He said that his opinion on this was informed by years of experience in the industry, despite the suggestion of Union counsel that the same would be true of workers who were in their mid fifties. He continued

to maintain that this became worse as the worker became older because deteriorating health worsens as age increases. He noted that having a limitation on eligibility for LTD of age 65 makes it unnecessary to make this distinction.

Mr Norton noted there was little published data on sick-leave utilization statistics but it was his opinion, based on the LTD data, that the incidence and utilization of sick days would certainly increase with advancing age. For this reason he believed there was a cost rationale for the negotiation of lower benefits for workers aged 65 and over. His opinion was that while it might be possible to negotiate an alternative schedule where sick leave benefits were the same for both groups of employees at the same cost to the Employer, the level of benefits provided to the sub 65 group of employees would need to be reduced to achieve this. For example, the parties could have negotiated an alternative schedule under which all employees only accumulate sick leave at 1.25 days per month (not 1.5 as exists now) and increase the accumulation maximum days for employees 65 and over to 119 days from 60 days at no change to cost. In his view, because the employee aged 65 or more is eligible to retire under OMERS at an unreduced pension, where such an employee is absent for 60 or more days such employee should be viewed as being retired. This is because he could see no reason why a person over the age of 65 who is no longer working and earning a salary would not want to resign and collect their pension. In Norton's opinion, the 60 day test caused by the 60 day time limit for sick leave for 65 plus employees (or any other similar bargained constraint on sick leave) replaces mandatory retirement with an objective test of retirement resulting from the inability to report to work and perform key aspects of the job for a period of 60 days.

Mr Norton also stressed the important role played by social benefits, the Old Age Security (OAS) and Canada Pension Plan (CPP), WSIB, and registered pension plans. OAS and CPP are

available to all workers at unreduced levels, at age 65, whether they are working or not. Under employment pension plans the Normal Retirement Date cannot be later than the end of the year in which the worker attains the age of 65. The worker's unreduced accrued pension is available at the normal retirement date, although it can be deferred to age 71. Both CPP and WSIB disability benefit payments cease at age 65 when retirement benefits under both schemes become payable. According to Mr Norton, although all of these social benefit programs allow employees to work beyond age 65, they are designed to presume retirement at age 65 and provide eligible employees with lifetime income during presumed or actual retirement years. In his opinion, "Providing lower death and disability benefits to active employees who are 65 or older, is different than providing "no" benefits, since other sources of funds to which employers have made significant past contributions (employers must at least match employee contributions to both CPP and OMERS) are available."

Mr Norton also expressed the opinion that members of bargaining units typically do not have homogenous needs and wants and younger employees may be more interested in cash or higher rates of pay whereas older employees may want more benefits such as life insurance, pensions or retiring allowances. Younger employees also may favour different forms of health and dental benefits than older employees. His affidavit concluded with the following paragraph:

> In this situation, the Employer and the Association negotiated a schedule of benefits for which the insured portion was known to be available from insurance corporations, and which had a determinable cost to the employer. Some alternate schedules of benefits that have no age limitation whatsoever almost certainly would not be available from insurance corporations. Some other schedules of benefits providing "more" benefits to individuals over age 65 and "less" benefits to individuals under age 65 would be available at an identical cost to the Employer. The Association presumably could have negotiated a CBA providing an alternate schedule of benefits available from an insurance corporation at an identical cost. Some other schedules of benefits providing "more" benefits to individuals over age 65 and unchanged benefits to individuals under age 65 would be available from an insurance corporation at an increased cost to the Employer; however, that was not the financial

agreement that was ratified between the Association and the Union.

On cross examination Mr Norton admitted that he had no knowledge of what actually took place during negotiations and whether in fact any alternate schedules of benefits such as those he proposed for life insurance and sick leave benefits were ever considered or discussed or were in fact made available to the Employer. However, he maintained that he knew for a fact that such alternate schemes as he proposed, without differentiation in benefits but with the same cost as those negotiated in the current agreement, would have been available and could have been costed as he proposed.

Mr Norton also acknowledged on cross that employees under the OMERS pension plan could retire without reduction in pension anytime after age 55 if they had over 30 years of service or if they could meet the ninety factor with a combined number of years of age plus service equalling 90 or more. They could also retire after age 55 with a reduced pension if they did not meet these criteria and could also continue working until and continue contributing to OMERS and not collecting pension until age 71. He also acknowledged that while the income tax legislation requires pension plans to have a normal retirement age of 65, most Canadians in fact retire earlier than that and the actual norm for retirement age among Canadians has been in the late 50's. However, his understanding is that it is in fact creeping upward although it has not reached 60 yet. In his view there could be several reasons for that increase including: people are staying healthier longer, and in many cases they are entering the work force later than they used to, in some cases due to increased educational requirements at the front end. He also agreed with the suggestion that many who continue to work past 65 will do so for financial reasons.

Mr Norton admitted that there have been statutory changes in several other countries to increase the age at which citizens become entitled to full pension benefits. In the U.S. the age of full

entitlement to social security for retirees has increased from 65 to 67. In Germany and some other European countries the age of entitlement to a full pension has gone from 65 to 67. In the United Kingdom it has been raised to 68.

Mr Norton also indicated that while OMERS has limited data on the issue, its experience thus far is that so few workers stay on past age 65 that they are not material to the actuarial valuation assumptions used to calculate pensions. This is not expected to change significantly despite the abolition of mandatory retirement.

Mr Norton confirmed that most group insurance is priced based on experience within the groups and indicated that one of the reasons he believed insurance companies would not be willing to underwrite LTD without age limitations past age 65 was the lack of reliable experience data on disability in those groups. He was then asked if such data is likely to become available after abolition of mandatory retirement and given that some insurers are now willing to offer some type of LTD coverage to age 70 as indicated by the affidavit of Mr Lewis. He replied that he was not sure there would be sufficient or meaningful data on levels of disability in older workers in the foreseeable future for several reasons. First, is the belief that there just are not expected to be that many employees who work past 65 years of age. The second is that no company is likely to provide LTD without age limits and while there may be a few companies willing to provide some extension of coverage in some form to age 70 there will not likely be meaningful data for another 10 or 15 years. In fact he described the plan Mr Lewis said Manulife is prepared to offer as not true LTD insurance but in fact an extended short term disability plan, because it offered only 5 years of coverage to employees who are disabled after age 60. However, he did admit that the plan set out in the Lewis affidavit did indicate that some form of LTD coverage to the age of 70 was available

from insurance companies, and he also indicated that he had made such a plan available to one of his clients in 2006 before the abolition of mandatory retirement. However, he said companies may be prepared to offer some type of LTD to age 70 plan for a group as large as the 1155 employees of this Employer but are not likely to offer it for a group of 32 employees such as the nurses employed by this Employer. He also admitted that when it came to LTD to the age of 70 the issue was a matter of cost, not availability, but said that after age 70 it was more likely to be a matter of availability.

On the cost of having full life insurance coverage for workers 65 or older he agreed with the suggestion that the actual increase in costs would depend on the age profile of the group and the proportions within the group of the older workers. On the cost of AD&D benefits he agreed with the suggestion that although accidental death and disability tended to increase with age there was an increased rate for young males under 30. He also agreed with the suggestion that women in child bearing years may make higher claims on extended health care benefits. On LTD experience for workers under age 65, he indicated the curve for usage of long term disability probably begins to curve upward before age 55 and keeps going up forever thereafter, albeit on a gradual basis without a particular jump at any particular age.

Mr Norton was working in the industry in 1974 when the ESA was amended to not allow any discrimination in the provision of benefits from age 18 to 65 rather than the old limits of 18 to 60 and he noted that the insurance industry responded by either offering group life insurance with waiver of premium to age 65 or they offered policies which excluded waiver of premium for all employees. He also agreed with the suggestion that the insurance industry may not like legislative changes that impact on benefit policies, but that generally it will respond and change its products in response to such changes. He also testified that the effect of allowing workers to work past age 65 would impact

on the cost of life insurance by increasing the cost approximately 10 % for every increase of one year in the average age of the employee group.

On re-direct Mr Norton indicated that he based his comments on younger and older members of bargaining units having different wants and needs on 40 years of experience dealing with employee groups and employers determining what employees wanted . He indicated that the reason the age of full pension entitlement in the US is going from 65 to 67 is for cost cutting purposes.

James Crawford Lewis, FCIA, FSA, testified on behalf of the Employer. He is currently the Assistant Vice President Strategic Initiatives-Group Benefits for the Manufacturers Life Insurance Company (Manulife). Manulife is the insurer which provides the group insurance policies at issue in this proceeding (life, AD&D and LTD). The purpose of his affidavit was to provide his analysis of the cost impact of continuing employee benefit coverage in the disputed areas after employees reached the age of 65. He obtained both of his actuarial professional designations (Fellow of the Society of Actuaries and Fellow of the Canadian Institute of Actuaries) in 2001. He has worked both as a group insurance consultant and as a group insurance actuary for an insurance company. He has worked as a consultant on the pricing and valuation of LTD programs and post retirement benefits. While working for Manulife he has been responsible for the pricing and risk selection strategy for all group benefits products. He has worked for Manulife for the past 5 years and before that was a group insurance consultant for employers while employed by Mercer Human Resource Consulting. He was not involved in the decision making by the Employer to offer reduced benefits for those who were working past age 65 and he had no role consulting or otherwise in the collective bargaining that led to the collective agreement which contains those reduced benefits

He expressed the following general opinions concerning group insurance benefits. Group

insurance tends to provide benefits to plan members and dependents when they are most needed, when death of major health events could significantly impact their lives, but their need generally reduces as people age. However, in cross examination he agreed that it depends on the individual circumstances of the employees, such as their working career, their dependents and their own particular health, as to what benefits they are likely to want and at what stage in their life. In Manulife's experience, relatively few plan sponsors have changed their plans significantly to cover employees who are over the age of 65 in the short period since mandatory retirement was abolished, and this is especially true of LTD plans. As a general matter risk usually increases with age and this means there is a cost, which can be significant, to offer benefits beyond age 65. As a means of offsetting the increased costs, most plan sponsors opt for reductions in benefits to maintain cost equity. Some benefits such as LTD may be eliminated to maintain cost equity while continuing to provide other benefits that increase in cost such as extended health.

Due to the changes in risk brought on by aging, Manulife does not offer all of the products available to employees under the age of 65 to employees who are 65 or older. And some products may only be available with a change in benefits provided for employees who are 65 or older due to the risk. So for example, although group life insurance is available for employees who are 65 or older, the waiver of premium benefit available for many group life plans for workers under age 65 is generally not available for 65 plus workers without significant modifications. The required premium rate for workers in the 65-69 age group is nine times higher than the premium for plan members who are aged 45. Age 45 is very close to the linear average age for the entire group of 1,155 total employees of the Employer. Life insurance for employees of this Employer is priced on the basis of the total group, not just the ONA group of 32 nurses. The require premium rate for full

life insurance coverage is 23 times higher for workers who are in the 70-74 age group. In this case the weighted average age of ONA members under the age of 65 is 47 and the cost to insure the two grievors (over 65) is approximately 5 times higher than for members under the age of 65. This increased rate for life insurance is consistent with a Statistics Canada publication "Life Tables, Canada 2000 to 2002: females" which show that on average there are 10.26 deaths per 1000 persons at age 66 compared to 1.76 deaths per 1,000 people at age 47. AD&D is also available to 65 plus workers but the premium rate would be 25% higher than the premium rate for the same amount of insurance for current ONA members under the age of 65.

Mr Lewis also noted that although extended health benefits are not at issue in this case, because total health costs increase with age the required premium rate for plan members aged 66 is 36% higher than the premium rate for the same plan at age 47 (the weighted average age for members of ONA under the age of 65).

LTD was identified as the most challenging benefit for 65 plus employees. Although Manulife will make it available with a termination age of 70 for 65 plus workers, it will result in a 20-25% increase in the total cost of the plan if all employees are covered by LTD to the age of 70 as opposed to the standard age of 65 for termination of all benefits. Similar to Mr Norton, Lewis expressed the view that after age 65 or even 60 the lines between disability and retirement can become difficult to discern due to factors such as non-disabling health problems that commonly occur with aging. Because LTD is designed to replace income that would have been received from employment (prior to retirement) it is difficult to design an effective LTD plan for employees over the age of 65. This is because it is hard to determine when the employee intended to retire. He also expressed the view that benefit offsets for other benefits received during disability, a common feature

of LTD to avoid over-insurance, become much more complicated to administer after age 65 because the age of 65 is a trigger age for the termination of some benefits (i.e WSIB benefits or CPP disability) and the commencement of entitlement to some other payment (retirement pension benefits, CPP pension and OAS). In his view this makes it virtually impossible to accurately price for LTD benefits that continue past age 65. This, combined with the absence of data on the probability of recovery from disability that commences after age 65, provide reasons why Manulife will insist on a benefit period that ends no later than age 70 in the few cases where it allows for LTD plans that extend beyond age 65. On cross examination he admitted that to a certain extent the difficulty with drawing the line between disability and retirement could arise much earlier than 65, at age 60 or 55, if the employee became eligible to retire with full pension under OMERS at that earlier time.

Mr Lewis laid out two alternative plans that Manulife would offer to the Employer for limited post 65 LTD coverage. The first option is a two tier plan where members disabled before age 60 would be eligible for benefits to age 65 but those disabled after age 60 would be eligible for benefits for a 5 year period only which could not exceed age 70. The second option was a plan under which there was a graduated schedule with maximum benefit periods tied to the age when disability began. If the Employer was less than 60 when disability occurred benefits could extend to age 65. But if age 60 the benefit period would be 60 months, if age 61 then 48 months, if 62 then 42 months, if 63 then 36 months and so on until at age 68 benefits would only be a maximum of 15 months and if aged 69 or over the benefit period would be limited to 12 months. In addition under both plans offsets to LTD would include both actual payments received from other sources and other sources of retirement income whether or not the employee actually claimed and received payment.

Mr Lewis also prepared a breakdown in chart form of the financial impact of providing past 65 age benefit coverage. The chart shows both a comparison of the existing costs of coverage for both the sub 65 employee group and the post 65 age group and the cost of both groups if the 65 plus employees were covered under life, AD&D and a limited LTD plan with gradations as to length of coverage depending upon age at time of disability.

Current Cost per Person - Employees Under age 65

	Life	**LTD**	**AD&D**	**EHC**	**Dental**	**Total**
Monthly Cost per Employee - Current Pl.	$19	$82	$3	$186	$82	$371
Cost per Person - Employees Over Age 65						
Monthly Cost per Employee - Current Pl.	$3	$0	$0	$248	$82	$333
Monthly Cost per Employee - Modif. Pl.	$89	$89	$4	$248	$82	$512

On cross examination Mr Lewis agreed that historically there has been a relatively small number of employees who choose to work beyond age 65 in other provinces where mandatory retirement was abolished before Ontario. He also agreed that insurance companies will generally adapt to changing circumstances and market forces in providing insurance programs. And he agreed that since mandatory retirement was eliminated in Ontario there is now an interest, being expressed by certain clients, for benefit plans covering workers who are 65 or older and that interest is increasing as time goes by.

In terms of his comments on employers sometimes reducing or terminating benefits for older

workers to maintain cost equity, Mr Lewis indicated that he used cost equity to refer to the following. When looking at the total value of the benefit package provided by an employer, the cost of that package, to the extent that it is increasing with age or other factors such as family status, there might be changes to the benefits to maintain a cost level that is consistent with those of the rest of the employees. But he admitted that it would cost more to provide life insurance for employees aged 60 to 65 than it would cost to provide life insurance to the same number of employees ages 40 to 45 and to achieve true cost equity then we'd have to either reduce the life insurance for the older group or eliminate it for everyone. He further agreed that there is no magic to the number 65 in that regard other than its historical tie with mandatory retirement. He also admitted that the graph for LTD claims by age of claimant actually starts to accelerate upward at approximately 45.

Mr Lewis also confirmed that there are two main factors that go into pricing life insurance premiums for group life policies. One is the historical experience of the employees of the particular employer at issue, this being referred to as the credibility rating. The second is to use the Manulife manual rates which are applied to the group taking into account the individual characteristics in terms of age and gender and other health factors of each employee in the group. He noted that the premium cost for a member in the 65-69 age group would be 1.20 times higher than that required for a 60 year old worker. It would be an increase of 120% over the cost for the 60 year old worker. He noted that insurance premiums generally go up by approximately 10% for every one year increase in the weighted average age of the group being insured. Using the chart he provided above, Mr Lewis said extending coverage for life insurance to the two grievors would require a total increase in premium of about $2,000 per year, whether that was spread over a group of 1100 employees or 32 employees. He also agreed with the suggestion that in group insurance premiums generally the young pay for the

old and the healthy pay for the sick. And he agreed that the increase in rate for AD&D caused by adding the two grievors and raising the average age of the group across a large group of 1155 employees would result in only a very small percentage increase in the premium. For extended health and dental benefits, which are costed on a bargaining unit basis, increasing the average age of the ONA groups from 47 to 48 would increase the premium by approximately 4 or 5 %.

In cross-examination by the Attorney-General, Mr Lewis expressed the view that the biggest challenge in providing LTD to workers who are 65 or older would be the assessment of the person's suitability, ability and willingness to return to work after they have gone off due to disability. On re-direct he confirmed that lack of experience is only one reason why insurance companies may be reluctant to provide LTD coverage to 65 plus employees. The other reason is a concern on the part of insurers with the risk of abuse that can arise with regard to LTD in the absence of any limitation in the form of mandatory retirement or age limit for coverage. The companies have a concern with whether they have a measuring stick to judge a claim that is fair. Prior to the legislation ending mandatory retirement the insurers had the comfort of knowing LTD would end at age 65 and thus did not need to worry about whether the person actually would have retired early or worked to age 65 in the absence of LTD. As workers can now work past age 65 it brings about subjective questions about what is the appropriate cutoff date for LTD. Mr Lewis also expressed concerns about the murkier more complex situation with LTD offsets that arises after age 65 due to the various types of retirement income that become available to most employees upon reaching the age of 65. He said this went to the "heart of the intent of providing a disability benefit" because its original purpose is to provide some income protection to replace a portion of their income that they had while actively working. It is not intended to be a pension benefit or to provide a retirement income, so calculating

LTD setoffs can become much more complicated when the person is 65 plus and they may have aspirations to retire and have various retirement income sources available for which they may have some choice about whether or when they claim those benefits.

Mr Fred Holmes was called by the Association as an expert in group insurance benefit plans. He obtained his Bachelor's degree in Mathematics in 1972 and has worked as a consultant on group benefits insurance for numerous large employers in the manufacturing, retail, hospitality, mining and service sectors. He has also acted as a consultant for unions on these issues and is currently semi-retired but acts as a consultant and expert witness on benefit plan legal issues for the Cavalluzzo Hayes law firm. He taught disability plan design and benefits funding for Humber College from 1986 to 1993. He has also acted as an instructor on group benefits issues for Mercer Canada, Towers Perrin and Buck Consultants. He has also made numerous presentations and published articles on this subject. In his capacity as a consultant he has been in regular and frequent contact with the senior people at most of the larger insurance carriers on major industry issues or issues specific to particular carriers. However, he is not, and has never been, an actuary and has never worked directly for an insurance company. Nor has he ever been hired by an insurance company to calculate the cost or pricing of insurance policies. At the time of the hearing he was semi retired and since 2006 had been acting as a consultant on pharmaceutical issues and benefit plan legal issues for clients of the Cavalluzzo Hayes law firm.

The main theme of Mr Holmes evidence was that, in his view, the choice of age 65 as the normal retirement age for both public and private pension benefits is arbitrary. He noted that Britain, Germany and Canada all had used the age of 70 as the age of entitlement for public pension benefits at some point in the early part of the 1900's but later lowered it to age 65. It was not adopted in

Canada until the 1960's. The U.S. moved to the age of 65 for pension entitlement in 1935. However, he noted that England has recently adopted legislation to raise its state pension age to 68 gradually, from 2034 to 2046. The U.S. has moved to age 67 for citizens born in 1960 or later due to improvements in health and lifespan. Germany has moved to age 67 as the pensionable age.

Mr Holmes also relied on a 2004 CD Howe Institute report, entitled Mandatory Retirement and Older Workers: Encouraging Longer Working Lives, for the proposition that the end of mandatory retirement is unlikely to effect a significant change in the number of workers who work past age 65. It concluded that even if all workers who have expressed an interest in working past age 65 did in fact work for 3 years after age 65 it would only increase the average age of retirement by 1 to 4 months. He also pointed to another 2004 study done by two economists (M Shannon & D Grievson, Mandatory Retirement and Older Worker Employment ((2004), 37 Cdn. J of Economics) which looked at experience in Quebec and Manitoba after the abolition of mandatory retirement and found that the number of older workers that were actually constrained by mandatory retirement was quite small. This appears to be borne out by the experience of this employer where the number of employees over the age of 65 is predicted to be 2 in 2007, 5 in 2008, 4 in 2009, and 8 in 2010. This represents between 0.17% and 0.69% of all employees of the municipality.

Mr Holmes expressed the view that in his experience working with employers and unions employee benefits are very important items in collective bargaining and are viewed as very important by individual employees. He relied on a 2007 survey of 1700 group plan members which showed 93% of respondents viewed LTD as very important, 89% said STD was very important, and 82% said life insurance was very important (2007 Sanofi-Aventis Health Care Survey). He also noted that older employees who lose their employer sponsored group insurance coverage will find significantly

reduced options to replace such coverage, often at much higher prices that reflect the person's age and gender and medical condition. Short term sick leave policies are generally not available.

He acknowledged that generally the cost of providing life insurance, STD and LTD and extended health care increases with the age of the insured group but noted there is no change in the acceleration rate of increased costs at the age of 65 itself. He testified that LTD costs begin to accelerate upwards at about age 45, health costs from age 42 and STD just rises moderately with age. However, on cross examination he conceded that short term disability rises rapidly after age 45 just like life insurance costs. In addition, life insurance is more costly for males in mid-20's than in mid-30's due to a higher incidence of motor vehicle accident deaths for that group and women have higher health care costs between ages 15 and 40 due to maternity issues. However, in cross examination he conceded that the hiccup in costs for life insurance for men in their 20's is only in comparison to men in their 30's and is not higher than rates for men in their 50's or 60's.

Mr Holmes did not really disagree with the views of Mr Lewis on the availability or cost of the benefits in dispute for workers aged 65 or greater. However, he did emphasize that the cost of providing benefits like life insurance, AD& D and STD for employees 65 and older would be only marginally greater than providing it to slightly younger employees (i.e. those just under the age of 65). He also expressed the view that major carriers would be prepared to offer LTD to employees to the age of 71, noting Mr Lewis had indicated two alternatives for plans to age 70 offered by Manulife and noting that the Canadian Bar Insurance Association offered a plan covering lawyers to the age of 71. He also suggested that employers could self insure some or all of their LTD coverage to mitigate costs. Mr Holmes also expressed the view that carriers had been reluctant to offer LTD coverage to 65 plus employees due to the lack of actuarial data and suggested the industry would

adapt over time now that mandatory retirement has been abolished in most Canadian jurisdictions. He indicated that the risk of covering 65 plus employees was lessened by: (1) the fact that there tends to be high drop off in continuation of LTD payments beyond 2 years when disabled employees come under close scrutiny to prove they are unable to perform any occupation; (2) the fact that LTD benefits are subject to offsets and maximum limits for income from all sources.

Mr Holmes had reviewed the documents setting out the financial arrangements between the Employer and Manulife (exh P of his affidavit) and renewal analysis prepared by Manulife for the Employer (exh O of affidavit). He noted that the extended health and dental benefits policies are refund accounted, which means the Employer shares in the financial results of the plan, whereas the basic life and optional life, LTD and AD&D are not refund accounted. For the latter plans there is no refund of surpluses or recovery of deficits at the end of the year. However, despite this fact Holmes said it is not accurate to say that this means they are underwritten on a fully insured basis. This is because the premium rating process for life insurance is increasingly based on the Employer's own death claims from year to year, until the credibility factor will soon reach 100%, so that the Employer premium rate will become the amount necessary to cover the average annual death claims payout plus insurer expenses. When this state exists, the number of working employees aged 65 or older who do not die will not negatively affect the renewal premium rate. He gave a similar view of the LTD premiums, given that they are increasingly become totally based on the experience of the Employer, rather than rates taken from the Manulife manual. In any event, he noted that the administration of both plans and calculation of premiums based on experience is done in a commingled fashion taking into account all 1155 employees of the Employer and not based on smaller groups like the ONA bargaining unit. He stated that given the size of this larger group, the

additions of two females over age 65 would not cause a material increase in the renewal premium rates for the entire group.

Mr Holmes accepted that extending coverage for LTD to employees at age 65 or over could place more emphasis on claims management for both insurers and employers, but discounted its significance by stating that these claims management issues do not change suddenly at age 65 and noting that there is a trend towards increasingly robust gerontological health. Finally, he noted that the total employee population of this employer is relatively young as evidenced by the low monthly group insurance premium rate, which was calculated on a commingled basis.

In cross examination Mr Holmes clarified that when he referred to the choice of age 65 as the normal retirement age he meant that it had been chosen by governments as the age at which persons would be entitled to a full pension from government and then the private sector chose to integrate its programs using age 65 as well. All pension plans must have a normal retirement date and that date cannot be later than one year after the attainment of age 65 according to the Pension Benefits Act. Retiring before the normal retirement date will result in reduced pension. However, employers and unions can agree to an earlier normal retirement for entitlement to full pension and many do so. However he acknowledged that governments generally use age 65 as a triggering date for when a variety of government benefits kick in because they are trying to integrate with the maximum normal retirement date set out in the *Pension Benefits Act*. Mr Holmes referred to it several times as "a line in the sand" which was something that was needed for the operation of various pension and benefit programs. He further admitted that having a normal retirement age is a benefit and protection for employees in a pension plan because it guarantees they will be entitled to a full pension if they work to the normal retirement age of 65 and provides a necessary basis for calculating pension entitlement

for those who retire prior to that age. He also agreed that raising the normal retirement age would delay entitlement to full pensions and is not something that unions are likely to lobby for in manufacturing and blue collar sectors. Mr Holmes also stated that although he believes the current normal retirement age is simply an arbitrary number he was not advocating raising or lowering that age and he recognized the necessity of having such an age specified in legislation for the purpose of administering pension plans and integrating other benefit entitlements with pension entitlements. He also acknowledged that having the normal retirement age raised by three years, as is the plan for the U.K. by 2046, or two years as is mandated in the U.S. to age 67, is not advantageous for the average worker because it would mean they have to wait for three or two more years before they get their state pension. And if they retire at age 65 after the normal retirement age is raised to 67 or 68 they will get a significantly reduced pension. Mr Holmes indicated that the reason for raising it in England is due to the increased pension costs to government that result from the increased life expectancy of the general population. He said he had discussed the reasons for the change in the U.S. with actuaries who he was working with in the past and they indicated that the bottom line reason for the change was to save the federal government money as it was facing a long term deficit in funding its Social Security program. These views are also confirmed in an article by Robert Brown, entitled Economic Security in an Aging Population (exh M of affidavit of Mr Holmes).

In cross examination Mr Holmes acknowledged that one of the authorities he relied on in his affidavit, Jonathan Kesselman, Mandatory Retirement and Older Workers: Encouraging Longer Working Life (2004, exh G), supported the need for flexibility and allowing for lesser benefits for workers over age 65 in the area of life insurance and LTD if contractual mandatory retirement were to be abolished, as was done by Ontario in 2006. The article noted that this was done in Manitoba

where the Human Rights Commission has recognized the difficulty of assessing when an older worker on disability benefits would have retired and allows for the termination of LTD benefits when a worker turns age 65 unless there are grounds for expecting recovery and a return to work. Holmes agreed with Kesselman's statement that increasing the age for Old Age Security entitlement by two years would both reduce the cost pressures on government and increase the incentives for continuing to work past 65. He also agreed that while some employers and workers have agreed to lower normal retirement dates the majority of pension plans use age 65 as the normal retirement age, although it would be less than 90 percent. But Mr Holmes took no position on whether the normal retirement age for full public pension benefits should be increased or would be a reasonable adaptation to the rising longevity and improved health of older workers.

Mr Holmes at first disagreed with Kesselman's conclusion that human rights codes should allow differential treatment for older workers in areas such as LTD and pension benefits. However, he then stated that he would have no problem with employers and unions negotiating different disability and life insurance benefits for workers aged 65 or older. When he was asked more directly if the union and employer should have the flexibility to make different arrangements for people over 65 because of the additional cost of insurance benefits and disability benefits for those people, he said he accepted the collective agreement for what it is and would do what was necessary to have it implemented and priced and funded on a go forward basis. He had no views or predetermined perspective on what employers and unions should be negotiating.

Mr Holmes referred in his affidavit to a statement in the 2004 C.D. Howe Institute Report that it made little sense that the average retirement ages were decreasing at the same time that life spans have been rising and the health status of older workers was improving. When it was suggested

to him that this made sense if one considered that early retirement was generally attractive to workers and was something that unions bargained for, he refused to agree but did admit that workers in the manufacturing sector and blue collar occupations that were physically demanding seemed to bargain for early retirement. He also admitted that early retirement was sought after by many white collar employees in his experience and suggested that may be due to reorganization and burnout.

Mr Holmes reluctantly agreed with the 1986 statement by Paul Weiler (relied upon by Mr Norton at paragraph 47 of his affidavit) that one cannot justify paying wage loss benefits for disability past age 65 because typically they do not lose wages for their entire life because normally they retire around age 65 when most public and private pensions plans start to pay retirement benefits. He agreed that the vast majority of workers, at least two thirds, retire before age 65 and therefore to continue paying them LTD benefits past age 65 would mean they would be receiving income placement for longer than they would have worked. But he nevertheless maintained the position that they should be able to continue receiving LTD payments until they die, despite the fact no such policy was available in the market. However, he did agree that a person who had worked 20 years before retiring at age 70 would get a pension of approximately 40% of his best year's salary while if he went on LTD at age 70 with no age limit for LTD he would get 70% of his wages until he died (from s combination of LTD and other pension or benefit payments that are offset from LTD) and thus would get a windfall from being injured in their 70th year. Holmes further agreed that in comparing the two scenarios there clearly would be a financial incentive as such a worker became advanced in age to claim that they are disabled and unable to work rather than retire.

Mr Holmes admitted that he had no Canadian data to support his prediction at paragraph 49 of his affidavit that the industry would adjust over time after mandatory retirement was abolished so

that LTD and other benefits would be extended to employees who work past age 65 as part of insurance group policies. His only precedent for this was the amendment to the *Employment Standards Act* in the early 1970s causing the waiver of premium at age 60 to be raised to age 65. But he agreed that he had no data from Manitoba where mandatory retirement was abolished some time ago to indicate that LTD had been made available by insurers past age 65. He could only remember three examples of companies taking out such extended policies to cover a handful of individual senior executives in very unique situations.

In terms of the rising costs of providing particular benefits to employees, Mr Holmes relied heavily on an article by Robert Brown entitled, Economic Security in and Aging Population: Implications for the Design and Marketing of Group Products ((1994), 46 Transactions of Society of Actuaries 9) and the chart at page 24 of that article. He conceded that this chart showed that the cost of life insurance for someone who is 65 is 14 to 15 times higher than the cost for a person who is 37. He also conceded that although the chart showed the cost of LTD decreasing beginning at about age 58, the reason was that coverage ceased at age 65 so that despite the fact incidents of LTD claims may increase beyond that age the number of payments for persons who go on LTD after age 57 or 58 goes down because coverage ends at age 65. He also agreed that if LTD coverage did not cease at age 65 then the cost of LTD would continue to go up with age at an accelerated rate similar to life insurance.

Mr Holmes also conceded in cross examination that the offset for pension benefits from LTD payments is quite different from other offsets in that pension benefits are not directly offset against LTD payments but rather are offset only to the extent necessary to prevent the employee on LTD from receiving more than 85% of their pre disability earnings. However, despite the fact he

conceded that LTD was insurance against the loss of income for the period in which the employee would have been working and earning income from work, he refused to concede that this meant that the plan needs some terminal age for coverage to enable providers to develop an LTD plan and price the product according to the potential loss to be covered. He agreed that this may be true for smaller employers with no more than 500 employees to insure but suggested it was not necessary to have a terminal date for large employers where the risks are shared between the insurance company and the employer. This is because in a large group insurance context there is ongoing recalibration of the pricing structure every 12 months based on experience. However, he did eventually agree that you need a line in the sand to be able to calculate a good number in terms of the pricing and funding of the benefit.

In redirect Mr Holmes clarified his reference to the impact that legislative changes in the 1970's had on the insurance industry. Prior to amendments to the *Human Rights Code* in the 1970's group life insurance programs generally provided for a waiver of premium benefit that was terminated for employees when they reached age 60. Amendments to the Code to prevent age discrimination affecting the ages of 18 to 65 resulted in amendments to the *Employment Standards Act* that prohibited discrimination against those aged 18 to 65 in the benefit plans provided to employees. So the waiver of premium benefit had to be extended to age 65 to comply with the amendments. This caused a pricing quandary for insurance company actuaries because they did not have any data to allow them to properly price the benefit up to age 65. They responded by coming out with an overstated price to protect the interests of carriers but after ten years of experience they were able to make downward adjustments to the pricing structure based on the data. He expressed the view that a similar period of adjustment would occur if the age 65 limit on benefit programs were

lifted.

Holmes also noted that a 63 year old employee with 25 years experience could retire early under the OMERS pension and collect a pension that would be 50% of his best salary years minus the percentage penalty imposed for leaving 2 years early but that would be less than the 70% he could collect if he was on LTD instead. He also confirmed that the unique Manitoba situations he referred to in cross were done a cost plus basis which is used only infrequently on a one off basis to handle a particular situation. It involves the employer reimbursing the insurer for the cost of what was paid out on the claim plus an administrative fee. Finally, he explained that LTD is somewhat nebulous as a benefit in terms of its pricing structure because there is a perceived amount of subjectiveness as to whether claimants are really disabled or could perform some jobs. He noted a tendency in tight economies for jobs that a worker might be able to perform to not be available causing some claimants to malinger and stay on claim longer than expected, leading to the need for recalibration to make adjustments in price to deal with unexpected increases in duration. Incidents of disablement also tend to go up in tight economy. This renders it difficult for actuaries to predict cost with accuracy so they do re-calibrations on an annual basis using a four or five year rolling average of past experience to predict the future. The industry norm is that group insurance policies are renewed annually. The use of a four or five year rolling average allows for a smoothing of increases and decreases in pricing. Pricing is based both on the number and duration of claims over the previous four or five years. In making predictions for the future with respect to existing LTD claims they now use a termination age of 65 but make discounts based on the probability of recovery, death and interest rates over the life of the claim. The companies are required to create a reserve fund for every disabled person that is equal to the present value of future payments discounted for recovery,

mortality and interest rates. That same calculation could be done if the end of the entitlement was age 71 instead of age 65.

Relevant Collective Agreement Provisions

The previous collective agreement, dated 1 February 2006, did not draw any distinctions on the basis of age with respect to benefits. In particular, it provided the same life insurance, accidental death and dismemberment ("AD&D"), long-term disability ("LTD") and extended sick leave benefits to all full-time workers, regardless of age. The current Collective Agreement contains a new "Post 65 Benefits" provision which is at the heart of the dispute. Article 13.11 establishes that, unlike their younger colleagues, nurses age 65 and over are entitled to lesser benefits. In particular, nurses, upon turning 65, have their life insurance reduced to $5,000, their AD&D and LTD benefits eliminated, and their accumulation of sick leave capped at 60 days:

> **Post 65 Benefits**: It is agreed and understood that once an employee turns 65, they will be entitled to the following benefits:
>
> > i) **Life insurance:** The Employer shall provide a $5,000 paid up life insurance policy for all Employees upon turning 65 and coverage under Article 13.05 of the collective agreement will cease. ii) **Extended Health Care** To continue as per Article 13.03 of the collective agreement.
> >
> > iii) **Dental Care:** To Continue as per Article 13.04 of the collective agreement.
> >
> > iv) **Long Term Disability:** Coverage will cease at 65.
> >
> > v) **Accidental Death and Dismemberment (AD&D):** Coverage will cease at 65.
> >
> > vi) **Extended Sick Leave:** Maximum accumulation of 60 days in sick bank as per 13.08(b) of the collective agreement.

Extended health care and dental care are available to nurses age 65 and over on the same

basis as they are for nurses under 65.

The effect of these provisions is that upon turning 65 a nurse:

- loses existing life insurance coverage which is replaced by a significantly smaller benefit ($5000 versus 2 times annual salary (= approx. $140,000);

- loses LTD coverage;

- loses AD&D insurance coverage; and

- loses any banked sick days over 60 days. As a result, a nurse aged 65+ is entitled to fewer days of paid leave in the event she gets sick - she can claim a maximum of 60 days paid sick leave rather than the 119 days available to other nurses. In addition, if she already has 60 days of banked sick leave, she does not earn any further days until she uses some of those banked days. Once she uses some sick time, an older nurse will be in a more precarious position than younger nurses because she will have lost any cushion that would otherwise exist under Article 13.08(b) where for younger nurses there is no ceiling on the number of unused sick days that can be accrued for future use.

Legislative History

The *Ending Mandatory Retirement Statute Law Amendment Act* (2005- Bill 211) came into effect on December 12, 2006. Prior to Bill 211, there was no legislation that prescribed mandatory retirement at age 65 for workers generally. But mandatory retirement policies - and the termination of workplace benefits - at age 65 were lawful because the *Human Rights Code*, R.S.O. 1990, c. H. 19 only protected workers from age-based discrimination when workers were between the ages of 18 and 64. For employment purposes only, prior to December 12, 2006, the Code defined "age" as meaning "an age that is eighteen years or more and less than sixty-five years". Because age-based distinctions were permitted at age 65, prior to Bill 211 most benefit plans terminated benefits at age 65. Bill 211 changed the definition of age in the *Human Rights Code* to remove the upper limit so that "age" is now defined as "an age that is 18 years or more". As a result, mandatory retirement at

age 65 is no longer lawful for most employees and workplace rules, practices and policies that make distinctions based on age (18 or older) may be subject to complaints of age discrimination under the Code.

While Bill 211 extended the right to equality in employment to older workers, it carved out an exception in the area of benefit plans so that some distinctions based on age are still permissible. Bill 211 maintained the status quo under *ESA* Regulation 286/01 which permits an employee benefit, pension, superannuation or group insurance plan or fund to make distinctions based on age where those distinctions are made on an actuarial basis. Bill 211 amended s. 25 of the *Human Rights Code* to provide as follows:

> (2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the Employment Standards Act, *2000* and the regulations thereunder.
>
> (2.2) Subsection (2.1) applies whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer.
>
> (2.3) For greater certainty, subsections (2) and (2.1) apply whether or not "age" ... in the Employment Standards Act, *2000* or regulations under it have the same meaning as those terms have in this Act.

Section 44(1) of the ESA sets out a general anti-discrimination rule under which "except as prescribed" in the regulations, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats employees differently because of age:

> 44. (1) Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex or marital status of employees:
>
> 1. Employees.
> 2. Beneficiaries.
> 3. Survivors.

4. Dependant

Permissible age-based distinctions are prescribed under sections 7 and 8 in the Regulation on Benefit Plans, O.Reg. 286/01 (the "Regulation").

> 7. The prohibition in subsection 44 (1) of the Act does not apply to,
>
> (a) a differentiation, made on an actuarial basis because of an employee's age, in benefits or contributions under a voluntary employee-pay-all life insurance plan; and
>
> (b) a differentiation, made on an actuarial basis because of an employee's age and in order to provide equal benefits under the plan, in an employer's contributions to a life insurance plan.
>
> 8. The prohibition in subsection 44 (1) of the Act does not apply to,
>
> (a) a differentiation, made on an actuarial basis because of an employee's age or sex, in the rate of contributions of an employee to a voluntary employee-pay-all short or long-term disability benefit plan; and
>
> (b) a differentiation, made on an actuarial basis because of an employee's age or sex and in order to provide equal benefits under the plan, in the rate of contributions of an employer to a short or long-term disability benefit plan.

More importantly, section 1 of the Regulation under the ESA defines age as "any age 18 years or more and less than 65 years". Section 25(2.3) of the *Human Rights Code* provides that this definition will not constitute a violation of the right to equality in employment even though it is inconsistent with the definition of age in the *Code* itself. In effect, employers are not prohibited from providing lesser benefits to employees once they reach age 65, and workplace benefit plans that discriminate against these workers cannot be challenged under the *Human Rights Code.*

When introducing Bill 211, the government stated its objective as being to end mandatory retirement and remove discrimination in the workplace against older workers "while not undermining existing pension, benefit and early retirement rights." In its documents released to explain Bill 211,

the government stated that "[tlhe status quo with respect to disability plans, life insurance plans, and health benefit plans will be maintained. The provision of benefits to workers aged 65 and older will continue to be at the employer's discretion." The government pointed out that under the ESA "employers are prohibited from discriminating on the basis of age in providing benefits to employees aged 18 to 64. This provision will remain in place." However the government also noted that "nothing in the legislation prevents employers from providing benefits to employees aged 65 and more." (Statement of the Minister of Labour to the Legislature introducing Bill 211 (7 June 2005), Tab 6 UBD vol. 3; and Ontario Ministry of Labour, *FAQ: Mandatory Retirement* (12 December 2005 update), Tab 4 UBD vol. 3).

Union Argument

The Union submits that sections 25 of the *Human Rights Code* and the definition of age in the ESA and its Regulation on *Benefit Plans* are unconstitutionally under inclusive in failing to protect workers aged 65 and over from age-based discrimination with respect to their benefits. The Union argues that these provisions discriminate against older workers by denying them human rights protections against employer discrimination with respect to their benefits. The effect of these provisions is to sanction the provision of lesser benefits, or no benefits at all, to older workers on the basis of their age. These benefits represent an important form of compensation which contribute to the physical, emotional and financial well-being of older workers. The Union asserts that the denial of these benefits to older workers undermines the income, health and job security of an already vulnerable group of workers. This differential treatment imposes prejudicial burdens on older workers that are not imposed on others and perpetuates and reinforces their vulnerability in the

workplace.

Second, the Union submits that the impugned laws' violations of s. 15 are not demonstrably justified as reasonable limits under s. 1 of the *Charter.* It argued that the legislation does not minimally impair the s. 15 *Charter* rights of older workers. The blanket exclusion of workers aged 65 and over from protection against benefits discrimination cannot be viewed as minimally impairing. Nor can the negligible salutary effects of the impugned laws be said to outweigh the significant detrimental impacts on the rights and material security and well-being of older workers. These violations cannot be justified under s. 1 and the impugned provisions are, as a result, unconstitutional and of no force and effect for the purposes of this arbitration.

Third, the Union argues that articles 13.11 and 13.08(b) of the collective agreement are in violation of both s. 15 of the *Charter* and s. 5 of the *Human Rights Code* by providing lesser compensation to workers over the age of 64. Under s. 54 of the *Labour Relations Act, 1995*, parties to a collective agreement cannot contract away those rights of individual employees protected by the *Charter* and *Human Rights Code*. The Employer in this case, as a municipality, comes within the meaning of "government" under s. 32 of the *Charter* and the provisions of the collective agreement must therefore comply with the *Charter*. Therefore, the Union asserts that, for the same reasons that the impugned *Human Rights Code* and ESA provisions are unjustifiable violations of s. 15 of the *Charter*, the impugned benefits provisions under the collective agreement must also be declared unconstitutional, contrary to s. 15, and of no force and effect for the purposes of this arbitration.

In the alternative, the Union submits that, even if I find the impugned legislation does not violate the *Charter*, the collective agreement still violates s. 5 of the *Human Rights Code* by providing, in effect, lesser compensation to workers who are 65 or older. The discriminatory

compensation of older workers cannot be justified on the basis of a *bona fide* occupational requirement. The cost of providing equal compensation - in particular, the cost of providing the same benefits to the two grievors which are currently provided to younger workers for the same work - does not constitute undue hardship for the Employer.

Attorney-General's Argument.

The Attorney-General began its submissions by referencing the Supreme Court of Canada's decision in *McKinney v University of Guelph*, [1990] 3 SCR 229, in which the Court held that *Human Rights Code* provisions limiting protection for age discrimination in employment to the ages of 18 to 64, and thereby permitting employers and unions to negotiate mandatory retirement at age 65, was not unconstitutional. That decision also found that the freedom of employers and employees to determine terms and conditions of employment through a process of bargaining is a very desirable goal in a free society and an important governmental objective. The Attorney-General further noted that the SCC has since recognized collective bargaining is a fundamental freedom protected under s. 2(d) in the *Charter* in the *Health Services and Support -Facilities Subsector Bargaining Association v British Columbia*, [2007] 2 SCR 391. It argues that the impugned 2006 amendments, by prohibiting mandatory retirement but permitting distinctions on the basis of age 65 to be negotiated freely with respect to employee benefits and pensions, have simply balanced the interests that some individuals may have in working past age 64, with the recognition that employee benefits and group insurance plans may be unavailable, or available only with significantly increased costs, for persons aged 65 and older. The Attorney-General thus submitted that these provisions encourage free collective bargaining in accordance with s. 2(d) of the *Charter* and do nor perpetuate prejudice,

disadvantage or stereotypes and therefore are not discriminatory in violation of s. 15.

In the alternative the Attorney-General submits that if these provisions create a violation of s. 15 they are nevertheless a reasonable limit on equality rights because they balance the desire of some individuals to work past age 65 with the desirability of allowing employers and employees the freedom to bargain their own terms of employment in the post Bill 211 regime.

Employer Argument

The Employer relied on the arguments of the Attorney-General on the issues of whether the impugned legislation under the *ESA* and the *Human Rights Code* violate section 15 and if so constitute reasonable limits under s. 1 of the *Charter*. It presented argument on the issues of whether the collective agreement provisions providing for lesser benefits for workers aged 65 or older violate section 5 of the *Human Rights Code* or section 15 of the *Charter.*

On the first issue, the Employer noted that the effect of the relevant provisions in s. 25 of the Code, s. 44 of the ESA, and Regulation 286, is that employers are not prohibited from providing lesser benefits to employees once they reach the age of 65, and the workplace benefit plans that provide for different benefits for these workers cannot be challenged under the *Human Rights Code*. It submitted that because the challenged benefit provisions in the collective agreement do not treat persons between ages 18 and 64 inclusive differently, they do comply with Regulation 286 under the ESA, and do not violate the *Human Rights Code*. It submits that one cannot interpret section 5 of the Code without regard to the amendments to section 25 of the Code. The clear wording and intent of section 25 can only mean that there is no prima facie violation of s. 5 of the Code. Thus there is no issue of accommodation or undue hardship to be addressed. In the Employer's view, section 25

provides a complete defence to any claim of violation of section 5 due to differential treatment under a benefit plan.

On the issue of whether the agreement violates the *Charter*, the Employer acknowledges that the *Charter* applies to the Employer and that the collective agreement must comply with the *Charter*. It also admits that the agreement provisions on benefits subject the grievors to differential treatment based on the enumerated ground of age. However, it argues that differential treatment or distinctions do not constitute discrimination contrary to s. 15 of the *Charter* unless they have the effect of perpetuating group disadvantage and prejudice or they impose disadvantage on the basis of stereotyping. The Employer submitted that this issue must be addressed on the contextual criteria considered relevant by the Supreme Court of Canada: pre-existing disadvantage or stereotyping; the relationship between the grounds and the claimant's characteristics or circumstances; the ameliorative purpose or effect of the provision; and the nature of the interest affected. It also argued that the contextual circumstance of the agreement being negotiated in a process of free collective bargaining must also be considered in deciding whether it was discriminatory. The Employer submitted that when the distinctions concerning benefits were looked at in the context of all these factors, and taking into account the differences between age and other enumerated grounds in the *Charter*, the distinctions made in the benefit clauses in the agreement do not constitute discrimination contrary to section 15. Further, it submitted that even if I should find a violation of s. 15, the collective agreement provisions constituted a reasonable and justified limit under section 1 of the *Charter*, particularly when one looked at the prior jurisprudence of the Supreme Court of Canada on mandatory retirement in a collective bargaining context *(McKinney v University of Guelph*, *supra*; *Dickason v University of Alberta, supra*). In this respect it noted that the parties did

not remove all benefit coverage for employees aged 65 or more, and chose to leave benefits for which the cost was not so directly affected by age in place.

Issues

The issues to be addressed to resolve this grievance are as follows:

(1) Do subsections 25 (2.1-2.3) of the *Human Rights Code* and the definition of age under the *Employment Standards Act, 2000* and its *Benefit Plans* Regulation, which exclude workers over the age of 64 from protection from age discrimination with respect to employer-sponsored benefits, violate the right under s. 15 of the *Charter* to equal protection and equal benefit of the law?

(2) If the answer to question (1) is positive, does the violation of s. 15 constitute a reasonable limit that is demonstrably justifiable under s. 1 of the *Charter*?

(3) Do articles 13.11 and 13.08(b) of the collective agreement, which provide for lesser employer-sponsored benefits for workers who are 65 or older, violate s. 15 of the *Charter* and if so are they demonstrably justifiable as reasonable limits under s. 1 of the *Charter*?

(4) Notwithstanding the provisions of subsections 25 (2.1-2.3) of the *Human Rights Code* and the definition of age under the *Employment Standards Act, 2000* and its *Benefit Plans* Regulation, do articles 13.11 and 13.08(b) of the collective agreement violate s. 5 of the *Human Rights Code*.

Decision

(1) Does the Impugned Legislation Violate s. 15?

There is little disagreement between the parties on the law that applies to this issue. Rather their disagreement arises from differences in the conclusions arrived at when the tests for discrimination derived from the case law under s. 15 is applied to these legislative amendments.

Section 15(1) of the *Charter* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The parties all argued that Section 15 must be interpreted in a purposive and contextual manner in order to permit the realization of the provision's strong remedial purpose. In *Law v. Canada (Minister of Employment and Immigration)*, [1999]1 S.C.R. 497 at para. 39, the purpose of s. 15 was identified as "remedying such ills as prejudice, stereotyping, and historical disadvantage." More recently, in *R v Kapp*, [2008] 2 SCR 483, the Court identified the central concern of the section in a very similar fashion as "combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping" (at para 24). It went on to assert that the focus of the provision is on preventing governments from "making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice, or impose disadvantage on the basis of stereotyping" (at para 25). Finally, in *Kapp* the Court also reaffirmed its commitment to the vision of substantive equality under s. 15 first adopted in *Andrews v. Law Society of B. C,* [1989] 1 SCR 143, where it stated, "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (at page 171). And further borrowing from *Andrews*, "... the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another" (at p. 165) (para 15 of *Kapp*).

In *Kapp* the Supreme Court also provided a thorough summary and analysis of the tests for violation of s. 15(1) that had been applied in its decisions from *Andrews* to *Kapp*, and concluded that the decision in *Law* had not really intended to add a third criterion of an 'affront to human dignity'

to the two part test developed originally in *Andrews*. It confirmed that the test for violation of s. 15(1) simply requires an analysis of the following two questions: (1) does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In this case there is no doubt that the first criterion of the test for violation of s. 15 is met. The impugned legislation creates a direct or express distinction based on the enumerated ground of age. The combination of the ESA Regulation and s. 25 (2.1) to (2.3) of the *Human Rights Code* clearly permits distinctions to be made in the provision of employer sponsored benefits for workers who are over 64 years of age. This conclusion on the first part of the test was not seriously disputed by the Employer or the Intervenor, although the Attorney-General asked me consider that distinctions based on age were somehow different or less likely to be discriminatory than distinctions made on other enumerated grounds. While I believe that the differences between age and other enumerated grounds are important to consider later in the piece, particularly in the section 1 analysis, I do not think they can change the outcome on this part of the test for discrimination.

When we move to the second part of the test, there is much more debate, for as the cases discussed above have made clear, not all distinctions on an enumerated ground constitute discrimination. To warrant that finding, a distinction must have the effect of perpetuating group disadvantage and prejudice or imposing disadvantage on the basis of stereotyping. To determine whether a legislative distinction will have these negative effects, a contextual analysis of the distinction must be undertaken. The Supreme Court has put forward four contextual factors that can be helpful, where they are relevant to the case at hand, to determine whether the law in question is

discriminatory: whether the distinction reflects and reinforces a pre-existing disadvantage, stereotyping and prejudice; the relationship between the grounds of discrimination or benefit claimed and the claimant's actual needs, capacity or circumstances; the ameliorative purpose or effect of the provision and whether the persons excluded are more advantaged than those included; and the nature of the interest affected. In addition, the Court has noted that other contextual factors may be relevant to a particular case (*Law*, supra, at para 62, and *Kapp*, supra, at para 23). Both the Employer and the Attorney-General have urged me to consider the following as important contextual factors: the impugned collective agreement provision was part of a freely negotiated collective agreement; and the fact that the Supreme Court has recognized the right of employees to bargain collectively as a component of the fundamental freedom of association under s. 2(d) of the *Charter*.

Despite very strong arguments presented by the Employer and Intervenor to the contrary, I have concluded that the impugned legislation is discriminatory in that it creates a disadvantage by perpetuating a stereotype or prejudice. This is revealed when the contextual factors mentioned above are considered. First the challenged provisions perpetuates a pre-existing disadvantage in that the denial of the benefit of protection against discrimination in the provision of employer benefit programs is denied to the same age group that was historically denied protection from mandatory retirement under the Code prior to the December 2006 amendments. While the 2006 amendments brought about the end of mandatory retirement, the group of workers identified by the age of 65 or greater had their previous disadvantage of denial of protection against discrimination in acquiring or maintaining employment on the basis of age replaced by a different disadvantage - the denial of protection under the Code from discrimination in the provision of employer sponsored benefits. The previous legislative disadvantage was recognized to be discriminatory in contravention of s. 15 (1)

in *McKinney v University of Guelph*, [1990] 3 SCR 229 (hereinafter *McKinney*), although it was upheld as a reasonable limit under s. 1. As is discussed below, there may be valid reasons for the legislature's choice of the same age limits for the cutoff from equal protection for benefits entitlement as the limits used previously for protection from age discrimination in employment, but this does not in any way alter the fact that this distinction perpetuates, at least in part, a pre-existing disadvantage. As the Union submitted, it perpetuates the notion that older workers are less valuable members of society, because it means that in effect workers who are aged 65 or older can be paid less compensation for the same work as younger workers.

Second, while there may be some relationship between the grounds of discrimination or benefit claimed and the claimant's actual needs, capacity or circumstances, there is not a sufficient correspondence between the two to render the distinction non-discriminatory. I acknowledge the arguments of the Employer and the Intervenor that the age chosen by the legislature corresponds to a long standing tradition of retirement at or before that age and the availability of a wide variety of income and benefits from other sources at that age, even for those who may choose to continue working. I also acknowledge that certain types of benefits are very age related in terms of the rising costs associated with older beneficiaries and a steeper rise in costs when they attain ages of 60 or 65 or older (i.e. life insurance and LTD). As well, as at least one expert testified, it may often be the case that some benefits, like life insurance, are less important to workers at the age of 65 or older because they have raised their families and no longer have a long list of dependents who have to be cared for if they die or become unable to work due to serious injury.

However, the legislative distinction at issue in this case is problematic on this contextual factor for a number of reasons. First and foremost, it is not limited to denial from protection for benefit programs that are closely related to age in terms of the cost of the benefit or the need for the benefit. It is an all encompassing exclusion, applying to all benefits, some of which will have no significant age relatedness in terms of cost or employee needs. Also, as the Union ably demonstrated through the testimony of the two grievors, many of the workers who choose to work past age 64 will do so because they need to do so to ensure the ongoing economic security of themselves and their loved ones. This may be particularly the case for women who have entered or returned to the workforce later in life after raising a family and do not have significant pension entitlements waiting for them upon retirement. For these workers, the loss or reduction of benefits like LTD, sick leave and life insurance may have an even greater impact than on younger workers because they may be subject to more health problems associated with aging and may find such benefits are not available to them if they seek them as individuals outside of a group insurance plan.

Third, the fact that the complete legislative package of which the challenged provisions were a part had a broader ameliorative purpose, to protect the right of older workers to choose to continue to work past age 65, is not sufficient to conclude that the impugned legislation is not discriminatory. The broader ameliorative purpose, while it may be relevant to some of the elements of the section 1 analysis, simply cannot overcome the conclusion that results from the consideration of the other three contextual factors. To the extent the specific sections of the *Human Rights Code* challenged herein may be said to have some 'ameliorative' purpose in terms of providing greater freedom to workers and employers to bargain the terms and conditions of employment past age 65, as argued

by the Attorney-General, I do not think this is the type of ameliorative purpose the Supreme Court had in mind when it developed this list of contextual factors to be considered under s. 15(1).

Fourth, the nature and scope of the interests affected support the conclusion that the distinction at issue is discriminatory. The impugned legislative provisions deny senior workers access to a mechanism by which they can challenge and rectify disadvantage and discrimination in the workplace in the provision of employer benefits. I acknowledge that this denial is not as critical as the pre-2006 denial to workers aged 65 or older of any access to human rights protection against age discrimination in their employment. Nevertheless, the denial of human rights protection against discrimination based on age in the provision of benefits must be seen as denial of a critical interest for those workers who choose to work past age 64.

I conclude, when looked at in context, the challenged legislative provisions must be held to constitute a violation of s. 15(1) of the *Charter*, and if they are to continue in force they must satisfy the requirements of s.1. In my view this conclusion is consistent with rulings on age based limits and distinctions in the case law presented in argument (see for eg., *Vilven v Air Canada*, [2009]m FC 367; *CKY-TV and CEP, Local 816 (Kenny)* (2008), 175 LAC (4th) 29 (Pelz); and *McKinney v University of Guelph*, [1990] 3 SCR 229).

I note before turning to the section 1 analysis that both the Attorney General and the Employer urged me to consider, within the s. 15 analysis, arguments concerning the differences between age and other enumerated grounds of discrimination, arguments concerning the broader ameliorative purpose of the entire package of December 2006 amendments to the *Human Rights Code*, and arguments concerning the reasonableness of the legislative choice of age 65 for the

exclusion from protection from discrimination in the provision of benefits. As I have noted above, I believe that all of these considerations are important to consider to determine the constitutionality of the impugned legislation. However, I believe they are best considered under s. 1 rather than under s. 15. I note that there has been some inconsistency in prior cases about whether these considerations are best analysed under s. 15 or s. 1. I am sure that inconsistency is what led the Attorney General to repeat its arguments on these considerations in both the s. 15 and s. 1 portions of its argument. However, I agree with the view expressed by Justice Mactavish in *Vilven, supra* (at para 322 to 328), that when dealing with this type of an age limit adopted by a government to achieve social policy objectives, these types of factors are best considered under s. 1 as they were in *McKinney, supra*.

(2) Does the Impugned Legislation Constitute a Reasonable Limit Under s. 1 of the Charter?

Section 1 allows for the limitation of the rights guaranteed under section 15 of the *Charter* to be upheld where such limitations are found to be "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The section 1 test originally articulated by the Supreme Court of Canada in *R. v. Oakes* [1986] 1 S.C.R. 103, has been modified somewhat by other Supreme Court decisions in the intervening years. What became known as the *Oakes* test appeared, in its first iteration, to create an almost lockstep, rigid and scientific enquiry to determine whether government imposed limits on *Charter* rights should be upheld. However, subsequent decisions have often expressed the need for some flexibility and even deference in cases where government is pursuing a social policy objective regarding the interests of competing groups, the

evaluation of complex and conflicting research, the distribution of public resources, or the implementation of solutions that attempt to balance benefits and costs for different parties.

The need for flexibility and deference in appropriate cases has been recognized by the Court in numerous decisions, including *MicKinney, supra*, *R. v. Edwards Books*, [1986] 2 SCR 713, and the Court's more recent decision in *Alberta v Hutterian Brethren of Wilson County*, [2009] SCJ No. 37. In the latter case the Court stated:

> Section 1 of the Charter does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused [...] The bar of constitutionality must not be set so high that responsible creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate. (At para 37)

Similarly in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Court observed that the application of the *Oakes* test "requires close attention to the context in which the impugned legislation operates", and that "where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically" (at para. 85).

The general framework for the section 1 test requires that parties seeking to uphold the legislation prove, on the civil standard of the balance of probabilities, that the challenged provisions satisfy the following tests.

> **The Ends Test**: The objective of the legislation must be pressing and substantial, or at least of sufficient importance to justify overriding a *Charter* right.
>
> **The Means Test**: The legislative means chosen to attain the objective must meet three criteria. First, it must be rationally connected to the objective or purpose of the legislation.

> Second, it must be reasonably considered to minimally impair the right in question. While this second criteria was first stated in *Oakes* as a very stringent requirement that the means impair the right as little as possible, as part of the recognized need to take a more flexible approach referred to above, in cases involving social policy legislation it became more common to state this criterion as, 'whether the impugned provision impairs the right no more than is reasonably necessary to attain the governmental objective'. Third, the challenged provision must meet the requirement of proportionality such that it does not result in deleterious effects on the *Charter* right in question that outweigh the salutary objective and benefits of the legislation.

Ends Test

In this case there is some dispute between the parties concerning the proper identification of the governmental objective of the impugned legislation. However, the Union ultimately concedes that both the ends test and the rational connection part of the means test have been met by the government and the Employer. Thus the real dispute in this case comes down to whether the Employer and the Intervenor have satisfied the requirements of the last two criteria of the means test. However, some discussion of the governmental objective or purpose is important as the nature and scope of the legislative objective have some bearing on the analysis of both the minimal impairment and proportionality elements of the means test.

The Attorney-General contends that the legislative objective of Bill 211 was to end the ability of employers to impose mandatory retirement by prohibiting discrimination in employment past age 65, and thereby provide older workers the freedom of choice to continue working past age 65. However, it contends that this extension of *Human Rights Code* protection was balanced with a concomitant objective of protecting employment benefit, pension and group insurance plans by allowing workers the freedom to bargain collectively or negotiate those terms of employment under s. 25(2.1). It notes that these combined objectives were reflected in the Minister of Labour's

announcement of the amendments in Bill 211 as a compromise that was a "fair, reasonable and rational approach" to ending mandatory retirement while "not undermining those benefit, pension and early retirement rights that so many depend on."(Ontario Legislative Assembly, Official Report of Debates, 8 June 2005, at 1420-1430). It further contends that the Supreme Court's subsequent elevation of free collective bargaining to the status of a constitutionally guaranteed freedom augments the importance of the free collective bargaining objective for the purpose of the analysis under s. 1 of the *Charter*.

The Union accepted that the Intervenor and Employer had established pressing and substantial governmental objectives in the two fold purposes of ending mandatory retirement and giving older workers the freedom of choice to work past age 65 and ensuring that the elimination of mandatory retirement would not undermine the availability of certain benefit, pension and group insurance plans. However, it disputes the Intervenor's attempt to assert the protection of free collective bargaining as a further government purpose as an attempt to assert a shifting or ex post facto objective that was not clearly articulated at the time of the passage of the impugned legislation. It asserts that the Employer and Intervenor have failed to adduce evidence to support this further objective as a pressing and important government purpose that motivated the government to act in December of 2005.

I accept the Union's argument that the protection of free collective bargaining was not identified as a governmental objective at the time of the enactment of the impugned legislation. There is simply not any convincing evidence that the protection of free collective bargaining was a third animating objective for the challenged provisions. However, that does not mean that the effect

of the challenged legislation on free collective bargaining between employers and employees concerning workplace conditions and benefit plans is not relevant to the section 1 analysis. It is simply not possible to contemplate a contextual analysis under section 1 that fails to give due consideration to the impact of the legislation or its constitutional removal on other important social and economic practices and values. The very essence of a 'contextual analysis' is the analysis of the impact of enforcing *Charter* rights and freedoms on the ability of governments to use legislation to protect other important societal values and interests, including other *Charter* rights and freedoms. The extent to which striking down legislation that limits a *Charter* right might have a deleterious effect on government policy protecting other important social policy objectives, like free collective bargaining to regulate workplace terms and conditions, was central to the section 1 analysis in *McKinney, supra*, and is certainly a relevant consideration in this case as well.

Means Test

The Union, quite wisely, did not dispute that the rational connection component of the means test was met by the legislation at issue. Allowing employers and employees to agree to employment benefit and group insurance plans that differentiate on the basis of ages of 65 or greater is rationally connected to the government objective of providing choice to workers to work past age 65 while ensuring that existing benefit, group insurance, pension and early retirement plans are not threatened or undermined in any way. That rational connection was supported by much of the evidence concerning the rising costs of many benefit and insurance plans for older workers and the potential lack of availability for certain types of benefits at some older age.

Minimal Impairment

To identify the proper approach to the minimal impairment analysis in this type of case I can do no better than restate the approach spelled out by Laforest J. in *McKinney, supra*, at paragraphs 104 and 105 of that decision.

> 104 I turn then to the question whether mandatory retirement impairs the right to equality without discrimination on the basis of age "as little as possible". In undertaking this task, it is important again to remember that the ramifications of mandatory retirement on the organization of the workplace and its impact on society generally are not matters capable of precise measurement, and the effect of its removal by judicial fiat is even less certain. Decisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and [page305] other components. They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch, as Irwin Toy, supra, at pp. 993-94, has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.
>
> 105 In performing their functions of ensuring compliance with the constitutional norms in these amorphous areas, courts must of necessity turn to such available knowledge as exists and, in particular, to social science research, both of a particular and general nature. The Court of Appeal in its judgment (at pp. 49-51) has helpfully described the difficult problems of evaluating these works and the extent to which the judiciary should defer to legislative judgment in determining issues of minimal impairment of a constitutional right when evidence rationally supports the legislative judgment. This Court has, however, recently dealt with these issues in Irwin Toy, supra, which I have discussed earlier in these reasons and I rely on what I have already said there. **I simply reiterate here that the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives.** (Emphasis added)

These comments were directed toward the question of whether the more significant limitation on senior workers in Ontario, of no protection from age based discrimination in employment for workers aged 65 or older, that existed in the *Human Rights Code* prior to the enactment of Bill 211

in 2005, was a reasonable limit under s. 1. However, in my view they are at least as applicable to the minimal impairment analysis of the less restrictive limitation, of no protection against discrimination on the basis of age (for workers over the age of 64) in the provision of workplace benefits and pensions, introduced as part of the package to eliminate mandatory retirement. The government is not required to prove that it has adopted the absolutely least intrusive means possible of attaining its objective. Rather, the question is simply whether the government had a reasonable basis for concluding that the legislation interferes as little as possible with the *Charter* right given its pressing and substantial objectives. After careful consideration of the evidence and the submissions of the parties I have concluded that this question must be answered in the affirmative. My reasons are as follows.

First, I agree with the submissions of the Attorney-General that the government was facing a complex task when it decided to extend the protections of the *Code* to eliminate mandatory retirement, because of the central role that mandatory retirement had come to play in collective agreements and other rules governing the employment relationship in the province. In *McKinney* the Supreme Court recognized the complexity of any attempt to tinker with the web of interconnected social and economic rules that resulted from the prevalence of mandatory retirement in our workplaces. The Court noted that any attempt to change the law concerning mandatory retirement could have important ramifications on many other societal norms and workplace rules and policies, including its effects on pension and benefit plans, youth employment and the desirability of allowing workers to bargain collectively to organize their own terms of employment. This complexity was recognized by the Court in *McKinney* as a major reason why courts should not be quick to interfere

or tinker with the legislative choice to allow the parties to agree on mandatory retirement as part of its complex rules for the organization of the workplace. (At para. 96 and 109).

The same approach should be applied to legislative choices concerning the appropriate balancing of rights and interests when the government does in fact take legislative action to eliminate mandatory retirement and ensure protection for workers' right to choose to work past age 64. By enacting the exemption from protection against discrimination in the provision of benefits and pensions for workers aged 65 and over, the Ontario government has chosen to act with caution out of concern for the possible undermining of those aspects of workplace rules that are most likely to be significantly impacted by workers choosing to continue working past age 64. Those are the rules governing employee benefit, pension and group insurance plans. By choosing to enact a blanket exemption from scrutiny under the *Human Rights Code* for employees who are 65 and older, under pension and benefit plans, the government has chosen to act with great caution by providing the maximum flexibility to employers and employees to deal with the potential disruption to such programs that might result from the presence of senior workers who chose to continue employment past age 64. In this manner they have left employers, employees and insurers with the greatest flexibility to adapt to the negative impacts that may arise from the abolition of mandatory retirement in terms of the cost and viability of employer sponsored pension and benefit plans. This choice may be more restrictive of the equality rights of senior workers in Ontario than the legislative solutions chosen by some other provinces, but this in itself does not take it outside the realm of a reasonably minimal impairment. This point is discussed more fully below.

Second, I find that the choice of age 65 as the limit for exemption from Code protection for treatment in pension and benefit plans is a reasonable age limit, one that impairs the right no more

than is reasonably necessary to attain the identified governmental objective. The Union's expert, Mr Holmes, repeated several times that there is no magic in the age of 65 and that its choice is somewhat arbitrary and historical in nature. It stems largely from its selection by governments in the past as the age at which certain government benefits become payable in unreduced amounts. To support this notion he noted that governments in several countries, including the United States and Germany, are taking measures to increase the age of entitlement to full government pension benefits. However, even Mr Holmes agreed on cross-examination that the insurance industry and governments need a "line in the sand", a normal retirement age, on which to base the costing of pension and group insurance plans. It was his suggestion that the age used for the necessary 'line in the sand' could be moved upward to age 70 because there were some LTD group plans being made available to cover up to age 69. The Union suggested that age 71 would provide a better cut off age for the limitation of age discrimination protection with respect to benefit plans and pensions under the *Human Rights Code* because 71 is the age at which members of the OMERS pension plan must begin to collect pension payments.

What all of these arguments suggest is that there may be a range of acceptable alternatives available to government to select, but that they must inevitably engage in some line drawing and decide on which is the preferable limitation from a social policy perspective given the need to balance the interests of the individual with the collective interests at stake. Given the expert evidence put before me concerning the cost curve of providing employment benefits and group insurance plans, showing that the cost becomes higher as workers enter their late 40's and 50's, and increases on a steeper curve when employees enter their 60's, it would appear that any age between the ages of 60 and 71 could be said to provide a reasonable choice for the challenged limit on

protection from age discrimination. But the fact that there must be an age limit of some kind for certain types of benefits such as LTD was accepted by all experts. And I believe that all experts acknowledged that there can be significant difficulties in administering LTD plans and sick leave policies for senior workers in terms of distinguishing between legitimate claims from workers who have no plans to retire, whether healthy or ill, and those who might choose to remain on LTD or sick leave despite the fact they may have planned to retire sooner if they had remained healthy. However, given the potential range of choices for an age limit for protection from discrimination in the provision of benefit and insurance plans, there are several factors that make the age of 65 a limit which provides reasonably minimal impairment of the equality rights of workers.

First, many social programs, such as government pensions, and private pension plans, use age 65 as the "normal retirement" age, thus providing for full or unreduced pension benefits at that age. Under current law, the normal retirement age for pensions cannot be greater than age 65. In addition some other government social benefit plans, such as medical drug coverage plans, also use age 65. The fact that other social benefit and support plans use age 65 as the age of entitlement makes the age of 65 a reasonable limit for the impugned legislation for several reasons. First, to the extent employees may lose coverage under employer sponsored benefit plans some of those losses can be compensated for by government programs should they choose to continue to work. Second, to the extent the loss of employer benefits proves to be an incentive to some employees to choose to retire, those employees will be better situated to retire and take advantage of government pensions and benefit plans. Third, the vast majority of workers do choose to retire by the age of 65. Because traditionally only a small percentage of workers have chosen to work past age 64, the limit of age 65 minimizes the number of workers who will be detrimentally affected by the legislative limitation on

protection under the Human Rights Code. Finally, given that prior to the amendments which took effect in December of 2006 the *Code* and *ESA* allowed mandatory retirement and only prohibited age discrimination in employment up to age 65, the choice of age 65 as the cutoff for protection against discrimination in benefit plans and pensions will best serve the government objective of minimizing the disruption to the web of interconnected rules that govern workplace relationships, a goal that was recognized as very important by the Supreme Court in *McKinney*.

Before leaving this point, it must be noted that the Supreme Court has on a number of occasions noted that the choice of a specific age limit for protection or entitlement will always have a degree of arbitrariness, which will result in a range of acceptable alternative age limits from which the government must choose. That fact does not invalidate the government's choice. The fact that some might prefer a different age, or that some individuals are disadvantaged by the choice of one limit over another does not render the government choice invalid under the *Charter*. As the Court stated in *Gosselin, supra*, "Provided that the age chosen is reasonably related to the legislative goal, the fact that some might prefer a different age - perhaps 29 for some, 31 for others - does not indicate a lack of sufficient correlation between the distinction and actual needs and circumstances." (At para 57; see also para. 55 and 56 and *Law, supra*, at para 105). While this discussion about the inherent degree of arbitrariness involved in any selection of an age limit for a legislative policy came under the s. 15 analysis in *Gosselin* and *Law*, I think it is just as relevant to the s. 1 analysis of minimal impairment where a violation of s.15 has been found to exist.

The Union contended that the Employer and Intervenor had failed to satisfy the minimal impairment requirement because of the evidence of the experts that plans were available from the Employer's insurer to provide life insurance, LTD and sick leave to age 69 and could be made

available to age 71 at an increased cost for coverage for the grievors and any other workers who chose to work past age 64. Further it submitted that the cost of providing the same health benefits to the two grievors, with LTD capped at age 71 (but excluding sick leave coverage), would not undermine the current benefits as it would cost "only" $479 per month more than it costs for workers aged under 65. Further, when that cost was spread over the entire plan membership of 1,155 workers, it would result in an increase per member of less than $5 per year. On sick leave it submits that the evidence of the experts was that the cost of providing the same sick leave benefit to workers over the age of 64 would be similar to the cost of providing it to workers slightly younger than 65. Finally, it noted that the experts agreed that the insurance industry will be able to adapt to respond to the demands for benefit plans that serve a workforce that includes persons who are 65 and older if it is forced to do so.

These arguments are not sufficient to refute a finding of reasonable minimal impairment for several reasons. First, they are based on costing estimates premised on the cost of providing the same benefits to workers who are only a few years older than 64, and do not take into account the cost of providing these benefits to workers who are over 71. Second, they are premised on only a small percentage of workers staying on for only a small number of years in a fairly large workforce of over 1000 employees. The cost implications relied on by the Employer could change dramatically if changing economic circumstances result in larger amounts of workers choosing to stay on, and could be far more negative in their impact for different sized employers. Third, an increased cost of almost $480 dollars per senior worker is not, in my view an insignificant amount for any sized employer. The fact that a ruling that the impugned legislation is of no force or effect might have only a minimal impact on this Employer because it only affects only two of 1155 employees cannot be

determinative of the section 1 inquiry. For the purposes of section 1, one must consider that the legislation applies to all workplaces and employees in Ontario and its demise could have dramatically negative impacts for other employers and employees. The need to consider the potential application of the challenged legislation across the entire province and the potential negative impact of its demise on all workplaces in Ontario was recognized in *McKinney*, *supra* (at para 117) and *Alberta v Hutterian Brethren, supra* (at para 69).

Finally, the Union argues that the Ontario government's approach in Bill 211 cannot meet the minimal impairment test because other provinces have taken different approaches, by providing employers with more limited defences to claims of discrimination in the provision of benefits to workers aged 65 or over. So for example in provinces like Alberta, BC and Newfoundland, the legislation allows distinctions in benefit plans only when the plans are "bona fide", or "genuine" or in "good faith". Other provinces like Manitoba (only allowing for a bona fide occupational requirement defence) or Quebec (only distinctions based on actuarial data) are even more restrictive of employer defences to policies which provide different benefits for older workers. In my view this argument has to be met with the same response that was given to it by the Supreme Court of Canada in *McKinney* when the applicant argued that the abolition of mandatory retirement in other provinces meant Ontario's legislation that continued to allow mandatory retirement at age 65 could not be a reasonable limit. I concur with the following passage from the judgment of Laforest J.:

> I do not intend here to take sides on the economic arguments, and it may well be that acceptable arrangements can be worked out over time to take more sensitive account of the disadvantages resulting to the aged from present arrangements. But I am not prepared to say that the course adopted by the Legislature, in the social and historical context through which we are now passing, is not one that reasonably balances the competing social demands which our society must address. The fact that other jurisdictions have taken a different view proves only that the Legislatures there adopted a different balance to a complex set of competing

> values. The latter choice may impinge on important rights of others, especially those near retirement. ....
>
> In such circumstances, as I there stated, "a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures". What a court needs to consider is whether, on the available evidence, the Legislature may reasonably conclude that the protection it accords one group does not unreasonably interfere with a guaranteed right. To repeat the formulation adopted in Irwin Toys, supra, the Legislature had a reasonable basis for concluding that the rights of the aged were impaired as little as possible given the government's pressing and substantial objectives. (at para 123)

In my view these arguments have at least as much application and force, if not more, when the section 1 analysis is with respect to provincial legislative choices concerning the freedom of employers and employees to bargain about the terms and conditions of employee benefit plans for workers who choose to continue working past age 64 after the removal of provisions allowing for mandatory retirement. Ontario's legislative choice is less restrictive of the equality rights of senior workers than the choice to allow mandatory retirement to continue which was challenged and upheld in *McKinney*. The fact that other provinces also allow for the collective bargaining of employee insurance plans that differentiate on the basis of age, but allow for differentiation to be made only where it is part of a 'bona fide' or 'good faith' benefit plan does not prevent a finding of minimal impairment given the government's pressing and substantial objectives. (See for example, *Alberta Human Rights Act*, c. A-25.5, s. 7; *British Columbia Human Rights Code*, RSBC 1996, c. 210, s. 13(3), 41(2); *Canadian Human Rights Act* Regulations (SOR/80-68, ss. 3, 5, 8; and *New Brunswick Human Rights Act*, RSNB 1973, c. 30 s. 3(1), 3(6)).

Proportionality of Effects and Objectives

The deleterious effects of the legislation on the equality rights of the two grievors are well documented in the summary of the evidence above. They have clearly suffered a loss of income protection security and financial security for their families that is provided to their younger co-workers. They have also suffered a threat to their personal sense of self-worth and dignity. Beyond the personal effects for the two grievors, the legislation places all workers who choose to remain in the workplace past age 64 at risk of similar losses due to discriminatory treatment in the negotiation of benefit and insurance policies.

I also accept that there was some evidence provided by the Union (affidavit of Ms Markovic) that legislation allowing for discriminatory treatment of senior workers on such terms of employment could act as a disincentive for their continuation of employment past age 64 and thus cause problems for employers should there be a shortage of nurses. I note as well that common sense tells us that to the extent that employers and employees agree to terms of employment that provide lesser benefits for workers after they reach the age of 65 that will generally act as a disincentive to those workers choosing to continue employment after reaching age 65, whatever the industry or occupation concerned. However, I do not view this as a significant deleterious effect when considering the proportionality requirement for several reasons. First, the Union failed to establish conclusive evidence that this employer or other employers in the public health area of nursing were having a significant retention problem. Second, there was no evidence to support the view that having the same benefit entitlements for senior workers would cause significant numbers of nurses to choose to work past age 65, given that most nurses choose to retire prior to age 65 despite the fact they are entitled to all employee benefits up to the age of 65. The evidence of Ms Markovic suggested that dealing effectively with retention problems in nursing would require employers to focus on

employees in their 50's. Third, the impugned legislation leaves employers, employees and unions with the flexibility to negotiate whatever terms and conditions of employment they feel the market warrants or requires to meet their particular needs in terms of recruitment, retention or continued employment. It does not mandate lesser benefits or insurance plan coverage for senior workers but leaves it to the parties to bargain to arrive at the coverage that best meets their circumstances. In this respect it should be noted that one of the grievors, Ms O'Brien, testified that it was explained to the membership at the ratification meeting that one of the reasons to support the Employer package of proposals that was put before them was because it would lead to significant salary increases for new nurses and would help them with a problem of recruiting and retaining new nurse hires in the coming years. In giving that testimony Ms O'Brien herself seemed to accept the need to consider the greater good of what the union representatives were trying to achieve in the new collective agreement and she acknowledged that this was probably why the Employer proposals were accepted despite the fact they contained provisions that would result in losses for her and other nurses who chose to work past age 65. Thus to the extent that employers and unions are faced with real problems of recruitment and retention and are able to identify a real prospect of success in retaining senior workers by improving benefit coverage for those workers, the legislation enables them to do so.

Despite the very real negative consequences of this legislation for the grievors, in my view the deleterious effects of the challenged legislation do not outweigh its salutary objectives and effects. The major benefit of the legislation is the fact that it allows workers who were previously faced with the prospect of mandatory retirement to choose to continue to work past age 65 for as long as they are willing and able. The two grievors have experienced this benefit themselves as they faced the prospect of mandatory retirement prior to the enactment of Bill 211. Second, it enabled existing

benefit and insurance plans to continue in place without being undermined or negatively affected by the abolition of mandatory retirement and the prospect of an unknown number of workers choosing to continue working for indeterminate periods beyond the age of 65. In the absence of the exemption provided for senior workers under s. 25(2.1) of the Code the majority of workers faced the risk that some existing benefit plans would have to be reduced and others made not available to avoid a Code challenge.

In addition, while it may not have been identified as an objective of the legislation when first enacted, a further important salutary effect of the legislation is the effect of leaving it to employers and employees to negotiate their own terms of employment, whether by free collective bargaining or otherwise. As noted above, Ms O'Brien herself appeared to recognize that there was a legitimate collective bargaining objective of providing better starting wages for new hires that was served by agreeing to the cost containment measures involved in the new benefit limitations for workers aged 65 or older. While this clearly has a deleterious impact on the individual equality interests of the two grievors, it demonstrates the beneficial effect of the legislation in terms of allowing collective bargaining to operate to meet the needs and circumstances of the two parties in the workplace. It leaves it open to the employer and employees to determine which balance of wages and benefits for workers, at various stages in their working lives, is most beneficial given their situation.

In addition, because it is an age based differentiation it is one which all employees, given that they all know they will pass through the limitations and different entitlements applicable to that age group if they survive and choose to continue working, will be able to anticipate and plan for alternative arrangements should they lose certain benefit entitlements or be faced with loss of job security due to serious illness or injury. The fact that full access to many pension and other social

benefit entitlements are linked to attainment of the age of 65 means that senior workers are better situated to deal with such differential treatment.

In my view the fact that "age is different" from other prohibited grounds of discrimination should be given considerable weight in assessing whether the proportionality requirement is met. Unlike other grounds, being a given age is an attribute that is expected to be shared by everyone in the majority, at least up to some very high age levels. Several American constitutional scholars have suggested that this means groups identified by age which are disadvantaged by age based legislative distinctions should not be viewed as discrete and insular minorities that warrant close judicial scrutiny and protection under constitutional equality provisions. This approach was recognized by the majority judgment in *McKinney*, where La Forest J. cited the following passage from Professor John Hart Ely's well known *Democracy and Distrust* (1980, at p. 160):

> "... the facts that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws ... that comparatively advantage those between, say, 21 and 65 vis-a-vis those who are younger or older" (at para 88)

The same point is made by Professor Hogg in his *Constitutional Law of Canada*, (looseleaf ed.) (Toronto: Carswell, 2009) at s. 55.18, page 55-66, and endorsed by the Supreme Court of Canada in *Diskason v University of Alberta*, [1992] 2 SCR 1103, at para 41. Because the same employees who negotiate age based limitations on benefits will be subject to the same terms themselves in the future, such restrictions are less likely to result in significant deleterious effects in the form of substantive discrimination and more likely to attempt to maximize compensation and benefits for all employees when their working life is looked at as a whole, not simply focusing on a single age based period in that working life. To the extent that such rational approaches to

compensation result in much richer compensation and benefit packages for all workers from the ages of 18 to 65, rather than unlimited coverage for LTD for those few workers who choose to work past age 65 (which may result in considerably less compensation and benefits for all workers up to age 65), it is difficult to find that the deleterious effects of the impugned legislation outweigh their salutary effects. This point becomes clearer if one considers that those who may be negatively effected by such age based limitations are generally, at different stages of their working life, a member of both groups. Arbitrator Rob Herman made a similar observation in his ruling upholding mandatory retirement under section 1 of the *Charter* in *Independent Electricity System Operator v Society of Energy Professionals*, [2005] O.L.A.A. No. 152 (at para 85).

The fact that age is 'different', and that age based groups generally cannot be considered to be discrete and insular minorities requiring judicial supervision and protection under constitutional guarantees of equality is even more significant in the demographic context in which the impugned legislation was introduced and is being challenged. The post war baby boom generation are generally in their late 50's or their 60's. They are a large and significant segment of our aging workforce and aging society. According to Mr Holmes, the size of this group, and its improving health and life expectancy as it approaches retirement age, is the motivating factor for several Western countries, including the United States, Britain and Germany, increasing the age of full entitlement to government pensions. This being the case it is difficult to view the aging but numerous boomer generation as an age group that is lacking in political clout and thus unable to protect their interests in the democratic process used to form legislative policy for the regulation of the workplace and the employment relationship.

Finally, when looking at proportionality between the beneficial and deleterious effects of challenged legislation under section 1, its impact on free collective bargaining between employers and employees concerning workplace conditions and benefit plans is a relevant consideration. A contextual analysis under section 1 cannot fail to give due consideration to the impact of the legislation, or its constitutional removal, on other important social and economic practices and values. It requires us to consider the effects of enforcing *Charter* rights and freedoms on the government's ability to use legislation to protect other important societal values and interests, including other *Charter* rights and freedoms. The extent to which striking down legislation that limits a *Charter* right might have a deleterious effect on government policy protecting other important social policy objectives, like free collective bargaining to regulate workplace terms and conditions, was an important factor in the section 1 analysis in *McKinney, supra*. In upholding the previous wider limitation of no protection against age discrimination in employment for workers aged 65 or older, the limit which allowed the parties to bargain collectively for mandatory retirement, the majority judgment stated:

> Involved here, as I indicated, are important social as well as economic values. The present situation allows the parties concerned, the employers and the employees, the freedom to agree about an issue of central importance to their lives and activities. The freedom of employers and employees to determine conditions of the workplace for themselves through a process of bargaining is a very desirable goal in a free society. (At para. 121)

In *Independent Electricity System Operator v Society of Energy Professionals, supra,* Arbitrator Herman relied on similar reasoning concerning the importance and value of collective bargaining to uphold collective agreement provisions providing for mandatory retirement under section 1.

79. ... In addition to the benefit of having a bargaining agent represent them collectively, the collective agreement itself will no doubt have a variety of terms beneficial to the employees, just as it will have a variety of terms employees might consider unfortunate or poor, as well as terms that some employees will like while others do not. For collective bargaining to prevail and flourish as a system where parties freely bargain the terms and conditions of the collective agreement, those terms or conditions ought only to be changed in rare circumstances absent further agreement of the parties.

80 ... As a matter of public policy, legislators have determined that collective bargaining and collective agreements are to be protected. This is not to suggest that a collective agreement justifies impermissible discriminatory conduct. It is no defense to discrimination against a visible minority, for example, to say that one is contractually bound to engage in the discrimination or that the conduct was in compliance with the collective agreement. One cannot contract out of or around the rights protected under the Charter.

81 However, it is the Charter itself under s. 1 that requires one to look at the nature and detail of the discriminatory behaviour and assess whether it is nevertheless justified. Here this requires an assessment of the mandatory retirement policy as part of the overall collective bargaining relationship and the benefits gained by employees through free collective bargaining and through the application of the Collective Agreement. One must consider the potential harm to the process that might result if a material term of the collective agreement were cancelled through non-consensual action after having been previously agreed to by the parties as part of the overall bargain. It is against the palate of the concept of the Collective Agreement and the clauses in it that I assess whether mandatory retirement can be demonstrably justified in this workplace. To apply any other approach would be inconsistent with the reality of collective bargaining and the collective bargaining relationship between employer and union, and would itself undermine the bargaining relationship.

82 I note that the Supreme Court recognized and commented upon the importance of a collective agreement in engaging in an analysis under s. 1, as can be seen from the quotes from McKinney in paragraphs 40 and 42 above and Dickason at paragraph 47 above.

83 Quite apart from particular terms of a collective agreement that might be beneficial to employees, there is the value of a freely negotiated or arbitrated collective agreement. The right of employees to bargain collectively with their employer is a core aspect of employment in our society, and ought not to be interfered with without considerable reason. Interference after the fact in one area with the "deal" made by the parties can only place a strain upon their relationship and other parts of the "deal". Where the balance of benefits and costs to each party has been upset through other than mutual agreement, the party losing the benefit (in this case the Employer losing the benefit of mandatory retirement) will no doubt seek in the next round of bargaining some compensatory benefit to recoup its loss. Interference with the "deal" will likely at least lead to a subsequent attempt to reduce other benefits that exist to compensate for the loss.

The views of Arbitrator Herman on the relevance and importance of the values of collective bargaining are equally applicable (if not even more so) to the section 1 analysis of impugned legislative provisions and collective agreement provisions that are at issue in the case before me. I agree with them and adopt them as part of my reasons for finding that impugned provisions satisfy the proportionality requirement of section 1 of the *Charter* and must therefore be upheld as reasonable limits on the right to equality under section 15 of the *Charter*.

The Supreme Court of Canada's finding in *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391, that the *Charter* freedom of association includes a right to free collective bargaining, simply confirms the value and importance of free collective bargaining as a desirable goal in a free society and a relevant factor in assessing the proportionality of the impugned legislative and collective agreement limitations on the equality rights of senior workers. I accept the Union's argument that the desirability of free collective bargaining, whether viewed as a fundamental *Charter* freedom or as a desirable policy objective, cannot by itself be accepted as a basis for finding that violations of other *Charter* rights and freedoms are justifiable as long as they result from collective bargaining. This, as Arbitrator Herman suggested, would be tantamount to suggesting that the parties could contract out of *Charter*. Nevertheless, the importance of free collective bargaining, both as a social policy mechanism to provide for peaceful and orderly governance of productive workplace relationships and as a component of the *Charter* freedom of association, is clearly a relevant and significant factor to be weighed against the detrimental effects of the legislation and collective agreement provisions.

For all the foregoing reasons, I conclude that the impugned legislation constitutes a reasonable limit under section 1 of the *Charter*.

(3) ***Do articles 13.11 and 13.08(b) of the collective agreement violate s. 15 of the Charter and if so are they demonstrably justifiable as reasonable limits under s. 1 of the Charter?***

In my opinion the reasons given under Issue 1 above are equally applicable, with necessary modifications, to the determination of whether the collective agreement provisions violate s. 15 of the *Charter*. For the same reasons given in considering whether the impugned legislative provisions of the *Human Rights Code* and the *ESA* violated s. 15 of the *Charter*, I find that the challenged provisions of the collective agreement violate the equality rights of the grievors under section 15 of the *Charter*.

Similarly however, the impugned collective agreement benefit provisions must be found to satisfy the requirements under section 1, as developed in *Charter* jurisprudence, for a reasonable limit on section 15 equality rights. Once the legislative provisions which allow the parties to bargain different terms concerning benefits, group insurance and pensions for workers who are 65 or older have been upheld as reasonable limits under section 1, then collective agreement provisions which comply with those legislative provisions must also be held to be reasonable limits. To hold otherwise would be inconsistent with the ruling that the challenged legislative provisions are reasonable limits under section 1 and would mean that there are different standards for the *Charter* right to equality depending on whether employees work for the government or for private employers.

The reasons provided above for the section 1 analysis upholding the legislative provisions of the *Human Rights Code* and the *ESA* also support, with necessary modifications, the conclusion that the challenged collective agreement provisions constitute a reasonable limit on the equality rights of the grievors. In addition, the challenged provisions were freely negotiated by the parties in a process of collective bargaining to address these issues in a manner best suited to their

workplace. The parties' mutual agreement on how to best deal with workplace issues is entitled to some deference, even where important equality interests are at stake, according to several Supreme Court of Canada precedents (*McKinney v University of Guelph*, supra, *Dickason v University of Alberta*, supra, and *McGill University Health Centre*, [2007] 1 SCR 161, at para 19). Their purpose in adopting the provisions, to create a collective agreement that allocated costs and benefits amongst a variety of interests and needs within the employer's workforce to deal with the new situation of the end of mandatory retirement, is a legitimate and pressing objective. The means chosen were rationally connected to that purpose. In terms of minimal impairment, the benefits and group insurance plans that provide for differential treatment are almost entirely limited to those which have a demonstrably strong correlation between age and cost. Benefits for which no such correlation exists, and even some for which there was evidence to suggest a correlation between cost and aging (extended health) were, for the most part, not changed for workers aged 65 or older. To the extent to which there is a less than perfect correlation between cost and aging and some of the benefits reduced or eliminated for senior workers, see my reasons above on the test for minimal impairment. On the issue of proportionality, the effects on the senior workers were not disproportionately severe, but rather demonstrated an attempt to balance the interests of employees who were newly hired and beginning their careers with those near the end of their careers. Ms O'Brien herself appeared to recognize this in her testimony concerning the rationale for giving up these benefits for older workers as she understood it from what she heard at the ratification meeting - that there was a legitimate collective bargaining objective of providing better starting wages for new hires to assist in recruitment.

Finally, I note that the majority judgments in *McKinney, supra*, held that the provisions providing for mandatory retirement in the university collective agreements that were challenged in that case were reasonable limits under section 1 of the *Charter*. While these findings were obiter for all of the majority judgments other than the opinion authored by Cory J. (because they found that the *Charter* did not apply to university policies or practices), they provide strong support for a finding that collective provisions that do not prevent continued employment but merely provide for differential treatment with respect to participation in benefit and group insurance plans should be upheld as reasonable limits on equality rights. They are clearly less restrictive limitations on those rights than the mandatory retirement clauses that were upheld as reasonable limits in *McKinney.*

Therefore, I conclude that the impugned collective agreement provisions violate the equality rights of the grievors under s. 15 of the *Charter* but have been established to be reasonable limits under section 1 of the *Charter*.

(4) Notwithstanding the provisions of subsections 25 (2.1-2.3) of the Human Rights Code and the definition of age under the Employment Standards Act, 2000 and its Benefit Plans Regulation, do articles 13.11 and 13.08(b) of the collective agreement violate s. 5 of the Human Rights Code.

Finally, the Union submits that, even if I find the impugned legislation does not violate the *Charter*, the collective agreement still violates s. 5 of the *Human Rights Code* by providing, in effect, lesser compensation to workers over the age of 64. To support this argument the Union referred to principles of interpretation that have often been cited with approval by courts and tribunals for application to human rights legislation: that such legislation is fundamental or quasi-constitutional in nature and must be interpreted in a broad, liberal and purposive manner to achieve its purposes

and objective; that rights limiting defences or exemptions included in such legislation should be construed narrowly so as not to unduly limit equality rights *(BCGSEU v Public Employee Relations Commission (Meiorin)* (1990), 176 DLR (4th) 1 SCC, at para 44; *NAPE v Newfoundland (Green Bay Health Centre)* (1996), 134 DLR (4th) 1 SCC at page 8); and that employers and trade unions are prohibited from contracting out of requirements of the *Code*. Thus it argues that I should find that even though the challenged legislation allows for differential treatment in pension, benefit and group insurance plans for workers who are 65 and older, I should find that where this can be shown to result in lower total compensation for such workers there is a violation of section 5 of the *Code*, requiring the Employer to prove that the benefit and group insurance provisions for workers who are older than 64 must be proven to be a BFOQ by the Employer. It then argues that the discriminatory compensation of older workers cannot be justified on the basis of a *bona fide* occupational requirement. It submits that the cost of providing equal compensation - in particular, the cost of providing the same benefits to the two grievors which are currently provided to younger workers for the same work - does not constitute undue hardship for the Employer.

This argument must be rejected for several reasons. First and foremost, it is contrary to the plain ordinary meaning of the language used in section 25 of the *Human Rights Code* and the ESA Regulation 286. For ease of reference I repeat them here:

> (2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the Employment Standards Act, *2000* and the regulations thereunder.
>
> (2.2) Subsection (2.1) applies whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer.

> (2.3) For greater certainty, subsections (2) and (2.1) apply whether or not "age" ... in the Employment Standards Act, *2000* or regulations under it have the same meaning as those terms have in this Act.

Section 44(1) of the ESA sets out a general anti-discrimination rule under which "except as prescribed" in the regulations, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats employees differently because of age:

> 44. (1) Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex or marital status of employees:
>
> 1. Employees.
> 2. Beneficiaries.
> 3. Survivors.
> 4. Dependant

More importantly, section 1 of Regulation 286 under the ESA defines age as "any age 18 years or more and less than 65 years". Section 25(2.3) of the *Human Rights Code* provides that this definition will not constitute a violation of the right to equality in employment even though it is inconsistent with the definition of age in the *Code* itself. In effect, employers are not prohibited from providing lesser benefits to employees once they reach age 65. More importantly for the argument put forward by the Union under this issue, by the plain meaning of the express terms of section 25 (2.1), workplace benefit plans that discriminate against workers aged 65 or older cannot be challenged as violations of section 5 of the *Human Rights Code.* The clear express statement in section 25 that such provisions will not constitute an infringement of section 5 does not allow any room for reliance on the principles of interpretation referred to by the Union. Although I admire the Association's argument on this issue for its creativity, to accept it would require me to find that sub

sections 25 (2.1) to (2.3) of the *Code* were of no force or effect, despite my findings above that they constitute a reasonable limit under section 1 of the *Charter*.

There being no violation of section 5 of the *Code*, there is no basis for requiring the Employer to justify the challenged benefit provisions in the agreement as a bona fide occupational requirement or qualification, nor is there any duty to accommodate.

Conclusion

. In summary, I have found that the impugned legislation, subsections 25 (2.1-2.3) of the *Human Rights Code* and the definition of age under the *Employment Standards Act, 2000* and its *Benefit Plans* Regulation, do violate the right under s. 15 of the *Charter* to equal protection and equal benefit of the law. However, I have found that this legislation constitutes a reasonable limit that is demonstrably justifiable under s. 1 of the *Charter*. I have also found that the impugned provisions of the collective agreement (articles 13.11 and 13.08(b)) violate s. 15 of the *Charter*, but they are demonstrably justifiable as reasonable limits under s. 1 of the *Charter*. Finally, I have found that, given the plain ordinary meaning and effect of subsections 25 (2.1-2.3) of the *Human Rights Code* and the definition of age under the *Employment Standards Act, 2000* and its *Benefit Plans* Regulation 286, articles 13.11 and 13.08(b) of the collective agreement do not violate s. 5 of the *Human Rights Code*. Given these findings, the union grievances and individual grievances before me are hereby dismissed.

One final note to the individual grievors and counsel is perhaps appropriate. The two grievors struck me as two model employees who conducted themselves with great sincerity and professionalism throughout the proceedings. This impression was confirmed by the evidence of their

performance evaluations. My rulings on these grievances are of course determined by consideration of the broader legal and policy issues that underlie the grievances and are of course no reflection on the grievors as valued employees and individuals. Finally, I want to thank counsel for their cooperation and assistance in finding an efficient and effective way to deal with the facts, issues and arguments in a comprehensive fashion. Their professionalism is much appreciated.

Signed in Windsor this 31st day of October, 2010.

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Arbitrator Brian Etherington