Citation: Bisnar, Danielle & Elizabeth McIntyre "Lessons for Litigators from ONA v Chatham-Kent: A Union Perspective" (2013) 17:1 CLELJ 225

Abstract: Despite the abolition of mandatory retirement in most Canadian jurisdictions, statutory provisions generally still permit the denial of employment-related benefits to workers aged 65 or over, or allow such benefits to be provided at a lower level than for workers under age 65. In *ONA v Chatham-Kent*, an Ontario arbitrator upheld the constitutionality of provisions in that province's *Human Rights Code* and *Employment Standards Act* excluding workers over 65 from protection against age discrimination in the area of employment benefits, holding that while the impugned provisions infringed the equality rights set out in section 15 of the *Charter of Rights and Freedoms*, they were nonetheless justified under section 1 as a reasonable limit on those rights. Writing from the perspective of advocates for unions and employees, the authors review the development of the case law on mandatory retirement, drawing particular attention to the "long shadow" cast by the Supreme Court of Canada's 1990 decision in *McKinney*. They go on to identify what they see as the flaws in the legal reasoning of the award in *Chatham-Kent*, especially the arbitrator's acceptance of the notion (inherited in large part from the *McKinney* decision) that age is "different" from other types of prohibited discrimination and his failure to closely scrutinize the legislature's policy choices with respect to employment benefits for older workers. Lastly, the authors extrapolate a number of lessons that may assist litigators in future challenges to statutory provisions that discriminate on the basis of age, notably the importance of framing section 15 claims by reference to intersecting grounds of discrimination (such as age and gender or disability) and of advocating for a lower level of deference to the legislature.