

Lessons for Litigators from *ONA v. Chatham-Kent*: A Union Perspective

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*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.*

1. INTRODUCTION

Mandatory retirement has in recent years been abolished in many jurisdictions in Canada, through statutory amendments and through court rulings under the *Canadian Charter of Rights and Freedoms*.¹

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¹ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

As the workforce ages, the legislative choice to that effect reflects the evolution of social values and norms on aging and age discrimination in the decades since the Supreme Court of Canada last considered the issue of mandatory retirement in *McKinney v. University of Guelph*.² In that case, the Supreme Court held that although the university's mandatory retirement policy for faculty violated the equality rights enshrined in section 15(1) of the *Charter*, it was saved by section 1 as a reasonable limit on equality rights in a free and democratic society. In the past decade, various courts and labour arbitrators have distinguished *McKinney* and found mandatory retirement to constitute unjustified age discrimination in light of changing social norms and public policy priorities.³ Contrary to this trend, a recent decision of the Federal Court of Appeal has affirmed that *McKinney* is binding on lower courts considering the issue of mandatory retirement.⁴ Leave has been sought to appeal this decision, and it may be that the time has come for the Supreme Court to examine the issue of mandatory retirement anew.⁵

In the receding wake of mandatory retirement, however, statutorily sanctioned age discrimination in employment persists, notably in the area of benefits. The Benefits Plans Regulation to Ontario's *Employment Standards Act, 2000* carves out an exemption to the Ontario *Human Rights Code*'s prohibition on age discrimination in employment, permitting pension benefits, life insurance and long-term disability benefits to be denied to workers over the age of 65⁶ or to be provided to them at a lower level than to younger workers. This Regulation was the subject of a *Charter* challenge by two nurses over 65 in a grievance arbitration case — *Ontario Nurses' Association*

2 [1990] 3 SCR 229 [*“McKinney”*].

3 See e.g. *Greater Vancouver Regional District Employees' Union v Greater Vancouver Regional District*, 2001 BCCA 435, 206 DLR (4th) 220 [*“GVRDEU”*]; *Ass'n of Justices of the Peace of Ontario v Ontario (AG)* (2008), 92 OR (3d) 16 (Sup Ct J), [2008] OJ No 2131 (QL) [*“Justices of the Peace”*]; *Communication, Energy and Paperworkers of Canada, Local 816 v CKY-TV* (2008), 175 LAC (4th) 29 (Peltz), [2008] CLAD No 92 (QL) [*“CKY-TV”*].

4 *Air Canada Pilots Association v Kelly*, 2012 FCA 209, [2012] FCJ No 976 (QL) [*“Kelly (FCA)”*], overturning 2011 FC 120 [*“Kelly (FC)”*].

5 [2012] SCCA No 395 (QL).

6 *Employment Standards Act, 2000*, SO 2000, c 41; Benefit Plans, O Reg 286/01; *Human Rights Code*, RSO 1990, c H.19.

*v. Chatham-Kent (Municipality of)*⁷ — in which Arbitrator Brian Etherington held that the Regulation violated the claimants' equality rights under section 15(1) but was a reasonable limit on those rights pursuant to section 1. The arbitrator found that the government had pursued valid objectives in permitting age discrimination in relation to employment benefits, as the legislation overall enabled workers to work past the age of 65 without threatening the availability of certain benefits or impeding free collective bargaining. He found that the government's use of that age threshold to define the exemption from the *Human Rights Code* was reasonable and that the Regulation impaired equality rights no more than was reasonably necessary to achieve the legislation's objectives. He also held that the deleterious effects of the legislation did not outweigh its benefits.

Along with other recent cases, including the Supreme Court's decision in *Withler v. Canada*⁸ and the Federal Court of Appeal's decision in *Kelly*,⁹ *Chatham-Kent* suggests that *Charter* challenges to age-based distinctions in benefit plans will face significant difficulty as adjudicators give substantial deference to the overall design of benefit schemes that try to balance competing interests. However, in illuminating the difficulties in advancing age discrimination claims in this context, *Chatham-Kent* offers important lessons for litigators seeking to advance equality rights on the basis of age after the end of mandatory retirement.

In the next section of this paper, we revisit the Supreme Court's decision in *McKinney* and assess whether the assumptions which drove that decision have been overtaken by recent case law striking down legislation permitting mandatory retirement. While many of the assumptions and anxieties articulated in *McKinney* about the impact of abolishing mandatory retirement have since been undermined to the point that the Supreme Court may soon choose to reconsider this issue, two key features of the *McKinney* decision persist in influencing adjudicators' analyses of other forms of age discrimination in the workplace. The first of those features is the notion that age is "different" from other protected grounds identified in section 15 of the *Charter*, because everyone ages and because there is a general

7 (2010), 202 LAC (4th) 1, [2010] OLAA No 580 (QL) [*"Chatham-Kent"*].

8 *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396.

9 *Supra* note 4.

correlation between increasing age and decreasing ability. The second is the level of deference the Court gives to legislatures in its analysis of whether an impugned statutory provision constitutes a reasonable limit on the right to equality on the basis of age within the meaning of section 1 of the *Charter*. In showing deference to discriminatory legislative choices, adjudicators have looked beyond the legislation under challenge to take into account the whole range of statutory post-retirement benefits that may be available to people over 65.

These tendencies are evident in recent decisions relating to age discrimination and benefits, including *Chatham-Kent* and *Withler*. A review of these cases reveals valuable lessons for litigators challenging age discrimination in employment. One is the importance of bringing section 15 claims on intersecting grounds in situations where legislation has a disproportionate impact on, for example, older women and workers of colour. Another is the importance, in the section 1 analysis, of advocating both a lower level of deference to legislatures and the limited relevance of statutory schemes other than the legislation under challenge.

2. THE LONG SHADOW OF *McKINNEY*

In its 1990 decision in *McKinney*, a majority of the Supreme Court of Canada upheld a statutory provision allowing mandatory retirement in Ontario in the face of a claim by university faculty that forced retirement was a form of age discrimination that contravened their equality rights under section 15 of the *Charter*. The impugned provision, section 9(a) of Ontario's *Human Rights Code*, defined "age" for the purpose of protection from discrimination in employment as "an age that is eighteen years or more and less than 65 years." La Forest J., for the majority of the Court, found that this definition of "age" infringed section 15 of the *Charter*, but held that it was justified as a "reasonable limit in a free and democratic society" under section 1.

Although the majority in *McKinney* found that the limited definition of age in the *Human Rights Code* was discriminatory, it went on to say, "there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1)."¹⁰ In the words of La Forest J.:

10 *McKinney*, *supra* note 2 at para 88.

To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability The truth is that, while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits.¹¹

This notion that age is “different” from other prohibited grounds of discrimination persists in the case law, and is one of the primary obstacles that must be met by equality-seeking groups and litigators challenging current forms of age discrimination.

Similarly, the *McKinney* majority’s analysis of the justifiability of mandatory retirement under section 1 of the *Charter* has continued to influence the case law on other aspects of age discrimination that have survived the end of mandatory retirement. Particularly influential is *McKinney*’s characterization of mandatory retirement as a complex policy area in which courts owe a high level of deference to legislatures in the face of competing social science theories and conflicting evidence. This characterization has been applied, by extension, to other age distinctions made in the labour relations context, including the provision of differential benefits based on age at issue in *Chatham-Kent*.¹²

Upon finding that section 9(a) of the *Human Rights Code* violated the applicants’ equality rights under section 15 of the *Charter*, the *McKinney* majority applied the *Oakes*¹³ test to hold that the discriminatory provision was justified under section 1. The majority identified the objective of the impugned provision of the *Human Rights Code* as being “to extend protection against discrimination to persons in a specified age range,” and described it as pressing and substantial.¹⁴ At the proportionality stage of the *Oakes* test, the majority found that the provision in question was rationally connected to its objectives:

Mandatory retirement is part of a complex web of rules which results in significant benefits as well as burdens to the individuals affected. In consequence,

11 *Ibid.*

12 *Supra* note 7.

13 *R v Oakes*, [1986] 1 SCR 103.

14 *McKinney*, *supra* note 2 at para 92.

there is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement suitable to a particular area of activity.¹⁵

At the minimal impairment stage of the *Oakes* test, the majority gave significant deference to the legislature's choice to permit mandatory retirement as a statutory defence to age discrimination in employment:

. . . 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 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 . . .¹⁶

Specifically, the majority held that the provision at issue met the criteria of minimal impairment, in light of the following considerations:

- (i) Because mandatory retirement had evolved as an important structural element in the organization of the workplace, no stigma was attached to being retired at 65.¹⁷
- (ii) Mandatory retirement formed part of a “web of interconnected rules mutually impacting on each other.”¹⁸
- (iii) Therefore, the repercussions of its abolition would be felt “in all the dimensions of the personnel function: hiring, training, dismissals, monitoring and evaluation, and compensation.”¹⁹

The majority also noted that, when presented with competing evidence with respect to complex policy issues, “the Legislature is entitled to choose between [competing socioeconomic theories] and surely to proceed cautiously in effecting change on such important issues of social and economic concern.”²⁰

15 *Ibid* at para 101.

16 *Ibid* at para 104.

17 *Ibid* at para 106.

18 *Ibid* at para 107.

19 *Ibid* at para 109.

20 *Ibid* at para 112.

Finally, the majority in *McKinney* concluded its section 1 analysis by holding that the salutary effects of the legislation outweighed its deleterious effects. The Court emphasized that legislatures ought to be permitted to take incremental steps to address complex social issues:

Some of the steps adopted may well fall short of perfection, but . . . the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.²¹

The majority thereby advocated an incremental approach to the full protection of human rights and characterized this approach as one that would allow for reassessment of the issues in light of changes in social context.

3. MANDATORY RETIREMENT IN THE COURTS AFTER *McKINNEY*

In the 23 years since *McKinney*, social attitudes, public policy priorities and some aspects of the law have changed significantly. Mandatory retirement has been abolished by legislatures in many Canadian jurisdictions. In Ontario, Bill 211 (the *Ending Mandatory Retirement Statute Law Amendment Act*²²) passed in 2005, eliminating mandatory retirement as a statutory defence to claims of age discrimination. Many of the Supreme Court's underlying assumptions about the repercussions of ending mandatory retirement have in our view been undermined by social science data that have led numerous superior and appellate courts to question and decline to follow *McKinney* over the course of the past decade.

These cases have included judicial reviews of labour arbitration decisions challenging mandatory retirement provisions in collective agreements²³ and a challenge to statutory provisions imposing retirement on justices of the peace.²⁴ In its 2001 decision in *GVRDEU*,

²¹ *Ibid* at para 131.

²² *Ending Mandatory Retirement Statute Law Amendment Act, 2005*, SO 2005, c 29 ["Bill 211"].

²³ *GVRDEU* and *CKY-TV*, *supra* note 3.

²⁴ *Justices of the Peace*, *supra* note 3.

the British Columbia Court of Appeal noted the increasing norm of abolishing mandatory retirement and suggested that it was time for the Supreme Court to revisit the issue:

Eleven years have now passed since *McKinney* was decided. The demographics of the workplace have changed considerably At least two other countries, Australia and New Zealand, have abolished mandatory retirement. Recent studies have been done on the effect of abolishing mandatory retirement in Canada and elsewhere The extent to which mandatory retirement policies impact on other equality rights, and on the mobility of the workforce, have become prominent social issues. The social and legislative facts now available may well cast doubt on the extent to which the courts should defer to legislative decisions made over a decade ago. The issue is certainly one of national importance.²⁵

In *CKY-TV*, the Manitoba Court of Queen's Bench judicially reviewed and upheld an arbitrator's decision that the evidence before him disclosed no reasonable basis for believing that "the employment regime of pensions, job security, good wages and reasonable benefits requires the maintenance of mandatory retirement at age 65 or a predominant age."²⁶

In Ontario, the Superior Court held that a provision of the *Justices of the Peace Act*²⁷ that imposed mandatory retirement on justices of the peace at age 70 violated section 15(1) of the *Charter* and was not saved by section 1. The Court read age 75 into the provision, making the legislated retirement age consistent with that for judges. The Court relied heavily on reports and policies of the Ontario Human Rights Commission, which it credited with influencing a "sea change in the attitude to mandatory retirement in Ontario,"²⁸ culminating in the elimination of the statutory defence of mandatory retirement in Bill 211.

In 2011, Justice Mactavish of the Federal Court relied on this line of cases in declining to apply *McKinney* in the context of a section 15 *Charter* challenge²⁹ to a provision of the *Canadian Human*

25 *GVRDEU*, *supra* note 3 at para 127.

26 *CKY-TV*, *supra* note 3 at para 28.

27 RSO 1990, c J.4.

28 *Justices of the Peace*, *supra* note 3 at para 45.

29 *Kelly* (FC), *supra* note 4.

*Rights Act*³⁰ which, like the provision at issue in *McKinney*, permitted mandatory retirement as a statutory defence to age discrimination. The challenge was brought by two Air Canada pilots who had been compelled to retire from their employment at the age of 60, pursuant to a mandatory retirement policy of the employer that was accepted by the Air Canada Pilots' Association through a referendum shortly before the applicants brought their complaints to the Canadian Human Rights Tribunal.

Justice Mactavish found that *McKinney* had no direct application, in part because it dealt with a different statutory scheme and the principle of *stare decisis* therefore did not apply.³¹ She went on to note that in any event the Supreme Court had not intended *McKinney* to be "the final word" on mandatory retirement. In support of this view, she cited La Forest J.'s observation that with respect to jurisdictions where mandatory retirement had already been abolished by legislatures, "we do not really know what the ramifications . . . will be and the evidence is that it will be some 15 to 20 years before a reliable analysis can be made."³² In Justice Mactavish's view, the majority decision in *McKinney* "was specifically made in the social and historical context of the early 1990s" and it "clearly left the issue open for revisitation in the future, when reliable evidence became available as to what actually happened when mandatory retirement was abolished."³³

Justice Mactavish cited developments in public policy and human rights jurisprudence as justifying a departure from *McKinney*, including the recommendation of the Canadian Human Rights Act Review Panel, chaired by La Forest J., the author of the majority decision in *McKinney*, to abolish the blanket exemption for mandatory retirement in that Act.³⁴ Mactavish J. also noted the Supreme

30 RSC 1985, c H-6 ["CHRA"], s 15(1): "It is not a discriminatory practice if (a), any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement . . . (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of the individual."

31 *Kelly* (FC), *supra* note 4 at para 134.

32 *Ibid* at para 137, quoting *McKinney*, *supra* note 2.

33 *Ibid* at para 138.

34 *Ibid* at para 149, citing Report of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa, June 2000) at 119.

Court's post-*McKinney* decisions in *Meiorin*³⁵ and *Grismer*,³⁶ which emphasized "the need for employers to avoid generalized assumptions as to the capacity of individual employees" by importing the duty to accommodate into cases of direct discrimination under human rights codes.³⁷

The Federal Court of Appeal subsequently reversed Justice Mactavish's decision, holding that she had erred in finding that she was not bound to apply the Supreme Court's decision in *McKinney*.³⁸ In the appeal court's view, the *ratio decidendi* of *McKinney* was that "mandatory retirement, as an exception to the prohibition against discrimination on the basis of age, could be justified under s. 1 of the *Charter* when it is a mutually advantageous arrangement between employers and employees which permits the workplace to be organized in a manner that accommodates the needs of both parties."³⁹ "To the extent that . . . the Supreme Court left the door open to revisit the issue of mandatory retirement at a later date," the appeal court said, "it was holding the door open for itself and not for others."⁴⁰

The complainant pilots have sought leave to appeal to the Supreme Court, and it remains to be seen whether that Court will elect in this case to go through the door it left open in *McKinney*.⁴¹

4. AGE DISCRIMINATION AFTER THE END OF MANDATORY RETIREMENT: THE ARBITRATION AWARD IN *CHATHAM-KENT*

Although mandatory retirement has largely ended in Canada, statutorily sanctioned age discrimination in employment persists in other forms, notably in the area of benefits. Provinces have adopted a

35 *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 ["*Meiorin*"].

36 *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 ["*Grismer*"].

37 *Kelly* (FC), *supra* note 4 at paras 153-154.

38 *Kelly* (FCA), *supra* note 4.

39 *Ibid* at para 80.

40 *Ibid* at para 46.

41 At the time of writing, the Supreme Court's decision on the airline pilots' leave application, filed October 1, 2012, remained pending, *supra* note 5.

range of approaches to defining the scope of permissible age distinctions in that area. Legislation in several provinces allows for different benefits based on age when the plan is “*bona fide*,” “genuine” or in “good faith.”⁴² In Manitoba, only distinctions that are *bona fide* occupational requirements or qualifications are permitted, and Quebec allows only distinctions based on actuarial data.⁴³

In Ontario, Bill 211 changed the definition of “age” under the *Human Rights Code* to remove the upper limit of 65 on the *Code*’s protection from discrimination, thereby making mandatory retirement contrary to section 5 of the *Code*.⁴⁴ However, Bill 211 carved out an exception for employee benefit plans. Read together, certain provisions of the *Human Rights Code* as amended, the *Employment Standards Act (ESA)*, and the Benefit Plans Regulation to the *ESA* exclude workers over 65 from protection against age discrimination in the provision of employment benefits. Section 25(2.1) of the *Code* provides that the right 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 *ESA*. Under the *ESA* and its Benefit Plans Regulation, the definition of age was not changed to remove the upper limit of age 65. The practical implication of these provisions is that employers are permitted to reduce certain benefit entitlements for workers who are 65 or over.⁴⁵

These provisions were the subject of the section 15 *Charter* challenge in *Chatham-Kent*, through grievances brought by the Ontario Nurses’ Association (ONA) — grievances that were dismissed by Arbitrator Etherington’s award. This unsuccessful challenge

42 *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14, s 7(2); *Human Rights Code*, RSBC 1996, c 210, s 13(3); *Human Rights Code*, RSNL 1990, c H-14, s 9(5); *Human Rights Act*, RSPEI 1988, c H-12, s 11; *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 16(4).

43 *Human Rights Code*, CCSM c H175, s 12; *Charter of human rights and freedoms*, RSQ c C-12, s 20.1.

44 Bill 211, *supra* note 22; *Code*, *supra* note 6, s 10(1).

45 *ESA*, *supra* note 6, s 44; Benefit Plans Regulation, *supra* note 6, ss 1 (“Definitions”), 4 (“Pension plans, permitted differentiation re employee’s age”), 7 (“Life Insurance plans, permitted differentiation re age”), 8 (“Disability benefit plans, permitted differentiation re age, sex or leave of absence”).

illustrates some of the difficulties that must be met by litigators who advance age discrimination claims in the current legal context.

ONA, which represented nurses at the Chatham-Kent Public Health Unit, brought two individual grievances and a policy grievance alleging that the employer had discriminated against employees over 65 in the provision of benefits. One of the issues in the round of bargaining for a renewed collective agreement in early 2008 was the benefit entitlement of nurses over 65 — an issue which arose under the above-mentioned legislative provisions after mandatory retirement was abolished. While ONA objected to new collective agreement clauses providing lesser benefits for workers over 65, the employer's final offer, which included such clauses, was put to a vote of the bargaining unit and was accepted. The new agreement provided that older nurses no longer had any long-term disability or accidental death and dismemberment coverage at all. It also reduced their life insurance benefit from two years' salary to \$5,000, limited them to just over half as many sick days as younger nurses, and capped (for nurses over age 65 only) the number of days of unused sick leave they could accumulate.

Arbitrator Etherington decided the following issues: (1) whether section 15 of the *Charter* was violated by the legislative provisions outlined above or by the collective agreement clauses that gave lesser benefits to workers over 65; (2) if there was a breach of section 15, whether that breach was justified under section 1 of the *Charter*; and (3) whether those clauses of the collective agreement violated section 5 of the *Human Rights Code* by providing less overall compensation to workers over age 65.

The arbitrator found that the legislative provisions did violate section 15 of the *Charter*. He held that they created a distinction based on age, which resulted in a disadvantage by perpetuating the stereotyping of older workers as less valuable members of society. However, he held that the violation was justified under section 1 as a "reasonable limit . . . prescribed by law [and] demonstrably justified in a free and democratic society." In so holding, he rejected ONA's argument that the legislative provisions failed the minimal impairment and proportionality branches of the section 1 test.

(a) Minimal Impairment Branch

Arbitrator Etherington applied case law on the minimal impairment branch of the *Oakes* test that had adopted a deferential approach.

He gave two reasons for finding a “reasonable basis” for concluding that the legislation interfered as little as possible with *Charter* rights.⁴⁶ First, the government had acted “with great caution by providing the maximum flexibility to employers and employees . . . 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.”⁴⁷ Second, age 65 was a reasonable limit that impaired the right to age equality “no more than is reasonably necessary to attain the identified governmental objective.”⁴⁸ The arbitrator noted that the union’s expert witness had agreed that the insurance industry and governments needed a “line in the sand,” or a normal retirement age, on which to base the costing of pension and group insurance plans. After mentioning the union’s argument that 71 would be a more appropriate age to cut off benefits because employees had to begin receiving their retirement pensions at that age, he concluded that this showed only that there were a range of acceptable alternatives available to governments.⁴⁹

Significantly, the arbitrator found that on the expert evidence before him, “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.”⁵⁰ He went on to state that “several” factors made 65 a limit that impaired the equality rights in question in a reasonably minimal way, but he mentioned and discussed only one such factor: that other social benefit and support plans used 65 as the age of entitlement. In his view, this factor suggested that it was a reasonable limit, for the following reasons:

- (i) To the extent that employees lost benefits at age 65, some of the losses could be compensated for by government programs.
- (ii) To the extent that the loss of benefits proved to be an incentive for some employees to retire, those employees would be “better situated to retire and take advantage of government pensions and benefit plans.”⁵¹

46 *Chatham-Kent*, *supra* note 7 at 61-63.

47 *Ibid* at 62.

48 *Ibid*.

49 *Ibid* at 63.

50 *Ibid*.

51 *Ibid* at 64.

- (iii) Since only a small percentage of workers had traditionally chosen to work past 65, using that age limit would keep to a minimum the number of workers detrimentally affected by the *Code*'s cutoff of benefit entitlement at 65.
- (iv) Using age 65 as the benefits cutoff would best serve the government objective of minimizing "the disruption to the web of interconnected rules that govern workplace relationships,"⁵² a goal that the Supreme Court had found to be important in *McKinney*.

Finally, Arbitrator Etherington relied on *McKinney* to find that the fact that Ontario's approach to benefit entitlement might be more restrictive than that of other provinces did not in itself move it outside the realm of reasonably minimal impairment.

(b) Proportionality Branch

Arbitrator Etherington held that the impugned provisions also satisfied the proportionality branch of the section 1 test, as their positive effects on the whole outweighed their negative effects. He accepted the Attorney-General's argument that "age is different" from other prohibited grounds, since being of a given age is an attribute that everyone can expect to share. His reasoning here seems to be reflected in his comment that "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. . . ."⁵³

The arbitrator acknowledged that there was clear evidence of negative effects on the two grievors personally and some evidence that the legislation could dissuade older workers from staying on after 65. However, he found no evidence that maintaining benefits at the pre-65 level would lead significant numbers of nurses to work past that age. Nor, in his opinion, had ONA established that the particular employer, or other public health nursing employers, were having significant staff retention problems.

⁵² *Ibid.*

⁵³ *Ibid* at 71.

In terms of positive effects, Arbitrator Etherington made several interrelated findings, which can be summarized as follows:

- (i) The legislation's major positive effect was to allow workers to stay on the job past age 65, because it limited the risk that staying on would reduce or eliminate the availability of some benefits.
- (ii) The legislation left it to employers and employees to negotiate their own terms with respect to benefits. There was evidence that ONA had asked its members to support the adoption of the collective agreement clauses in question because it would lead to higher wages for new hires.
- (iii) The arbitrator agreed with ONA that the desirability of free collective bargaining, as emphasized in *McKinney* and later recognized in *B.C. Health*,⁵⁴ could not in itself justify violations of other *Charter* rights. However, he held that it was "clearly a relevant and significant factor to be weighed against the detrimental effects of the legislation and collective agreement provisions."⁵⁵

For largely the same reasons for which he upheld the constitutionality of the impugned legislation under section 1, Arbitrator Etherington concluded that the impugned collective agreement clauses violated section 15 of the *Charter* but were justified under section 1. He noted that the parties had freely negotiated a package of salaries and benefits for all workers in light of the end of mandatory retirement and the higher costs of providing benefits for older workers, and in his view, that agreement warranted some deference. The benefits which were reduced for employees over 65 were, he said, "almost entirely limited to those which have a demonstrably strong correlation between age and cost."⁵⁶

The arbitrator went on to dismiss ONA's claim under the Ontario *Human Rights Code* that the impugned collective agreement clauses amounted to employment-related discrimination contrary to

54 *Health Services and Support-Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.

55 *Chatham-Kent*, *supra* note 7 at 74.

56 *Ibid* at 75.

section 5 of the *Code*. The legislative scheme explicitly permitted employers to give employees lesser benefits once they reached 65, and in his view the union's argument on this point failed on the plain language of the *Code*.

5. LESSONS FOR LITIGATORS FROM *CHATHAM-KENT*

In framing age discrimination litigation after the end of mandatory retirement and after *Chatham-Kent*, it is important to note at the outset the extremely narrow scope of statutory exemptions from the prohibition of age discrimination. The provisions of the *Human Rights Code*, *Employment Standards Act* and Benefit Plans Regulation upheld in *Chatham-Kent* permit differentiation on the basis of age with respect only to disability benefit plans, life insurance plans and pension plans as defined by the Benefit Plans Regulation.⁵⁷ Age-based distinctions in relation to each type of benefit must be made on an "actuarial basis,"⁵⁸ and must comply with the other conditions set out in the Regulation.⁵⁹

While *Chatham-Kent* and the Benefit Plans Regulation permit employers to provide differential benefits on the basis of age, they have no bearing where a collective agreement does not make age distinctions with respect to benefit plans. As Arbitrator Etherington himself said in *Canadian Union of Public Employees v. London (City of)*:⁶⁰

It would be inappropriate to attempt to read an implied limitation into the various benefit provisions that remain in force on the basis of a clause that has been rendered null and void because it is in violation of anti-discrimination legislation found in the *Human Rights Code*, particularly where the implied limitation is contrary to the plain ordinary meaning of the language used to express entitlement that remains. . . . In short, the amendments to the *Human Rights Code* may enable employers and unions to make distinctions that disadvantage senior workers in their entitlement to benefits, but it does not mandate it or require us to read such a limitation into existing general contract

57 Benefit Plans Regulation, *supra* note 6, s 1.

58 *Ibid.*

59 *Ibid.*, ss 4, 7 & 8.

60 *Canadian Union of Public Employees, London Civic Employees, Local 107 v London (City of)*, [2010] OLAA No 347 (QL).

language concerning benefits simply on the basis that workers who are 65 or older were not allowed to work past age 64 prior to December 12, 2006.⁶¹

The scope of the *Chatham-Kent* exception to age discrimination is also limited by the definitions of “benefit plans” in the Regulation. These definitions cannot be imported into other contexts and used to defend differential eligibility for other negotiated entitlements under a collective agreement, such as retirement allowances.

(a) Intersecting Grounds and the Trouble with “Age”

A very troubling aspect of the award in *Chatham-Kent* is the persistence of the notion, set out in *McKinney*, that age is different from other protected grounds. The *McKinney* majority found that there was a general correlation between age and ability, and that advanced age is a characteristic which individuals generally expect to share in the course of their lives.

In its 2002 decision in *Gosselin*,⁶² the Supreme Court dismissed a *Charter* challenge to Quebec legislation that precluded applicants under 30 years of age from receiving certain welfare benefits unless they participated in an employment program which was difficult for many of them to access. In doing so, the Court articulated what it saw as another distinguishing feature of age as a ground of discrimination: the idea that age, and in particular younger age, is not associated with historical vulnerability:

[U]nlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society. They do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization . . . in the way that other enumerated or analogous grounds might.

...

Concerns about age-based discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they

61 *Ibid* at para 37.

62 *Gosselin v Quebec (AG)*, [2002] 4 SCR 429.

may in fact possess. Young people do not have a similar history of being undervalued.⁶³

The differences identified by the courts between age and other protected grounds have not necessarily precluded findings of age discrimination in breach of section 15 of the *Charter*, particularly in relation to older persons.⁶⁴ In *McKinney* itself and again in *Tétreault-Gadoury*,⁶⁵ the Supreme Court found that distinctions affecting those over 65 offended section 15. Similarly, in *Chatham-Kent*, Arbitrator Etherington recognized that differential access to benefits based on age 65 was a breach of the grievors' section 15 equality rights and simply replaced one form of disadvantage with another.⁶⁶

It is at the section 1 stage that adjudicators have most consistently cited the distinguishing features of age to find that particular infringements of equality rights on the basis of age are justifiable. In *Chatham-Kent*, Arbitrator Etherington held that these features were best considered under section 1,⁶⁷ and made the following comments about the lack of correlation between age and pre-existing disadvantage:

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 . . . [I]t is difficult to view the aging

63 *Ibid* at paras 31-32. Similarly, Professor Hogg has said that "a minority defined by age is much less likely to suffer from hostility, intolerance and prejudice of the majority than is a minority defined by race or religion or any other characteristic that the majority never possessed and never will." Peter W Hogg, *Constitutional Law in Canada*, 5th ed, vol 2 (Scarborough, Ont: Thomson Carswell, 2007) looseleaf at s 55.18. This comment was endorsed by the Supreme Court in *Dickason v University of Alberta*, [1992] 2 SCR 1103 at para 141.

64 The Supreme Court has also held in a number of cases that age distinctions did not breach section 15(1) of the *Charter*: see e.g. *Gosselin*, *supra* note 62; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497; *Withler*, *supra* note 8.

65 *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22. The Supreme Court held that provisions of the *Unemployment Insurance Act, 1971* which disentitled job seekers over 65 from ordinary employment insurance benefits in favour of a lump-sum retirement benefit violated section 15 of the *Charter* and was not saved by section 1.

66 *Chatham-Kent*, *supra* note 7 at 53-54.

67 *Ibid* at 56.

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.⁶⁸

The arbitrator's analysis in this respect is inconsistent with at least some of the post-*McKinney* case law striking down mandatory retirement.⁶⁹ In recent years, evolving social attitudes have led to a broader and more nuanced understanding of age discrimination. In 2008, in the *Justices of the Peace* case,⁷⁰ an Ontario trial court quoted the following from the Ontario Human Rights Commission's *Policy on Discrimination Against Older Persons Because of Age*:⁷¹

Age discrimination is not seen as something that is as serious as other forms of discrimination, despite the fact that it can have the same economic, social and psychological impact as any other form of discrimination.

...

Despite the fact that the population is aging, many aspects of society have been designed in a way that is not inclusive of older persons.

Preconceived notions, myths and stereotypes about the aging process and older persons persist and give rise to discriminatory treatment.

Age often works in "intersection" or combination with other grounds of discrimination to produce unique forms of disadvantage. For example, women experience aging differently than men and older persons with disabilities face compounded disadvantage.

While the Federal Court of Appeal did affirm in *Kelly* that lower courts are bound to follow *McKinney* where statutory provisions permitting mandatory retirement are challenged under section 15 of the *Charter*, it also acknowledged that "it may be that conditions have changed to the point where the Supreme Court is prepared to revisit the issue."⁷²

The notion that groups defined by age are somehow less susceptible to disadvantage than those defined by other enumerated grounds is called into question by the insight that different grounds intersect and interact to shape experiences of discrimination. Policies

68 *Ibid* at 71.

69 *Supra* note 3.

70 *Justices of the Peace*, *supra* note 3 at para 42.

71 2002, revised 2007, online: <<http://www.ohrc.on.ca>>.

72 *Kelly* (FCA), *supra* note 4 at para 87.

that make distinctions on the basis of age often have a disproportionate adverse impact on groups that are also defined by other prohibited grounds, such as gender, race and disability. The Court in *Justices of the Peace* noted the Ontario Human Rights Commission's view "that mandatory retirement is age discrimination and that it has a particular discriminatory impact on women, racial minorities, recent immigrants and persons with disabilities who have more restricted access to labour markets, have lower earnings and greater unemployment during their working lives."⁷³ In their dissenting opinions in *McKinney*, Wilson J. and L'Heureux-Dubé J. both emphasized the disproportionate impact of mandatory retirement on women. L'Heureux-Dubé J. said:

The median income of those over 65 is less than half the median income of average Canadians, and there is a wide disparity among these individuals many of whom have no, or very small, private pension incomes. Moreover, women are particularly affected by this deficiency. Upon attaining the age of 65, women often have either lower or no pension income since a greater proportion of them are in jobs where they are less likely to be offered pension plan coverage. Women are more susceptible to interrupted work histories, partly as a result of childcare responsibilities, thereby losing potential pension coverage. Furthermore, women are prone to have lower lifetime earnings upon which pension benefits are based.⁷⁴

As Wilson J. pointed out, "immigrant and female labour and the unskilled comprise a disproportionately high percentage of unorganized workers," and represent "the most vulnerable employees" who would be hardest hit by mandatory retirement at age 65.⁷⁵ In *Kelly*, the Federal Court of Appeal similarly recognized that the differential impact of mandatory retirement could rise to the level of systemic discrimination.⁷⁶

An intersectional analysis of discrimination was recently approved unanimously by the Supreme Court in *Withler v. Canada (Attorney-General)*.⁷⁷ This was a section 15 *Charter* challenge to provisions of the *Canadian Forces Superannuation Act* and the *Public Service Superannuation Act* which excluded surviving spouses of

73 *Justices of the Peace*, *supra* note 3 at para 43.

74 *McKinney*, *supra* note 2 at para 398. See also para 353, *per* Wilson J.

75 *Ibid* at para 352.

76 *Kelly* (FCA), *supra* note 4 at para 33.

77 *Withler*, *supra* note 8.

plan members from receiving a supplementary death benefit if the plan member was over 65 at the time of death. The Court found that in the context of the overall benefit schemes established by the legislation at issue, the impugned provisions did not violate the claimants' equality rights under section 15. However, the Court took the opportunity to clarify its approach to section 15 by doing away with the need for a comparator group analysis, in part because of the importance of a contextual and intersectional analysis of discrimination:

An individual[']s] or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt . . .⁷⁸

The experience of one of the grievors in *Chatham-Kent* illustrates the intersectional nature of discrimination as recognized in *Withler* and in the *McKinney* dissents. Patricia O'Brien obtained a nursing diploma in 1991, after staying home for 21 years to raise her four children. She was licenced as a registered nurse in 1994 at the age of 51, and began working with the Chatham-Kent Health Unit. She had worked as a nurse for only 12 years when she reached age 65, and her pension was insufficient to allow her to retire. She also wished to continue working in order to help her children financially, and because she was in good health and loved her work. Although Bill 211 allowed her to continue working, it also permitted drastic reductions in her benefits because she had reached 65. Her experience shows how gender and age can combine to give a disproportionate adverse effect to the reduction of benefits for employees who are 65 or older.

To make the systemic effects of age discrimination clearer to adjudicators, litigators ought to frame claims of age discrimination in intersection with other grounds. This would help bring to light the flaws in the prevailing rhetoric that age is different from other prohibited grounds and that infringements of equality rights on the basis of age are easier to justify. An intersectional analysis would also be consistent with the guidance of the Supreme Court in *Withler*. It would require litigators to develop an evidentiary record to support claims of

78 *Ibid* at para 58 [citations omitted].

the adverse impact of age differentiations on demographic groups also defined by gender, race or disability, and to link that adverse impact to the individual experience of the particular claimants.

This strategy would also help to keep adjudicators from placing any weight, consciously or unconsciously, on the competing interests of younger and older workers in a collective bargaining context. The majority judgment in *McKinney* did caution against weighing that factor too heavily, but it is nevertheless used in support of arguments that discriminatory policies are justified. Furthermore, as the Federal Court of Appeal made clear in its affirmation of *McKinney* in the *Kelly* decision, while age discrimination in employment may be justifiable when it is “mutually advantageous,” distinctions can be drawn in a way that gives rise to systemic discrimination.⁷⁹ Establishing an evidentiary record to support claims of systemic discrimination based on intersecting grounds will, in our view, help greatly to counter arguments about the “mutually advantageous” effects of discriminatory employment policies.

(b) Striking a Balance under Section 1

Arbitrator Etherington’s award in the *Chatham-Kent* decision shows the high level of deference that adjudicators tend to accord to legislatures in applying the *Oakes* test under section 1 of the *Charter*. On the other hand, the reasoning in the award also suggests the following arguments to counter that tendency.

(i) *Minimal Impairment Branch*

(A) AVOID TOO MUCH DEFERENCE TO LEGISLATIVE “LINE-DRAWING”

As Arbitrator Etherington said, courts have often deferred to the legislature where there is conflicting social science evidence or where the legislature is mediating between competing societal or workplace interests, especially when the distinctions at issue are based on age. In several cases involving competing interests of that sort, courts have noted that it may always be possible to identify an option that might

⁷⁹ *Kelly* (FCA), *supra* note 4 at paras 80 & 33.

have impaired *Charter* rights less than the option the legislature did choose. In such cases, however, courts have not seen it as being their role to second-guess the legislature's choice.

Nonetheless, courts have made it clear that they cannot abdicate their responsibility to protect constitutional rights just because a situation involves complex issues or competing interests. In some of its decisions, the Supreme Court has held that the minimal impairment analysis requires consideration of whether the legislature turned its mind to alternative and less rights-impairing ways to promote its objective.⁸⁰ Litigators ought to rely on this case law to contend that adjudicators should not accord too much deference to legislative choice. It can reasonably be argued that Arbitrator Etherington abdicated his responsibility to scrutinize the legislature's "line drawing" in *Chatham-Kent*. In *Kelly* and in *CKY-TV*, the adjudicators at first instance and the reviewing courts recognized that while deference is owed to legislatures, this should not necessarily preclude a finding that a discriminatory statutory provision is not saved by section 1 of the *Charter*. While the Federal Court of Appeal decision in *Kelly* likely means that at least for the moment, *McKinney* will preclude challenges to most mandatory retirement policies, litigators challenging other statutory schemes which discriminate on the basis of age should press the courts to seriously assess the processes followed and the options considered by legislatures in choosing the means to promote their objectives.

(B) THE LEGISLATURE IS REQUIRED TO CHOOSE THE LEAST RIGHTS-IMPAIRING OPTION

As indicated above, in *Chatham-Kent*, before concluding that *Charter* equality rights were only minimally impaired by the government's choice of a cutoff age of 65 for benefit entitlement, Arbitrator

80 "[W]hen assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the 'same' objective or would achieve the same objective as effectively." *R v Chaulk*, [1990] 3 SCR 1303 at para 65. As McLachlin J. said in *RJR-MacDonald*, "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail": *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 127 DLR (4th) 1 at para 160. This reasoning was applied by the Superior Court of Justice in *Justices of the Peace*, *supra* note 3 at para 170.

Etherington observed 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.”⁸¹ If that observation is correct, it could well be argued that he should have required the government to choose the least impairing age within that range — i.e. 71. In that vein, in *Justices of the Peace*,⁸² because the government’s own expert witness said that any age between 70 and 75 would have met the government’s legislative goal, the Ontario Superior Court held that the least impairing age of 75 had to be chosen.

(C) ADJUDICATORS OUGHT TO CONSIDER LESS RESTRICTIVE APPROACHES TAKEN IN OTHER JURISDICTIONS

It can also be argued that adjudicators must give weight to the fact that less restrictive approaches have been taken in other provinces. At a minimum, the legislature should have to consider such approaches before adopting one that is more restrictive of the *Charter* right in question.

In *Chatham-Kent*, Arbitrator Etherington relied on *McKinney* in not holding the Ontario legislature to the less restrictive approaches taken elsewhere in Canada, but it can be argued that he was wrong in doing so. The majority of the Supreme Court in *McKinney* rejected the *bona fide* occupational requirement (BFOR) approach taken to mandatory retirement in other jurisdictions (permitting mandatory retirement only if it could be shown to be a BFOR), for the reason that this approach was inappropriate in the context of mandatory retirement. According to the *McKinney* majority, mandatory retirement had less to do with individual accommodation and more to do with general questions about how workplaces should be organized.

The Canadian Human Rights Tribunal declined to follow that reasoning in *Vilven*.⁸³ In the section 1 part of its decision, the Tribunal noted that other jurisdictions had pursued far less intrusive options on the issue of mandatory retirement, one of which was to permit

81 *Chatham-Kent*, *supra* note 7 at 63.

82 *Supra* note 3.

83 *Vilven v Air Canada*, 2009 CHRT 24, the decision reviewed in *Kelly* (FC) and (FCA), *supra* note 4.

mandatory retirement arrangements that constituted a BFOR. The Tribunal referred to the *McKinney* majority's rejection of such an option, but observed that the majority of other Canadian jurisdictions had nonetheless adopted this method of dealing with mandatory retirement. The Tribunal also pointed out that the concerns about individual accommodation expressed by the majority in *McKinney* might no longer have the weight they had before the Supreme Court's decision in *Meiorin*, which underscored the importance of individual accommodation and of building the recognition of equality into workplace standards.⁸⁴ In upholding the *Vilven* decision's section 1 analysis, Mactavish J. in *Kelly* carefully reviewed the record with respect to expert evidence on the labour relations and other consequences in jurisdictions where mandatory retirement had long been abolished.⁸⁵ While Justice Mactavish's decision was reversed by the Federal Court of Appeal as being inconsistent with *McKinney*, the appeal court did not comment on this aspect of the tribunal's or lower court's reasons.

Similarly, the arbitrator and reviewing court in *CKY-TV* relied on the elimination of mandatory retirement in other jurisdictions to support the conclusion that the mandatory retirement provision in the *CHRA* was unconstitutional.⁸⁶ Despite the appeal court's holding in *Kelly*, those cases can provide support for the argument that decision-makers must give at least some significance to the fact that other jurisdictions have taken less restrictive approaches.

(D) RELIANCE ON OTHER SOCIAL BENEFIT AND SUPPORT
PLANS IS UNJUSTIFIED

An argument can also be advanced that the use of age 65 in other social benefit schemes should not be taken to justify its application in the benefits carve-out provisions impugned in *Chatham-Kent*.

First, while government programs could make up for the loss of some employment benefits, those programs would not compensate workers over 65 for all such losses. Moreover, most of those benefits are integrated into employer-sponsored benefits through offsets. Even

84 *Ibid* at paras 59-63.

85 *Kelly* (FC), *supra* note 4 at paras 309-326.

86 *CKY-TV*, *supra* note 3 at para 34.

when other social benefits are taken into consideration, older workers still receive fewer benefits than their colleagues under age 65. Nor does the availability of social benefits and retirement plans such as the Ontario Municipal Employees' Retirement System at age 65 or younger address the late entry of workers into the labour market and their need to continue working to build a sufficient pension.

Furthermore, the rules respecting entitlement to government benefits are subject to change and cannot reasonably be relied upon to justify age discrimination in the current social context. For example, the federal government has passed legislation to raise the age of eligibility for Old Age Security benefits from 65 to 67 by 2029.⁸⁷ As the majority in *McKinney* recognized, the constitutionality of legislative choices must be assessed in the light of the historical context, including the history of the impugned legislation, and in the light of the current social context.⁸⁸ In upholding the provision of the *Human Rights Code* at issue in *McKinney*, La Forest J. reviewed the history of mandatory retirement and found that the use of age 65 was based on private pension plans which had been designed to "complement and integrate with" government benefit schemes.⁸⁹ Anticipated changes to federal benefit schemes, and inconsistency between the age of eligibility for government benefits and the age distinctions in employment benefits permitted by the carve-out provisions at issue in *Chatham-Kent*, mean that the existence of external benefits can no longer justify discriminatory treatment of employees by employers.

In *Withler*,⁹⁰ the Supreme Court did consider the extent to which a broader benefit scheme can be invoked to justify age limitations on entitlement imposed by a statute. The Court found that provisions governing survivors' benefits under the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* did not contravene section 15 of the *Charter* because those statutory schemes, viewed as a whole, provided benefits that corresponded with the claimants'

87 *Jobs, Growth, and Long-term Prosperity Act*, SC 2012, c 19, s 445; Government of Canada, *Budget Plan 2012*, ch 4: "Sustainable Social Programs and a Secure Retirement," online: <<http://www.budget.gc.ca/2012/plan/chap4-eng.html#a10>>.

88 *McKinney*, *supra* note 2 at para 123.

89 *Ibid* at paras 82-83.

90 *Supra* note 8.

needs.⁹¹ This reasoning is, however, clearly distinguishable from that of Arbitrator Etherington in *Chatham-Kent*, which relied on the existence of *other* social benefit schemes to support the justification under section 1 of a scheme which he had found to violate section 15 rights.

Second, the fact that only a small percentage of workers have traditionally chosen to work past 65 should be irrelevant to the constitutionality of provisions limiting the benefit entitlements of those who do work past that age. If anything, those low numbers should militate in favour of accommodating the claimant group and eliminating the benefits carve-out provision.

Finally, it could be argued that Arbitrator Etherington should not have placed so much reliance on what *McKinney* had said about the “web of interconnected workplace rules” linked to mandatory retirement. It is largely on the basis of social science evidence showing that the elimination of mandatory retirement has not affected the web of workplace rules that some more recent decisions have found mandatory retirement to be no longer justifiable under section 1. The Federal Court of Appeal’s decision in *Kelly* does limit the current authoritative weight of some of these cases, in particular the lower court’s decision in *Kelly* and that of the Manitoba Court of Queen’s Bench in *CKY-TV*. However, the social science evidence presented in those cases remains instructive for other challenges to employment policies that discriminate on the basis of age, and may yet persuade the Supreme Court to reconsider its position on mandatory retirement itself.⁹²

(ii) *Proportionality Branch*

Finally, Arbitrator Etherington relied on the *McKinney* majority’s finding that the freedom of employers and employees to determine workplace conditions through a process of bargaining was a very desirable policy goal in a free society.⁹³ He then cloaked this policy goal in the language of constitutional rights by referring to the

91 *Ibid* at paras 70-83.

92 *Kelly* (leave application), *supra* note 5.

93 *Chatham-Kent*, *supra* note 7 at 74.

fact that the Supreme Court's *B.C. Health*⁹⁴ decision had constitutionalized the right to free collective bargaining under section 2(d) of the *Charter*.⁹⁵ In our view, this reasoning is deeply flawed and needs to be challenged.

Section 2(d) protects the right of workers to join together to pursue their common goal of negotiating terms and conditions of employment. That section was not engaged in *Chatham-Kent*. Extending *Human Rights Code* protections to workers over 65 would not nullify negotiated workplace benefits or remove them from the bargaining process, nor would it undermine the capacity of workers to join together to bargain collectively. Employers and unions would still be able to bargain with respect to workplace benefit schemes, but those schemes would not be permitted to discriminate against older workers because of their age. Older workers would have access to the quasi-constitutional protections in human rights legislation to ensure that the collective bargaining process did not discriminate against them. Taken to an extreme, Arbitrator Etherington's reasoning would put into question all minimum employment standards and *Human Rights Code* protections because they set minimum standards that the parties cannot contract out of.

As well, although the parties in *Chatham-Kent* happened to be covered by a collective agreement, the carve-out provision in the *Human Rights Code* is not limited to situations where a union or a group of employees has negotiated the employment benefit entitlements of older workers. That provision of the *Code* permits the reduction of benefits to workers over 65 even where such reductions have not been negotiated. Applying this reasoning, the Manitoba Court of Queen's Bench held in *CKY-TV* that the right to collective bargaining recognized under section 2(d) of the *Charter* could not be used to justify a legislative carve-out in claims by employees who were not represented by a union.⁹⁶

94 *Supra* note 54.

95 *Charter*, *supra* note 1, s 2: "Everyone has the following fundamental freedoms . . . (d) freedom of association."

96 *CKY-TV*, *supra* note 3 at para 32.

6. CONCLUSION

While litigators of age discrimination claims in the employment context continue to face challenges following the end of mandatory retirement, strategies are available to advance the “journey towards full and ungrudging recognition of the dignity of the human person.”⁹⁷ The legacy of *McKinney* continues to pose challenges, but litigators should draw on post-*McKinney* case law to argue for the full recognition of the effects of age discrimination, in a way that takes into account the effect of intersecting grounds in shaping experiences of discrimination and looks to newly available evidence to counter assumptions that have proven to be obsolete by the passage of time, by social science research and by evolving social values.

⁹⁷ *McKinney*, *supra* note 2 at para 131.