

# Two-Tier Workplace Compensation: Issues and Remedies

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*As a result of the recession that began in 2008, many employers are looking for ways to cut labour costs. One way of doing so is to impose two-tier compensation schemes, whereby younger employees do essentially the same job as older ones, but for lower wages and benefits. The key concern of this paper is how Canadian labour, employment and human rights law could respond to the differential impact of two-tier schemes on younger workers. First, the author reviews the use of two-tier systems in the United States and Canada, showing that they affect not only workers' wages and benefits but also their pensions, as employers move from defined benefit to defined contribution plans. In the next part of the paper, he analyses arbitral, labour board and human rights tribunal case law, arguing that lower-tier workers face significant barriers in seeking legal recourse through duty of fair representation or human rights complaints. The author concludes with an overview of the restrictions on two-tier schemes in the Quebec employment standards statute, and discusses the difficulties of enacting similar legislation in other Canadian jurisdictions.*

## 1. INTRODUCTION

“Young people might reasonably ask their parents or grandparents why a much richer society cannot now provide the benefits it provided for an earlier generation. I am not sure I have a good answer . . . . But, in the main, I would have to reply that whatever

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the sacrifices my parents and grandparents made for us, we do not intend to display similar generosity now that we are in charge.”<sup>1</sup>

John Kay

In 2007, the United Auto Workers in the United States agreed to an arrangement with the Big Three automakers whereby newly hired employees would be paid only half as much as ongoing employees.<sup>2</sup> Buzz Hargrove, then president of the Canadian Autoworkers Union (CAW), stated that this was “one automotive import that won’t cross the border into Canada.”<sup>3</sup> Sam Gindin, former director of research at the CAW, said that the negotiation of such two-tier systems takes “inequalities that have been growing within the work force to a new stage: It brings them right into the workplace and includes the union as an accomplice.”<sup>4</sup> The CAW has nevertheless agreed to two-tier compensation in its most recent collective agreements, although it has resisted making them permanent.<sup>5</sup> While both the CAW and U.S. automakers have expressed strong reservations about two-tier systems,<sup>6</sup> the demand for those systems has been a significant issue in collective bargaining in both Canada and the United States.

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- 1 John Kay, “My Generation Should Repay its Good Luck,” *Financial Times* (28 March 2012), online: <<http://www.ft.com>>. John Kay is a leading British economist, born in 1948, considerably older than most of the younger workers who are affected by the two-tier workplace arrangements described in this paper. The quotation is from an op-ed article criticizing what Kay describes as the “unjustifiable anger” against a recent British government proposal that people reaching the age of 65 should pay income tax on the same basis as everybody else.
  - 2 Lila Shapiro, “Detroit Auto Workers Look To See Scales Balanced With Big Three Back In Black,” *The Huffington Post* (20 May 2011), online: <<http://www.huffingtonpost.com>>.
  - 3 Cited in Sam Gindin, “Two-Tier Wages, Second-Class Workers,” *The Globe and Mail* (22 February 2008), online: <<http://www.theglobeandmail.com/>>.
  - 4 *Ibid.*
  - 5 Herman Rosenfeld, “Canadian Auto Workers Ratify Ten-Year Two-Tier,” *Labour Notes* (1 October 2012), online: <<http://labornotes.org/2012/10/canadian-auto-workers-ratify-10-year-two-tier>>.
  - 6 “Chrysler: What a Great Difference Two Years Makes,” Editorial, *Automotive News* 86:6489, 12 (7 November 2011), on Sergio Marchionne, CEO of Chrysler, now saying that the scheme is unsustainable because it undermines efforts to get Fiat and Chrysler working in unison.

With the economic recession that began in 2008, many employers have been focused on cutting costs, including labour costs as represented by wages and benefits. Occupational pension plans have been particularly compromised. Pension law requires employers who sponsor pension plans to take steps to ensure that the plans are sufficiently funded to meet future pension payment obligations. These potentially large obligations have led many employers to put pension plans on the bargaining agenda, seeking to transfer risk to employees by moving away from defined benefit (DB) plans (which provide a predetermined pension calculated on the basis of the length of an employee's service and his or her average wage over a certain number of years before retirement) and toward defined contribution (DC) or money-purchase plans, which pay a pension based on the accumulated contributions made by the employee and the employer and the investment earnings on those contributions. To help them make these moves, employers often push for the creation of a two-tier pension structure, in which newly hired employees are enrolled in the riskier DC plans while older workers remain in DB plans. Some of the most significant collective bargaining disputes in Canada over the past year or so, such as those at Canada Post and Air Canada, have centered on disagreements over two-tier systems.

While all of this has been taking place, concerns have continued to be expressed about increasing inequality in Canadian society,<sup>7</sup> with a particular focus on vulnerable workers and precarious work. One group that is greatly affected by changing economic conditions and labour markers is younger workers,<sup>8</sup> who face much higher

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7 The richest quintile of Canadians accounts for 39.2% of national income compared to 7.2% for the poorest quintile, and the gap between the two has been growing. See, for example, Conference Board of Canada, *Canadian Income Inequality: Is Canada Becoming More Unequal?* (July 2011), online: <<http://www.conferenceboard.ca/>>; and Armine Yalnizyan, *The Rise of Canada's Richest 1%* (Ottawa: Canadian Centre for Policy Alternatives, 2010), online: <<http://www.policyalternatives.ca/>>.

8 Francis Fong, "The Plight of Younger Workers," *TD Economics Observation* (8 March 2012), online: <[http://www.td.com/document/PDF/economics/special/ff0312\\_younger\\_workers.pdf](http://www.td.com/document/PDF/economics/special/ff0312_younger_workers.pdf)>.

unemployment rates<sup>9</sup> and the spectre of decreased state-funded benefits at the end of their working lives.<sup>10</sup> Two-tier arrangements that substantially reduce the wages or benefits of newly hired workers raise significant equity issues between older and younger generations of workers. They also raise concerns about subjecting new workers to key terms of employment on which they have had little or no say, and about whether such arrangements constitute unacceptable forms of age-based discrimination.

The key concern of this paper is whether and how our labour, employment and human rights laws might respond to two-tier schemes. Are such schemes subject to regulation under those regimes, and if not, should they be controlled through labour relations principles or through human rights processes because of their possibly discriminatory impact? In an effort to answer this question, this paper will begin by examining the differential treatment of workers, primarily under collective agreements but with some reference to non-unionized workplaces. In Part 2, to provide context, it draws on John Budd's framework for balancing the values of efficiency, equity and voice in employment relationships.<sup>11</sup> It then provides an overview of the use of two-tier arrangements, starting from their emergence in the United States in the 1980s and moving on to more recent experiences in U.S. and Canadian workplaces.

Part 3 will explore three types of legal issues arising from two-tier arrangements. First, do the principles of collective bargaining law, especially the duty of fair representation imposed on unions, act as constraints on the use of two-tier compensation arrangements? Second, can age-based discrimination claims, either before a human

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9 Statistics Canada reports that during the recent economic downturn, youth employment increased to 16% in December 2009, compared to 7.1% for workers 25 years and older. Their participation rate also dropped by 3 percentage points. See Katherine Marshall, "Youth Neither Enrolled nor Employed" (Summer 2012) 24:2 Perspectives on Labour and Income, catalogue no 75-001-XIE, online: Statistics Canada <<http://www.statcan.gc.ca>>.

10 In the March 2012 budget, the federal government announced its intention to raise the eligibility age for Old Age Security from 65 to 67. See Government of Canada, "Sustainable Social Programs and a Secure Retirement," ch 4 (29 March 2012), online: Budget 2012 <<http://www.budget.gc.ca>>.

11 John W Budd, *Employment with a Human Face: Balancing Efficiency, Equity and Voice* (Ithaca and London: ILR Press, 2004).

rights tribunal or in grievance arbitration, provide a way to balance the competing interests? Third, should we introduce a statutory employment standard regulating the use of two-tier wage and benefit schemes, as Quebec has done?

## **2. TWO-TIER COMPENSATION SCHEMES**

### **(a) What Two-Tier Schemes Are and Why They Arise**

Employers faced with an economic imperative to maximize profits, especially at a time of economic instability, may be inclined to address that imperative by cutting labour costs. They can do this in a number of ways. The size of the workforce can be reduced. Functions can be outsourced or subcontracted to suppliers of goods and services, often abroad, who may be able to operate more cheaply because of efficiencies of scale, lower labour costs or higher productivity.<sup>12</sup> Alternatively, the employer may decide to carry out all or some of its own operations offshore in low labour-cost jurisdictions. Sometimes none of these options may be considered appropriate, practical or sufficient.

Another option open to the employer may be to reduce costs by lowering wages and benefits for some or all of its current employees. This option may face strong resistance from workers, especially in a unionized environment. There is considerable evidence showing a rigidity in wages even during economic recessions. This reflects a widespread reluctance to impose general wage decreases, perhaps due in part to a perception that they have a very significant negative impact on employee morale and consequently on productivity.<sup>13</sup> In the face of these concerns, an employer may seek to establish a two-tier compensation system, leaving the terms and conditions of current employees intact but creating a lower wage scale and benefit package for new employees. This two-tier arrangement may be seen as a temporary measure needed to survive a particular economic challenge,

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12 Richard Haines, "Organizational Outsourcing and the Implications for HRM" in David G Callings & Geoffrey Wood, eds, *Human Resource Management* (New York: Routledge, 2009) 92.

13 Truman F Bewley, *Why Wages Don't Fall During a Recession* (Cambridge: Harvard University Press, 1999).

or it may be intended to be permanent. If it is permanent, the number of workers in the lower tier will in the long run come to exceed that of the grandparented workers, resulting in a long-term reduction in labour costs.

Whether an employer reduces labour costs by laying off workers or by instituting a two-tier compensation system, the effect is to create two classes of workers. A general reduction in the size of the workforce creates a class of employees who continue to have jobs and a class who become unemployed, whether for a short or a long period. In general, where mass layoffs occur, the redundant workers end up finding jobs that pay less and provide fewer benefits.<sup>14</sup> Where the employer outsources work or turns to offshore production, the new service provider often achieves lower labour costs by using vulnerable workers and flexible working arrangements which may lead to large increases in precarious employment and part-time work, and to lower benefits.<sup>15</sup> Offshore production has negative consequences for workers both in the home jurisdiction<sup>16</sup> and those offshore, who typically have much lower wages and benefits and much less protection through collective bargaining and legislated employment standards.

Two-tier systems within a workplace create distinctions among workers based on their date of hire; two categories of workers perform the same job in the same establishment, but with formally different compensation entitlements. These systems favour workers who were hired before a particular date. Such workers tend on average to be older than those hired later, and the two-tier system may well have the effect of discriminating on the basis of age.

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14 "Workers displaced in a plant closing or other events when jobs disappear permanently suffer long-term earnings losses lasting as long as twenty years." Michael Greenstone & Adam Looney, *An Economic Strategy to Renew American Communities* at 6 (13 October 2010), online: Brookings, The Hamilton Project <<http://www.brookings.edu>>.

15 David Weil, "Rethinking the Regulation of Vulnerable Work in the USA: A Sector-based Approach" (2010) 51:3 JIR 411.

16 Avraham Ebenstein, Ann Harrison, Margaret McMillan & Shannon Phillips, "Estimating the Impact of Trade and Offshoring on American Workers Using the Current Population Surveys," World Bank Policy Research Working Paper 5750 (June 2011), online: National Bureau of Economic Research <<http://www.nber.org>>.

What we need is some metric for assessing whether two-tier compensation schemes provide an appropriate balance between competing workplace goals. Budd's perspective on the balancing of the three fundamental goals of efficiency, equity and voice in the employment relationship is helpful in providing a normative framework against which to measure the consequences of these schemes.<sup>17</sup>

The goal of efficiency is closely tied to a commitment to property rights and market ordering. Advocates of efficiency emphasize the need for employer flexibility in responding to competitive pressures. They fear that collective bargaining or government regulation will interfere with the ability of employers to respond effectively to global competitive demands, market fluctuations and economic crises.

As for equity, Budd describes it as "fairness in the employment relationship such that employees receive the treatment they deserve including minimal conditions worthy of any free human being and fair conditions based on objective standards of performance."<sup>18</sup> Assessing exactly what treatment employees deserve and what constitutes fair conditions is no easy task. Nevertheless, it is widely accepted that equity includes a commitment to norms of non-discrimination, and in the context of employee compensation, to "equal pay for equal work" and perhaps also to "equal pay for work of equal value" or some other formulation of the aims of pay equity. Richbell and Wood note "the importance of feelings of fair treatment and the possible behavioural manifestations that may result from perceived inequity."<sup>19</sup> For example, employees' perceptions of inequities arising from two-tier compensation schemes may lead those in the lower tier to hold unions partly responsible for the inequity.<sup>20</sup>

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17 *Supra* note 11.

18 *Ibid* at 20.

19 Suzanne Richbell & Geoffrey Wood, "Reward Management" in David G Callings & Geoffrey Wood, eds, *Human Resource Management* (New York: Routledge, 2009) 208 at 212, citing JS Adams, "Inequity in Social Exchange" in Leonard Berkowitz, ed, *Advances in Experimental Social Psychology*, vol 2 (New York: Academic Press, 1965) 267.

20 James E Martin & Melanie M Peterson, "Two-Tier Wage Structures: Implications for Equity Theory" (1987) 30:2 *Academy of Management Journal* 297. This in turn can lead to employee morale problems, higher employee turnover, lower productivity and workplace conflict: Marvin J Levine, "The Evolution of Two-Tier Wage Agreements: Bane or Panacea in Labor Intensive Industries" (1989) 40:1 *Lab LJ* 12.

Recent declines in unionization and the growth of strategic human resource practices, such as performance pay, raise ethical issues for human resource managers aiming to balance equity and efficiency.<sup>21</sup> The legitimacy of different pay for similar jobs raises similar issues. Performance-based pay schemes might justify compensation differentials on the basis of the output of each worker, but two-tier schemes which create differentials primarily on the basis of the date of hire do not generally fall within the scope of such justifications. Where efficiency and equity conflict, we may have to make a choice between accepting efficiency as the justification for an inequitable arrangement and declaring that some measure of restraint on market ordering is necessary to ensure basic fairness and decency.

Voice, in Budd's framework, is a third, very important factor that deserves close consideration in assessing two-tier compensation schemes. Budd describes voice as the "ability to have meaningful input into decisions."<sup>22</sup> He connects voice to theories of political self-determination, which justify industrial democracy, and to theories of autonomy and human dignity, which justify giving employees a role in decision-making. Traditionally, unions and collective bargaining have been one means of providing employee voice and industrial democracy in the workplace. However, because collective bargaining is realistically available to only a minority of the working population in Canada, other forms of employee voice must be sought in developing public policy. Voice could, for example, be promoted in the setting of minimum employment standards and in internal decision-making processes within a workplace. Careful scrutiny is needed of workplace practices and public policies that affect workers who have had little voice in their development.

In the context of two-tier compensation schemes, we are likely to be confronted with a class of younger workers who have diminished entitlements compared to older workers. An employer might

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21 John W Budd & James G Scoville, eds, *The Ethics of Human Resources and Industrial Relations* (Champaign, Ill: Labor and Employment Relations Association, 2005).

22 *Ibid* at 23. For a study of how employees themselves value the opportunity to exercise voice, see Yuval Feldman, Amir Falk & Miri Katz, "What Workers Really Want: Voice, Unions and Personal Contracts" (2011) 15 *Employee Rights and Employment Policy Journal* 237.



justify this as a necessary means of reducing labour costs while retaining the loyalty of an experienced workforce. Unions might justify it as a necessary evil which protects the interests of older incumbent workers whom it has a duty to represent fairly. Those older workers' interests are given voice through the collective bargaining process, but the class of yet-to-be hired workers has no voice and is subject to different and arguably inequitable conditions of work.

**(b) Two-Tier Compensation Schemes in the United States and Canada**

The early 1980s was a period of economic upheaval, labelled by Bluestone and Harrison as the Deindustrialization of America,<sup>23</sup> and was marked by intense concession bargaining in unionized workplaces. While U.S. employers had sporadically demanded concessions in earlier years,<sup>24</sup> in the early 1980s they made significant concession demands, to which unions often acceded. Employer pressure commonly took the form of threats to close down, to relocate work or to file for bankruptcy.<sup>25</sup>

Concession bargaining in the 1980s often led to two-tier compensation agreements.<sup>26</sup> By 1984, Levine reported, 8% of new collective agreements included two-tier provisions. They ranged across a variety of industries including airlines, auto manufacturing, grocery retailing and aerospace manufacturing, of which the airline industry pacts received the most attention. These two-tier arrangements took diverse forms, some applying almost universally to all job categories while others applied only to selected categories. Some were designed to be permanent and others temporary. Some focused on wages only, and others delayed or reduced benefits as well.

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23 Barry Bluestone & Bennet Harrison, *Deindustrialization of America: Plant Closings, Community Abandonment and the Dismantling of Basic Industry* (New York: Basic Books, 1982).

24 Peter Cappelli, "Plant-Level Concession Bargaining" (1985-86) 39:1 *Indus & Lab Rel Rev* 90.

25 *Ibid.*

26 Levine, *supra* note 20.

U.S. airlines, in particular, resorted to two-tier wage schemes.<sup>27</sup> One reason was the need to reduce labour costs in the face of new competitive forces arising from airline deregulation, but that was far from the whole story. Walsh noted that two-tier wage structures were characterized by a gradual payoff structure for the firms; the magnitude of the reduction in average labour costs depended on the rate of new hiring arising from either employee turnover or expansion. The paradoxical result, as he put it, was that “two-tier wage structures are a form of concession that can be best utilized by prosperous firms.”<sup>28</sup> They put a disproportionate share of the cost of retrenchment on newly hired employees who had no chance to participate in the negotiation of the scheme. Walsh described the move to two-tier structures in the airline industry as more of an experiment than a coherent strategy, motivated as much by a desire to modify long-term bargaining relationships as by a desire for short-term cost reductions.<sup>29</sup> The differences in pay rates between the two tiers negotiated in that industry in the 1980s were very large indeed. For example, under the American Airlines agreement with its pilots, a pilot with 12 years’ experience in the newer, lower tier would earn \$65,000, compared to \$150,000 for incumbents in the older, higher tier.<sup>30</sup>

While the straightforward explanation of employers’ motivation in negotiating two-tier plans was that they sought to reduce labour costs, the question remains why they pressed for two-tier arrangements rather than across-the-board concessions. From the union perspective, a key to agreeing to such arrangements was a reciprocal undertaking by employers to give job security to the more highly-paid incumbents, who otherwise would have feared dismissal because their wages and benefits were significantly higher than those of the newly employed lower tier of workers.

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27 David J Walsh, “Accounting for the Proliferation of Two-Tier Wage Settlements in the U.S. Airline Industry, 1983-1986” (1988) 42:1 *Indus & Lab Rel Rev* 50.

28 *Ibid* at 52.

29 *Ibid* at 61.

30 Levine, *supra* note 20.

Two-tier arrangements declined in the 1990s, but have come back on the agenda in the United States in the past decade.<sup>31</sup> Jacobs noted that there was a trend to “soft freezes” of DB pension plans, with contributions continuing to be made for ongoing employees but none for new hires. Such soft freezes in effect created a two-tier system, and were occurring at a much higher rate in unionized workplaces.

Only limited data is available on the extent to which two-tier wage and benefit schemes have been adopted in Canada. Michel Coutu notes that such schemes were introduced in Quebec in the mid-1980s,<sup>32</sup> and cites several studies carried out between 1988 and 1992 measuring their extent. A 1992 study showed that 6.3% of collective agreements in Quebec included two-tier provisions, some of which were permanent and others temporary.<sup>33</sup> A later study by the Quebec Ministry of Labour, cited by Coutu, showed that between 1992 and 1997, 5.2% of collective agreements had two-tier provisions, which were particularly prevalent in the retail sector and in municipalities. Another study of municipal collective agreement settlements discussed by Coutu showed that 34 of 60 had either temporary or permanent grandfathering arrangements.<sup>34</sup> This percentage is very high compared to that found in other studies, partly because of the definition it used, which took into account differential terms for temporary and student employees as well as differential job security

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31 Perhaps the most significant of those arrangements was between the Big Three automakers and the United Automobile Workers in 2007. John J Lucas & Jonathan M Furdek, “The Labor Agreements between UAW and the Big Three Automakers – Good Economics or Bad Economics?” (2009) 7:1 *Journal of Business and Economics Research* 41.

32 Michel Coutu, “Les clauses dites ‘orphelins’ et la notion de discrimination dans la Charte des droits et libertés de la personne” (2002) 55:2 *RI* 308. Two-tier provisions are often called “orphan” clauses in Quebec.

33 Yves Turcot, “La remuneration à double palier dans les conventions collectives au Québec. Evolution de la situation entre 1985 et 1990,” *Le Marché du Travail*, novembre 1992, at 9-10 & 78-87. For the purposes of the CRIMT study, two-tier systems were defined as those which created two or more distinct salary scales for the same jobs, separating employees on the basis of their date of employment. This effectively excluded other grandparenting arrangements, such as those which might have set differential probationary periods based on date of employment.

34 Rock R Beaudet, “Les clauses ‘orphelins’ dans le secteur municipal,” Montréal, *Le pont* entre les générations, 24 février 1988.

provisions for new employees, and perhaps also because it focused on a restricted set of municipalities.

It is not clear whether a similar percentage of collective agreements in other parts of Canada had two-tier provisions. However, a number of recent high-profile collective bargaining disputes have focused on demands for differential wages or benefits for new hires. A key demand has been the recent placing of new hires in recently created DC or hybrid pension plans while leaving ongoing workers in DB plans. An important example is found in the negotiations in early 2011 between Air Canada and the CAW over terms and conditions for sales and service agents, when the employer claimed to have a pension deficit of \$2.1 billion. Air Canada also demanded cuts to the pensions of existing employees, so that new retirees would have a lower level of benefits than those who had already retired.<sup>35</sup> The parties' inability to arrive at a settlement on this issue was one of the major factors leading to a strike. Although the Canadian government introduced legislation to end the strike,<sup>36</sup> Air Canada and CAW arrived at an agreement before that legislation could be enacted. The agreement maintained the level of pension benefits for current employees, while lowering wage rates by 20% for newly hired employees and significantly reducing early retirement benefits for all employees.<sup>37</sup> The parties further agreed to send the issue of a DC pension for new employees to arbitration, using mediation and final offer selection. The CAW made a significant move in arbitration, by proposing a hybrid pension plan for new employees that would essentially have a portion of their pensions guaranteed through a DB plan and a portion dependent on a DC scheme. The arbitration board accepted the CAW

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35 "Air Canada's great pension divide," CBC News (13 June 2011), online: <<http://www.cbc.ca/news/business/story/2011/06/13/f-aircanada-pension-faq.html>>.

36 *An Act to provide for the resumption and continuation of air service operations*, Bill C-5, 41st Parliament, 1st Session (not enacted because of the settlement).

37 "Air Canada strike to end Friday," United Press International (16 June 2011), online: <[http://www.upi.com/Business\\_News/2011/06/16/Air-Canada-strike-to-end-Friday/UPI-58071308247898/](http://www.upi.com/Business_News/2011/06/16/Air-Canada-strike-to-end-Friday/UPI-58071308247898/)>. *Air Canada v CAW – Canada Local 2002* (2011), online: CAW <[http://www.caw.ca/assets/pdf/air\\_canada\\_\\_caw\\_re\\_pension\\_for\\_new\\_hires\\_award1.pdf](http://www.caw.ca/assets/pdf/air_canada__caw_re_pension_for_new_hires_award1.pdf)> [CAW Award].

proposal on this issue,<sup>38</sup> noting that “age-based cross-subsidies are built into the design of DB pension plans.”<sup>39</sup> It also observed, from an equity perspective, the fact that DB plans “help to insulate members from the risks associated with longevity, low interest rates and market volatility.”<sup>40</sup>

In a second set of negotiations, involving flight attendants represented by CUPE, Air Canada continued to push the DC plan for new employees. This dispute also ended up in arbitration; Elizabeth McPherson, Chair of the Canadian Industrial Relations Board (CIRB) acted as arbitrator. Invoking the concept of replicability, which favours the choice of terms that best replicate what the parties would likely have negotiated themselves, McPherson chose the Air Canada position, including a hybrid plan for newly hired employees.<sup>41</sup> She rejected the argument that significant weight should be placed on the refusal of employees to ratify an earlier tentative agreement. Air Canada’s disputes with its pilots, baggage handlers and mechanics have also resulted in arbitral imposition of similar hybrid schemes.<sup>42</sup>

In the 2010-2011 round of bargaining between Canada Post and the Canadian Union of Postal Workers, Canada Post placed on the table a number of demands for two-tier wages and benefits. Initial demands included a proposal to implement a DC plan for new employees, leaving in place a DB plan for incumbent employees, and

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38 CAW Award, *ibid.* Air Canada initially threatened to seek judicial review of the arbitral decision, but eventually backed off. Brent Jang, “Air Canada won’t appeal arbitrator’s pension ruling,” *The Globe and Mail* (25 October 2011), online: <<http://www.theglobeandmail.com/report-on-business/air-canada-wont-appeal-arbitrators-pension-ruling/article4255709/>>.

39 *Ibid* at 35-36.

40 *Ibid* at 44, quoting “Retooling Canada’s Ailing Pension System Now, For the Future,” Canadian Institute of Actuaries, October 2009.

41 *Air Canada v Canadian Union of Public Employees* (2011). Both parties agreed to the hybrid plan in the tentative agreement rejected by union members, and both parties included it as part of their final-offer submission.

42 Scott Deveau, “New Air Canada pilots’ contract will allow for launch of low-cost carrier,” *Financial Post* (31 July 2012), online: <<http://business.financialpost.com/>>; Brent Jang, “Arbitrator sides with Air Canada in contract dispute,” *The Globe & Mail* (17 June 2012), online: <<http://theglobeandmail.com/>>.

to set lower wage rates for new employees.<sup>43</sup> Canada Post eventually dropped the former demand,<sup>44</sup> but kept the two-tier wage demand on the table through rotating strikes by CUPW and through a subsequent lockout. The dispute was eventually ended in June 2011 by the enactment of the *Restoring Mail Delivery for Canadians Act*,<sup>45</sup> whereby Parliament sent unresolved issues to final offer selection by an arbitrator unilaterally appointed by the government. That Act also removed wage rates from the arbitration process,<sup>46</sup> and imposed rates that might be considered punitive because they were lower than those in Canada Post's last offer.<sup>47</sup> No arbitration award was made because of extensive litigation over the appointment of an arbitrator.<sup>48</sup> The parties negotiated a settlement in early October 2012, maintaining a

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43 See CUPW's description of outstanding Canada Post proposals, online: <[http://www.cupw.ca/index.cfm/ci\\_id/1165/la\\_id/1.htm](http://www.cupw.ca/index.cfm/ci_id/1165/la_id/1.htm)>. As of June 15, 2011, CUPW claimed that Canada Post was proposing an 18% reduction in the starting wage rate for new employees, an increase in retirement age, and a reduction of vacation.

44 Canada Post News Release, "Canada Post Committed to Reaching a Negotiated Settlement" (18 May 2011), online: <<http://www.canadapost.ca>>.

45 *Restoring Mail Delivery Act*, SC 2011, c 17.

46 *Ibid*, s 15.

47 Barrie McKenna, "Postal Dispute was Never about Pensions, New Hires," *The Globe and Mail* (26 June 2011), online: <<http://theglobeandmail.com>>.

48 The Act also prohibited court proceedings challenging the appointment of the arbitrator or reviewing any arbitral decision (see *supra* note 45, s 12). However, the union obtained a declaration from the Federal Court annulling the appointment on the grounds that the arbitrator lacked fluency in French and had insufficient labour relations experience. *Syndicat des travailleurs et travailleuses des postes c Société canadienne des postes*, 2012 CF 110 (QL). On March 14, 2012, the Minister of Labour appointed a new interest arbitrator, and the union announced the next day that it would challenge the appointment because of the arbitrator's connections with the federal Conservative Party and with Canada Post. Canadian Union of Postal Workers Urban Operations, Internal Release, Negotiations Bulletin 95, "Union to Challenge Arbitrator Appointed by Minister Raitt" (15 March 2012), online: <[http://www.cupw.ca/multimedia/website/publication/English/PDF/2011\\_urbneg\\_bul/neg2011\\_bul\\_95\\_en.pdf](http://www.cupw.ca/multimedia/website/publication/English/PDF/2011_urbneg_bul/neg2011_bul_95_en.pdf)>. The Federal Court upheld that challenge on August 8, 2012, citing among other things the fact that the arbitrator had as Facebook friends the Minister of Labour and another member of the federal cabinet. *Syndicat des travailleurs et travailleuses des postes c Société canadienne des postes*, 2012 CF 975 (QL). As of late August 2012, the parties were back at the bargaining table.

defined benefit plan for new employees, albeit with a raised retirement age, but providing them with differential compensation and benefits.<sup>49</sup>

In addition to the struggles at Air Canada and Canada Post, two-tier arrangements (especially the replacement of DB pension plans with DC plans for new employees) have figured in other recent collective bargaining disputes. For example, after the acquisition of Inco by Vale, a key goal of the new employer in collective bargaining was to reduce labour costs, and one of its demands was for a DC plan for new workers. After a long and sometimes violent strike, the union agreed to that demand. It is worth noting that the agreement gave ongoing workers in the DB plan a boost in their post-retirement income as well as improvements in the disability plan.<sup>50</sup> Similarly, after the takeover of Stelco by U.S. Steel, the failure of collective bargaining resulted in an 11-month lockout, which ended only when the United Steelworkers agreed to a DC pension plan for new workers and to other concessions, including the removal of indexing for current retirees.<sup>51</sup>

These events are consistent with a general trend away from DB pension plans. Towers Watson's 2012 Pension Risk Survey of Canadian pension plan sponsors indicated that only 36% of plan sponsors were keeping their DB plans open to current members and future hires, and that many private-sector employers in particular had already frozen their DB plans.<sup>52</sup>

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49 Canadian Union of Postal Workers, "The Settlement versus CPC's July 19th Position," online: <<http://www.cupw.ca>>.

50 "Ont. Vale workers vote to approve new contract," CTV News (8 July 2010), online: Bell Media <<http://www.ctvnews.ca>>.

51 "US Steel lockout over," *The Hamilton Spectator* (15 October 2011), online: Metroland Media Group <<http://www.thespec.com>>.

52 For example, the Royal Bank announced that as of 1 January 2012 it would no longer offer access to its DB plan for newly hired employees, and would limit them to its DC plan. Press Release, "Pension Worries on the Rise for Both Defined Benefit and Defined Contribution Plan Sponsors, Towers Watson Survey Finds" (1 March 2012), online: <<http://www.towerswatson.com/canada-english/press/6522>>. In making the announcement, the bank also claimed that the change would bring no short-term cost savings, in part because of an increase in employer contributions, but that it would help to achieve "more predictable" pension costs in the future.

### (c) The Main Problem of Employer Pension Plans

Membership in an employer-sponsored pension plan is a common though far from universal benefit for Canadian workers.<sup>53</sup> Such plans are part of what is referred to as a three-pillar national retirement income system, because they combine with the publicly funded Old Age Security and Guaranteed Income Supplement, the privately funded but publicly administered Canada Pension Plan, and tax-incentivized private savings through registered retirement savings plans and tax-free savings accounts.<sup>54</sup> Some employer-sponsored pension plans are unilaterally created by employers and some are the result of collective bargaining. In 2008, DB plans accounted for about 80% of all employer pension plans,<sup>55</sup> most of the others being DC plans, also called money-purchase or contribution accumulation plans. Who bears most of the financial risk differs markedly between DB and DC plans.<sup>56</sup> Under a DB plan, it is normally the employer who must ensure that there are adequate reserves to fund the payment of all pensions, whereas under a DC plan, employees bear the risk that the accumulated capital may not suffice to produce a stream of retirement income consistent with their expectations. In practice, there are various types of hybrid pension plans that have attributes of both DB and DC plans.

DB plans have come under considerable strain in recent years. As a result of the economic recession that began in 2008, many DB plans have been determined to be significantly underfunded, in which case employers are statutorily required to make additional payments

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53 In 2008, it was reported that only 34.7% of the paid workforce under Ontario jurisdiction was covered by an employer pension plan, compared to the Canadian average of 38.5%. Ontario, Expert Commission on Pensions, *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (Toronto: Queen's Printer for Ontario, 2008) at 30 ["Arthurs Report"].

54 Elizabeth J Shilton, *Gifts or Rights? A Legal History of Employment Pension Plans in Canada* (SJD Thesis, University of Toronto, 2011) (unpublished).

55 "Arthurs Report," *supra* note 53.

56 For a more thorough discussion of this difference, see the papers in this issue of the CLELJ by Ronald B Davis, "Security of Retirement Benefits in Canada: You Bet Your Life?"; by Paul W Litner & Jonathan Marin, "Legal Issues for Plan Sponsors in the Current Round of Pension Reform"; and by Elizabeth J Shilton, "Gender Risk and Employment Pension Plans."



into the plans to ensure their solvency. This has led many employers to look to the possibility of transferring risk to employees by moving to a DC or hybrid plan. Especially in unionized workplaces, a major challenge is how to move away from a DB plan without compromising the expectations of those employees who have claims under such a plan. One way to do this is to adopt a two-tier pension system, setting up a new DC or hybrid plan covering newly hired employees while maintaining the existing DB plan for ongoing employees. As with two-tier wage and benefit systems, this means that two groups of workers who do the same job for the same employer in the same establishment will receive quite different pension benefits.

### **3. POTENTIAL LEGAL CHALLENGES TO TWO-TIER SYSTEMS**

What forum or forums might be available to challenge a two-tier collective agreement provision as discriminatory?

#### **(a) Arbitral Responses to Two-Tier Systems**

The Supreme Court of Canada has shown considerable deference to grievance arbitration as the forum of choice for disputes arising from collective agreements,<sup>57</sup> augmented by arbitral authority to consider human rights issues.<sup>58</sup> Nevertheless, the Court has determined that a human rights tribunal has concurrent jurisdiction to consider a claim that a two-tier arrangement is discriminatory,<sup>59</sup> noting in particular that arbitration may not be appropriate if the union is opposed in interest to the claim of a disenfranchised minority that it has been unfairly treated. This can be particularly problematic where the claim is not that the collective agreement has been violated, but that its provisions are themselves discriminatory. However, a union that has reluctantly agreed to a two-tier scheme may in some

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57 *Weber v Ontario Hydro*, [1995] 2 SCR 929, [1995] SCJ No 59 (QL).

58 *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, [2003] 2 SCR 157.

59 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (AG)*, 2004 SCC 39, [2004] 2 SCR 185 [*Morin*].

circumstances be willing to grieve against the enforceability of such a scheme and to argue strongly against it at arbitration.<sup>60</sup>

The few arbitral awards that have touched on two-tier arrangements have demonstrated little concern about their inequities. In *Teamsters, Local 1979 v. McKesson Canada Inc.*,<sup>61</sup> the employer and union differed on whether part-time workers employed before the introduction of a two-tier plan for full-time workers became entitled to be paid at the higher rate if they took a full-time position. Relying on extrinsic evidence and employer practice after the negotiation of the two-tier arrangement, the arbitrator concluded that the parties intended part-time employees to be placed in the lower tier if they moved to a full-time position. There was no suggestion that the potentially inequitable impact of the provision should lead to a different interpretation.

Two-tier systems have also been applied retroactively to employees who were already working for the employer when the agreement was made. In *United Steelworkers, Local 2020-51 v. Selkirk Canada Corp.*,<sup>62</sup> the parties agreed that one group of workers would be designated as “protected” employees, and another group, who had been recently hired, would be designated as “alternates.” The wage rate of alternates would be decreased to \$12 per hour from an average of \$17, with no increases during the term of the collective agreement. The issue in arbitration was whether the alternates would be paid scheduled wage increases or have their wage rates frozen for the life of the agreement. The arbitrator found that the intention of the parties, as expressed in the collective agreement, was to freeze the alternates’ wages.

## **(b) Labour Relations Board Responses to Two-Tiered Systems**

### *(i) First Contract Arbitration*

Collective bargaining legislation in most Canadian jurisdictions provides, in ways that vary between the jurisdictions, for settlement by labour relations boards (through interest arbitration) of bargaining

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60 See, for example, *Ontario Nurses' Association v Chatham-Kent (Municipality of)* (2010), 202 LAC (4th) 1, [2010] OLAA No 580 (QL).

61 [2007] OLAA No 441 (QL) (Reilly).

62 [2010] OLAA 35 (QL) (Luborsky).

disputes that arise in new collective bargaining relationships. This is often referred to as “first contract arbitration.”<sup>63</sup> In this context, labour boards have to decide how to treat employer demands for a two-tier wage or benefit structure. For example, in determining whether to order that a first contract dispute be referred to arbitration, the Ontario *Labour Relations Act (OLRA)* requires the Ontario Labour Relations Board (OLRB) to consider a number of criteria. These include whether an employer has refused to recognize the bargaining authority of the union, whether it has taken an uncompromising position in bargaining without reasonable justification, and whether it has made reasonable efforts to reach a collective agreement.<sup>64</sup>

The Ontario Board is the only one that has addressed two-tier issues in this context. In *Canadian Union of Public Employees, Local 3501 v. Boys’ Home*,<sup>65</sup> the OLRB held that an employer’s proposal to introduce a two-tier structure for certain benefits such as vacation entitlement was not justified by the employer’s claim that it wanted to save money. The union was concerned that a rollback of the benefits of newly hired employees might be seen as punishment for having unionized, and with the unfairness of providing differential benefits to employees doing the same work. The employer’s claim that its proposal had a cost-saving rationale was considerably undermined by its unilateral decision to increase wage rates. In *United Food and Commercial Workers International Union, Local 1000A v. Hillview Farms*<sup>66</sup> the Board more directly rejected, on equity grounds, an employer’s proposed two-tier wage scale. “Although it may be appropriate to initiate cost saving measures by limiting wage increases,” the Board said, “those should, in our view, be shared by all members

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63 See Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary*, 8th ed, ¶6:700.

64 SO 1995, c 1, Sch A, ss 43(2)(a)-(c).

65 [1992] OLRB Rep (April) 409, [1992] OLRD No 1278 (QL). See, to similar effect, *Service Employees Union, Local 268 v Fort William Clinic*, [1997] OLRB Rep (May/June) 406, 1997 CanLII 15563. Note, however, *International Association of Machinists and Aerospace Workers v Premark Canada Inc*, [1995] OLRB Rep (March) 338, 1995 CanLII 9965, holding that a two-tier wage scheme, following the combining of two bargaining units, was acceptable in light of the geographically distinct areas in which the two tiers of workers were employed.

66 [1990] OLRB Rep (May) 564, 1990 CanLII 5832.

in the bargaining unit. Introducing this type of pay structure results in two employees performing exactly the same work but receiving different wage rates based solely on an arbitrary date of hire.” In an earlier decision, the Board declared that although two-tier proposals were not inherently unreasonable, they may be unreasonable in first contract situations, where they could be seen by workers as punishment for choosing to unionize and could damage relations between the tiers of workers.<sup>67</sup>

Two-tier arrangements have also been taken into consideration by the British Columbia Labour Relations Board in denying an application for partial decertification of a bargaining unit. In *Certain Employees of Brandt Tractor Ltd. v. International Union of Operating Engineers, Local 115*,<sup>68</sup> the union had been certified to represent employees of the employer in multiple locations across the province. In refusing to decertify the union for one of the locations, the Board placed some weight on the argument made by the union that such decertification would disrupt the union’s efforts to bargain for the elimination of a two-tier wage scheme that had been introduced in a previous round of bargaining through binding mediation. In doing so,

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67 *International Woodworkers of America – Canada, Local 2693 v MacMillan Bloedel Building Materials*, [1990] OLRB Rep (January) 58, 1990 CanLII 5728. An Ontario interest arbitrator has also held that it is inappropriate to impose a two-tier benefit and wage scheme in a first contract award: “Although there are two-tier collective agreements in this jurisdiction, they remain the exception, and achieving a two-tier system of collective agreement wages and benefits is a quintessential collective bargaining ‘breakthrough.’ It is something that must be obtained through free collective bargaining and cannot be obtained at interest arbitration — particularly in the private sector.” See *International Union of Operating Engineers, Local 793 v Rainbow Concrete Industries Ltd*, 2011 CanLII 6861 (Surdykowski) at para 64. However, see *Canadian Union of Public Employees, Local 3302 v Glebe Centre Inc*, [2012] OLAA No. 174 (QL), 2012 CanLII 17133 (Knopf), and *Canadian Union of Public Employees, Local 1404 v St. Joseph’s Villa (Dundas)*, 2011 CanLII 48891 (Randall), in which interest arbitration boards accepted the employer’s proposal to take away the right of employees hired after the commencement of the collective agreement to cash in unused sick leave benefits on retirement. There was no discussion of the significance of creating a two-tier arrangement, except by the dissenting members of the boards.

68 (2011), 204 CLRBR (2d) 51.

the Board expressed concern that the two-tiered system could create potential divisions between junior and senior employees.

These cases do not demonstrate any great consistency among arbitrators and labour boards, who appear to accept the legitimacy of two-tier provisions in some circumstances but at other times demonstrate an awareness of their manifest unfairness and their potential for creating divisions that may impair a union's ability to effectively represent all employees. Uniformly, however, the decisions have given very little consideration to the lack of voice of lower-tier workers in setting terms and conditions.

(ii) *The Duty of Fair Representation*

The duty of fair representation (DFR), originally developed by the courts without an explicit legislative mandate, has been described by the Supreme Court of Canada as the natural result of a system of exclusive bargaining rights.<sup>69</sup> A union that has acquired exclusive bargaining rights has a duty to represent all persons in the bargaining unit — those who support or belong to the union, and those who do not. As originally framed in a decision of the United States Supreme Court,<sup>70</sup> it was a duty on the union, in negotiating a collective agreement, “to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.” The DFR was subsequently extended to apply not only to a union's role in negotiations but also its role in representing employees in the grievance and arbitration process. In most Canadian jurisdictions the duty is now explicitly embedded within the labour relations statute, prohibiting union conduct that is (to use the example of section 74 of the *OLRA*) “arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit,” although the statutory formulation in some jurisdictions now appears to apply only to grievance and arbitration processing and not to collective bargaining.

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69 “The duty of fair representation arises out of the exclusive power given to a union to act as spokesman for the employees in a bargaining unit.” *Canadian Merchant Service Guild v Gagnon*, [1984] 1 SCR 509 at 526, 9 DLR (4th) 641.

70 *Steele v Louisville & NR Co*, 323 US 192 (1944); 65 Sup Ct 226; 89 L Ed 173.

An extensive jurisprudence has developed on the scope of the DFR. While that jurisprudence shows a considerable commitment to maintaining fairness among bargaining unit members, courts and tribunals are aware of the need to allow a union considerable flexibility in negotiations. Not every differential term or condition negotiated by a union will be seen as discriminatory, and the union will have considerable control over how it structures the bargaining process without running afoul of the DFR.

When it comes to evaluating whether the DFR might be used as a means of holding a union accountable for negotiating a two-tier wage or benefit scheme, several issues must be resolved. The first is whether employees who were not in the bargaining unit when the terms in question were negotiated, but who are now in it, could make a DFR claim. Even if they could, the second question is whether this type of differential treatment would be regarded as conduct which is “arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit.”<sup>71</sup>

These issues were the subject of an extensive analysis in a student note in the Harvard Law Review in 1984. The argument of that note was that the DFR, as it was then formulated in the U.S., failed to provide a “suitable framework for analyzing the substantive fairness of two-tier schemes, and therefore yields few meaningful restrictions on collective agreements that discriminate at the point of the employee’s entry into the bargaining unit.”<sup>72</sup> The problem, from the perspective of workers hired under an already negotiated two-tier structure, is that the DFR does not extend beyond the confines of the bargaining unit. At the time a collective agreement is negotiated, the workers who are adversely affected by the two-tier structure are not yet included in the unit. Nevertheless, as the note argued, there may be compelling reasons to extend the protection of the DFR to them, “because unions effectively claim authority to barter the interests of prospective employees during collective negotiations.”<sup>73</sup> The note draws an analogy between the negotiation of terms and conditions

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71 *Labour Relations Act*, *supra* note 64, s 74.

72 Note, “Two-Tier Wage Discrimination and the Duty of Fair Representation” (1984-85) 98:3 Harv L Rev 631 at 632.

73 *Ibid* at 636.

for prospective employees and the negotiation of benefits for retired employees, where the U.S. Supreme Court had implicitly suggested that a DFR did exist.<sup>74</sup>

Applying Budd's framework discussed above, the conundrum here is how one would give voice to the claims of workers not yet hired when a collective agreement is signed. The analogy to retired workers is not entirely apt, as in the latter case there is a class of easily identifiable persons (already retired workers, or current workers who will at some point retire) who can voice the interests of the class. In the case of potential employees, there is no way to identify who can speak on behalf of the group. That is not to say, from an ethical viewpoint, that a current generation of workers should not take into account the interests of a succeeding generation. But the problem of representing persons outside the bargaining unit might not be easy to handle through the DFR, so that if the two-tier arrangement creates a discriminatory rule, one may have to turn to some other area of law and forum to obtain relief — for example, by bringing a human rights complaint alleging a breach of anti-discrimination legislation.

Even if not-yet-hired employees have a DFR right that crystallizes after their hiring, it is necessary to consider the standard that courts or tribunals will apply in regulating the substance of collective bargaining. Here we see a tension between claims of equity and claims of efficiency. It has been noted that “the general reaction of labour boards is to permit discrimination against various categories of employees provided that the union has weighed the competing interests and has made rational judgments.”<sup>75</sup> In this vein, boards have accepted the legitimacy of differential treatment of summer students,<sup>76</sup>

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74 *Allied Chemical and Alkali Workers of America, Local Union No 1 v Pittsburgh Plate Glass Co*, 404 US 157 (1971), cited in *ibid* at note 29. The Supreme Court of Canada has suggested that retired workers might not be able to bring a DFR complaint against the union: *Dayco (Canada) Ltd v CAW – Canada*, [1993] 2 SCR 230.

75 Mac Neil, Lynk & Engelmann, *Trade Union Law in Canada* (Toronto: Thompson Reuters, 2012), ch 7 at 7.350.

76 *Mason v Canadian Union of Public Employees, Local 87*, [1979] OLRB Rep (February) 116.

part-time workers<sup>77</sup> and casual workers<sup>78</sup>, and have given unions considerable latitude in negotiating benefits for retired workers.

The 1984 Harvard Law Review note argued that the differential treatment of potential employees through two-tier arrangements differs from the other forms of differential treatment just mentioned in two important ways that make it easier to justify the application of the DFR to limit union choices.<sup>79</sup> First, two-tier schemes eliminate or significantly delay the opportunity for lower-tier employees to reach the compensation levels of upper-tier members, leading to permanent wage stratification within the bargaining unit based on date of hire. Second, the distinction between employees based on date of hire is, as the note discussed, purely arbitrary in that it takes no account of “economically relevant criteria such as length of competent service, type of work performed and competence and skill with which it is performed.”<sup>80</sup>

Few Canadian labour board cases have dealt with the DFR in the context of two-tier arrangements, and they do not adopt the approach advocated in the note. On whether workers who were not yet employed at the time the two-tier agreement was negotiated could bring a DFR complaint, the CIRB has stated quite definitively, in *Thibeault v. Canadian Flight Attendants' Union*, that “[n]o duty of fair representation is owed to an individual until he or she actually becomes a member of the bargaining unit.”<sup>81</sup> The CIRB rejected the worker’s claim that the union’s refusal to file a complaint with the Canada Human Rights Commission was a violation of the DFR. The complainant argued that the two-tier structure raised a pay equity issue. The union’s response was that the matter was to be dealt with through collective bargaining rather than by filing a human rights

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77 *Vesik v Consolidated Fastfrate Ltd*, [1984] OLRB Rep (May) 691, 1984 CanLII 986; *Knowles v United Food and Commercial Workers, Local 175*, [1990] OLRB Rep (September) 968, 1990 CanLII 5786.

78 *Parsley and Kennedy (Re)* (1986), 86 CLLC ¶16,018, 12 CLRBR (NS) 272 (CLRB).

79 *Supra*, note 72.

80 *Ibid* at 633. A similar argument was proffered by Malcolm H Liggett, “The Two-Tiered Labor-Management Agreement and the Duty of Fair Representation” (1987) 38:4 Lab LJ 236.

81 2010 CIRB 505. In any event, the complaint was untimely because it had been filed more than 90 days after the two-tier wage agreement came into effect.



complaint. The CIRB did acknowledge that when a member of the bargaining unit claims that provisions of a collective agreement are discriminatory, there is a duty on the union to “consider the allegation objectively and honestly, and reach its own conclusion as to whether the provision does in fact discriminate on a prohibited ground or has a discriminatory effect.”<sup>82</sup> In considering the matter, the union must not act in a manner that is arbitrary, discriminatory or in bad faith. The CIRB was satisfied that the union in this case had turned its mind to the issue and had made an objective determination that it was in the best interests of the unit as a whole to deal with the matter through collective bargaining. In particular, the Board noted that a human rights complaint could take years to resolve, and would require the commitment of considerable resources. The Board also noted that the union had advised the complainant that she was free to file a human rights complaint on her own.

*Thibeault* did not examine whether there was any merit to the claim that the two-tier system was itself discriminatory. The decision points to the difficulty of using a DFR complaint to raise such a challenge, given the Board’s view that workers not yet hired when the two-tier clause was negotiated had no fair representation right that could be violated. Nevertheless, the Board did note that the *Canada Labour Code* imposed some obligation on the union to turn its mind to the issue if a provision has an ongoing discriminatory effect. This obligation appears to have left an opening by which an employee hired after the negotiation of the two-tier provision may be able to exercise some voice.

In *United Food and Commercial Workers, Local 340 v. Saskatchewan Brewers Association Ltd.*,<sup>83</sup> the Saskatchewan Labour Relations Board (SLRB) directly considered whether a union’s agreement to a two-tier wage scheme proposed by the employer would violate the union’s DFR. The decision acknowledged that a union must often make difficult decisions that favour one group of employees over another. It also acknowledged that conflicts among employees are often not of the union’s making but may arise from the inclusion of very different jobs in a single bargaining unit and from the fact that the

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82 *Ibid* at para 22.

83 [1995] SLRBD No 29 (QL).

employer's legitimate business interests mean that unions often negotiate in a tense, adversarial climate. The test applied by the SLRB was whether the union had a reasonable and objective basis for believing that a two-tier wage structure was necessary and in the long-term interests of employees. "The fact that existing employees are grandfathered and treated as a closed class with superior wages that are not available to new employees," the Board said, "is a common and rational compromise for unions and employers who face external competitive pressure and internal divisions among the employees."<sup>84</sup> This clearly suggests that a union need not seek to "spread the pain" by insisting on across-the-board wage cuts that would be objectionable to incumbent employees who make up most of the bargaining unit.

While the SLRB emphasized that there was no evidence the union had acted in bad faith, it offered no focused discussion of whether the union's actions discriminated on a ground prohibited by human rights statutes. The decision shows a great deal of deference to, and maybe even sympathy with, the choices that a union must make, but it does not take into account the lack of voice of not-yet-hired younger workers, or provide a rigorous analysis of whether the union could in good faith conclude that the provision was necessary. There is almost always an alternative to a two-tier arrangement — for example, an across-the-board reduction in wages for all employees — and employers may be equally happy with such an alternative. If a union is indeed required to show its good-faith belief that a discriminatory arrangement is necessary, the existence of such alternatives may mean that two-tier arrangements could be found to violate the DFR.

The *Thibeault* and *Saskatchewan Brewers* cases suggest that newly hired employees who complain that their compensation entitlements are unfair in comparison to those of longer-service workers are not likely to succeed. When framed within the efficiency-equity-voice triad, the cases place considerable weight on efficiency. They show some concern for employees who lack voice, but favour collective bargaining as the dominant way of providing it. In the context of our highly institutionalized system of collective bargaining, this leaves those who have not yet been hired without any voice.

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84 *Ibid.*

### (c) Potential Human Rights Claims against Two-Tier Systems

Are workers adversely affected by a two-tier system likely to have any greater success with a human rights-based claim of discrimination?

The differential treatment of workers based on their date of hiring is arguably discriminatory. At the heart of the complaint is a concern that workers doing the same job are being paid differently. This violates ideas of fairness that underline the principle of equal pay for equal work, which has long been recognized as a basic employment standard. In Ontario, for example, it is embodied in the *Employment Standards Act (OESA)*,<sup>85</sup> but it has developed primarily in the context of differential pay between men and women.<sup>86</sup> In the language of the *OESA*, “[n]o employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex” if they are doing essentially the same kind of work requiring substantially the same skill, effort and responsibility, in the same establishment and under essentially the same working conditions. The statute adds that the prohibition does not apply if the differential is based on “any other factor other than sex.”<sup>87</sup> This provides an opening for an employer to defend a two-tier arrangement by arguing, among other things, that the differential is based on market conditions and that even if it has an indirect discriminatory impact based on age, this is not prohibited by the employment standards statute.

The same limitation that applies to an equal pay for equal work claim applies to a pay equity claim. Pay equity legislation, with its commitment to equal pay for work of equal value,<sup>88</sup> was introduced in recognition of the limitations of equal pay for equal work, and in the light of empirical evidence demonstrating a continuing imbalance in the compensation paid to men and women. In Manitoba, New Brunswick, Nova Scotia and Prince Edward Island pay equity

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85 *Employment Standards Act, 2000*, SO 2000, c 41, s 42(1).

86 Note, however, the Quebec *Charter of Human Rights and Freedoms*, RSQ, c C-12, s 19, which does not specify discrimination on the basis of sex or gender in its requirement to pay equal wages for persons performing equivalent work in the same establishment.

87 *Supra* note 85, s 42(2)(d).

88 See, for example, *Canadian Human Rights Act*, RSC 1985, c H-6, s 11.

legislation covers public employers, but only in Ontario and Quebec does it apply to both the public and the private sector.<sup>89</sup> Such legislation requires employers to evaluate their compensation systems proactively to determine if there are impermissible pay inequities, and if there are, to take steps to rectify them. At the heart of the evaluation process is the comparison of female-dominated and male-dominated job classes.<sup>90</sup> Thus, legislated pay equity schemes clearly reflect the commitment to reduce or eliminate pay inequities affecting women as compared to men, and do not address discrimination on other grounds.<sup>91</sup>

If one is to challenge pay inequities caused by a two-tier scheme, with a concern for the differential treatment of younger workers, the only available recourse may be a complaint to a human rights tribunal that the scheme violates the general prohibition of age discrimination in the applicable human rights statute. As a brochure published by the Prince Edward Island Human Rights Commission puts it, the “Human Rights Act prohibits paying different rates of pay based on any of the grounds of discrimination which is different from what is commonly referred to as ‘pay equity.’”<sup>92</sup> Nevertheless, there are a number of barriers to making a pay discrimination claim under a human rights code, some of which we will now look at.

Respondents to a human rights complaint about a two-tier arrangement might argue that the equal pay for equal work requirement in employment standards legislation, or the existence of a separate pay equity statute, has the effect of ousting the jurisdiction of

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89 Women’s Legal Education and Action Fund, “Pay Equity,” online: <<http://leaf.ca/wordpress/wp-content/uploads/2011/01/PayEquityFactSheet.pdf>>.

90 See, for example, *Pay Equity Act*, RSO 1990, c 7, s 4, stating that the purpose of the statute “is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.”

91 Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (Canada, 2004) at 172 argued that although a pay equity statute addresses gender discrimination in pay, there is a continuing need for a requirement of equal pay for equal work. However, the task force recommended that the requirement cover only the grounds of gender, membership in a visible minority, aboriginal ancestry and disability. It did not address age-based claims.

92 Prince Edward Island Human Rights Commission, *Discrimination in Pay vs. Pay Equity*, online: <<http://www.gov.pe.ca/humanrights/index.php3?number=1013664&lang=E>>.

the human rights forum to entertain a claim relating to any form of pay inequity. A number of cases have rejected this argument. They emphasize the importance of giving the wording of human rights statutes a “fair, large and liberal interpretation as to best insure their objects are attained.”<sup>93</sup> Equal pay is appropriately characterized as a human right, and the fact that there may be multiple forums for the consideration of such issues does not deprive a human rights tribunal of its broad powers to find discrimination and to provide appropriate remedies for it. Many cases have confirmed the jurisdiction of human rights tribunals to consider gender-based pay equity or equal pay for work of equal value claims under general anti-discrimination provisions.<sup>94</sup> If equal pay claims involving gender discrimination can be heard under human rights legislation despite the existence of other statutory avenues for such complaints, the case for bringing an age-based equal pay claim is even stronger, because there is no other statutory route to challenge age-based pay differentials.

In bringing a human rights claim, the complainant has to demonstrate at least a *prima facie* case of discrimination.<sup>95</sup> Two-tier wage or benefit systems do not usually discriminate directly on the basis of age, so a complainant would have to show that the particular system had a differential impact on younger workers. As the Supreme Court has put it, “the essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed,

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93 *Reid v Truro (Town of)*, (2009) 67 CHRR D/214 at para 89 (NS Bd Inq).

94 *Cruise-Pratchler v Wood Creek (Rural Municipality No 281)* (7 February 2008), Doc 08-068 (Sask Bd Inq); *Canada Safeway Ltd v Saskatchewan (Human Rights Commission)* (1997), 29 CHRR D/435 (Sask CA); *Canada Safeway Ltd v Saskatchewan (Human Rights Commission) (No 2)* (1999), 34 CHRR D/409 (Sask QB); *Reid*, *supra* note 93; *Lockhart v New Minas (Village of)*, [2008] NSHRBID No 3 (QL); *Gale v Miracle Food Mart (No 2)* (1992), 17 CHRR D/495 (Ont Bd Inq); *Nishimura v Ontario (Human Rights Commission)* (1989), 11 CHRR D/246 (Ont Div Ct). A different view was reached in *University of Saskatchewan v Dumbovic* (2007), 2007 SKQB 182, 297 Sask R 1, but the case has been distinguished on the ground that its jurisdictional analysis was *obiter dicta* or was inconsistent with the Saskatchewan Court of Appeal’s decision in *Canada Safeway*.

95 *Ontario (Human Rights Commission) v Simpson-Sears*, [1985] 2 SCR 536, 23 DLR (4th) 321.

whether intentionally or unwittingly.”<sup>96</sup> It seems rather intuitive that a group of workers hired after another group would on average be younger, and it would probably not be difficult to provide precise data on the average ages of the two groups. Proof of the differential treatment of the two groups should be enough to establish a *prima facie* case.

A decision under the Quebec *Charter of human rights and freedoms* (the Quebec *Charter*) — which, despite its name, is a non-constitutional human rights statute supports such an approach.<sup>97</sup> In *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Syndicat des constables spéciaux*<sup>98</sup> (the *Tardif* case), the provincial government imposed budget cuts which led the union and the respondent government department to renegotiate the collective agreement covering special constables who provided security in courthouses and government buildings. Under the new arrangement, the salaries of “casual” special constables were reduced, and they would have to climb a new ten-step salary ladder to reach the maximum rate. Permanent special constables did not have their salaries reduced, and they remained on a salary ladder that had only five steps. Casual and permanent special constables did substantially the same jobs. Although the distinction between the two groups appeared to be based on a neutral standard (whether the employee was in a permanent or a casual position), the evidence demonstrated that on average the permanent employees were sixteen years older. The human rights tribunal concluded that the disproportionate impact of the modifications on constables in the 20 to 39-year age range constituted discrimination. As the union and the employer had offered no evidence on the rationality and proportionality of the arrangement, they were held jointly liable (the union — for 30% of the damages, the Ministry — for 70%) to compensate the complainants for discrimination.

It is worth noting, however, the recent *dicta* of the Quebec Court of Appeal in *Association des pompiers de Laval c. Commission des*

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96 *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 at para 48.

97 RSQ c C-12.

98 *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Syndicat des constables spéciaux*, 2010 QCTDP 3, 70 CHRR D/89.

*droits de la personne et des droits de la jeunesse*.<sup>99</sup> Firefighters hired after a particular date were placed on a lower compensation ladder than those hired earlier. A claim of age-based discrimination was brought under the Quebec *Charter*. The Court rejected the claim without determining whether age-based discrimination had been demonstrated, but it noted that there was considerable age overlap between those hired before and after the implementation of the two tiers. Given this overlap, the Court questioned whether the statistical data actually allowed an inference of indirect age-based discrimination.

Establishing a *prima facie* case of discrimination for the purposes of a human rights claim may not involve the same elements as establishing discrimination pursuant to section 15 of the *Canadian Charter of Rights and Freedoms*. More specifically, the Supreme Court's reading of an element of dignity into the determination of discrimination under the *Charter*,<sup>100</sup> and the fact that many *Charter* cases involve difficult economic and social policy choices which can be justified under section 1, reduces the direct applicability of *Charter* standards in cases under human rights statutes. However, the Supreme Court's perspective on age discrimination in *Charter* cases may influence tribunals and courts in applying human rights statutes.<sup>101</sup>

In *Charter* cases, the courts' assessment of whether there has been discrimination involves a two-step process of determining whether the law creates a distinction on an enumerated or analogous ground and whether this distinction creates a disadvantage by perpetuating prejudice or stereotyping.<sup>102</sup> In a series of *Charter* cases challenging legislated social policies and benefits that use age to determine eligibility, the Supreme Court has been reluctant to conclude that age-based distinctions are discriminatory, and appears to

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99 *Québec (Commission des droits de la personne et des droits de la jeunesse) c Laval (Ville)*, 2011 QCCA 2041 [*Laval*].

100 See the discussion in note 106, below.

101 There has been considerable debate about the appropriateness of applying the framework developed under section 15 of the *Charter*, along with the reasonable limits analysis in section 1, to claims of discrimination under human rights statutes. For a particularly good discussion of this issue, see Claire Mummé, "The Strange History of *Charter*-Like Claims against Legislated Government Services under the Human Rights Codes in Canada" (14 February 2012) *J L & Equality*, forthcoming; available on SSRN: <<http://ssrn.com/abstract=2005474>>.

102 *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483.

have treated age as being different from other prohibited grounds of discrimination. This poses an additional hurdle for those bringing age-based discrimination challenges.

In the most recent of these cases, *Withler v. Canada (Attorney-General)*,<sup>103</sup> the Supreme Court upheld the validity of provisions of the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* which provided for a reduction of 10% in supplementary death benefits for each year by which the plan member was over a certain age (65 under one statute, 60 under the other) at the time of death. The Court emphasized the need to consider the supplementary death benefits within the context of the broader pension scheme of which they were a part — a scheme which, the Court concluded, “uses age-based rules that, overall, are effective in meeting the actual needs of the claimants, and in achieving important goals such as ensuring that retiree benefits are meaningful.”<sup>104</sup> There was, the Court said, no “negative or invidious stereotyping on the basis of age.”<sup>105</sup>

Although *Withler* involved a claim that individuals were being discriminated against as they got older, rather than an allegation that two-tier compensation schemes discriminate against those who are younger, it is nevertheless relevant to our concerns. The Supreme Court has moved beyond the “affront to dignity” requirement used in its earlier section 15 analysis,<sup>106</sup> but *Withler* shows that in considering

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103 2011 SCC 12, [2011] 1 SCR 396.

104 *Ibid* at para 77.

105 *Ibid*.

106 In *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, the Supreme Court held that a general purpose of section 15 was to prevent the violation of essential human dignity, and suggested that as part of the legal test for discrimination, one must look at a series of contextual factors to determine whether the legislation in question has the effect of demeaning a claimant’s dignity. Several years later, in *Kapp, supra* note 102, the Court abandoned the use of human dignity as a criterion. Nevertheless, the Court’s view of age discrimination in *Withler* is consistent with the earlier decision in *Law*, where the Court concluded that the imposition of a minimum cut-off age of 35, below which claimants would not be entitled to survivor benefits under the Canada Pension Plan, was not discriminatory. In *Law*, the Court stated that neither the purpose nor the effect of the Canada Pension Plan provisions violated the complainant’s human dignity. It suggested that the differential treatment of young people did not reflect the notion that they were less capable or less deserving of concern, respect and consideration. The greater opportunities available to younger people, combined with a legislative intent to provide funding to those whose ability to overcome need was weakest, made the scheme consistent with the purposes of section 15.



contextual age-based distinctions in the awarding of benefits, the Court was unwilling to find discrimination in the absence of negative stereotyping, historical disadvantage or economic vulnerability.<sup>107</sup>

The Court had taken a similar position in earlier decisions. In *Gosselin v. Québec (Attorney-General)*,<sup>108</sup> it held that a provincial government welfare scheme which paid to qualified applicants under the age of 30 roughly one-third of the benefits it paid to those over that age did not violate section 15, because the differential treatment did not constitute discrimination. This was not a case, according to the majority of the Court, where “the affected group of young adults constitutes a group that historically has suffered disadvantage, or that is at a particular risk of experiencing adverse differential treatment based on the attribution of presumed negative characteristics.”<sup>109</sup>

The perception that age is a ground of discrimination different from all others has been closely mirrored in Ontario arbitrations. Arbitrator Brian Etherington, in dismissing a grievance brought by the Ontario Nurses’ Association (ONA) against the municipality of Chatham-Kent, engaged in an extensive and helpful analysis of *Charter* equality jurisprudence as it applied to a collectively bargained two-tier compensation scheme.<sup>110</sup> The adversely affected employees over 65 were (among other things) given fewer sick leave days than younger employees, lower life insurance benefits, and no coverage for long-term disability. The ONA argued that this directly violated the prohibition of age discrimination in section 15 of the *Charter*, and that the provisions of the *OESA* and the *Human Rights Code* allowing different treatment of workers over 65 were also violations.<sup>111</sup> The arbitrator concluded

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107 See also the recent decision of the Ontario Workplace Safety and Insurance Appeals Tribunal in *Decision No. 512/06*, 2011 ONWSIAT 2525, holding that a provision of the Ontario statute limiting compensation for loss of earnings arising from a workplace accident to two years for workers aged 63 or older was not discriminatory.

108 2002 SCC 84, [2002] 4 SCR 429.

109 *Ibid* at para 33.

110 *Supra* note 60.

111 In 2006, Ontario eliminated employers’ freedom to impose mandatory retirement in most cases, by removing the upper cap of 65 from the definition of age in the *Human Rights Code*, RSO 1990, c H-19, s 25. In doing so, it also deemed that if an employee benefit or pension plan is in compliance with that Act, the plan does not violate the *Human Rights Code*. Under the *Benefit Plans Regulation*, O Reg 286/01, s 1, the definition of age maintains the cap of 65, thereby permitting different benefits for those over and under 65.

that the differential treatment on the basis of age did indeed violate section 15, but that it was justified under section 1 of the *Charter*.

Many of the contextual factors which led Arbitrator Etherington to find that the differential treatment of older workers in *Chatham-Kent* was discriminatory (and therefore violated section 15) could also be applied to the differential impact of two-tier systems on younger workers. On the other hand, some of the contextual factors which led him to find that the discrimination was justified under section 1 highlight distinctions between younger and older workers that may justify two-tiered arrangements for older but not younger workers. These included the fact that the disputed provisions were part of a freely negotiated collective agreement, the fact that younger workers benefitted from facilitating the elimination of mandatory retirement, and the fact that there was a strong connection between age and the cost of the benefits in question. Arbitrator Etherington nevertheless concluded that the distinction perpetuated a pre-existing disadvantage, in particular by reinforcing the notion that older workers were less valuable members of society and could therefore be paid less than younger workers for doing the same work.

These contextual factors cut two ways. Applying a similar analysis to two-tier compensation schemes based on the date of hiring would easily support the conclusion that they indirectly discriminate against younger workers entering the workforce, thereby perpetuating a pre-existing disadvantage and reinforcing the notion that they are less valuable members of society. On the other hand, the factors that justify discrimination against older workers could also justify discrimination against younger workers. The primary objective of a two-tier scheme might be framed as cost savings to allow the employer to be competitive and stay in business, with the subsidiary purpose of not having to reduce the size of the workforce or undermine the existing wages and benefits of those already employed.

One must be wary of arguments that employer discriminatory actions are motivated by a need to cut costs. Containing compensation costs may be a legitimate goal, and it may be possible to establish a rational connection between two-tier arrangements and attaining that goal. However, the more contentious issue is likely to be whether there are other ways of achieving that goal which intrude less on the right to be free from age-based discrimination.

Another argument raised in *Chatham-Kent* is that age-based discrimination differs from other kinds of discrimination because “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.”<sup>112</sup> In the arbitrator’s words, the argument is that “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.”<sup>113</sup>

This view may carry some weight where younger workers have a real voice in negotiating the terms that will reduce their benefits when they get older. It has no weight when older workers collaborate with employers to create a scheme that denies younger workers an opportunity to ever achieve the same economic gains that the older workers have enjoyed. Under two-tier schemes, older workers take no risk of loss in the future. Nor should a discriminatory provision be insulated from review, or a union protected from liability, merely because the provision is included in a collective agreement.<sup>114</sup>

Human rights complaints about two-tier compensation schemes are less likely to be dealt with under *Charter* standards than under the more complainant-friendly rubric that the Supreme Court set out in 1999 in the *Meiorin* case.<sup>115</sup> According to that decision, once a *prima facie* case of discrimination is demonstrated, employers have the burden of establishing that the rules creating the distinction are a *bona fide* occupational requirement. *Meiorin* laid down a quite complete template for considering the question, involving a three-part burden on the employer to show each of the following:<sup>116</sup>

- (1) the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

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112 *Supra* note 60 at para 136.

113 *Ibid* at para 137.

114 For a more thorough discussion of this issue, see Mac Neil *et al*, *supra* note 75.

115 *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 at paras 54-68, 176 DLR (4th) 1 [*Meiorin*].

116 *Ibid* at para 54.

- (3) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In *Meiorin*, the Court made clear that this approach applies not only to direct discrimination but also to adverse-effect discrimination, where an employer's rule or policy is neutral on its face but nevertheless has a discriminatory effect. In doing so, the Court emphasized that the older approach, which made it easier to justify indirect discrimination, may have served to legitimize systemic discrimination that can result from the simple operation of established procedures which were not intended to be discriminatory.<sup>117</sup>

In defending a two-tier scheme under the *Meiorin* judgment, employers (and unions, if they are named as respondents) are likely to raise arguments along these lines: the scheme is economically necessary; it merely replicates widely accepted seniority systems and commonly used grandparenting arrangements; younger workers actually benefit, because employers can afford to maintain larger workforces and therefore employ more younger people; giving older workers differential (and lower) benefits has been accepted (in cases discussed above) as compliant with the *Charter* guarantee of equality; and finally, if the scheme is the result of collective bargaining, it should be recognized as a legitimate outcome of a legally mandated, *Charter*-protected process.

Under statutory equal pay provisions, whether in employment standards or specialized pay equity statutes, pay differentials attributable to a seniority system are usually expressly listed as an exception to the requirement of equal pay,<sup>118</sup> although it is commonly required

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117 *Ibid* at para 39, referring to *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 8 CHRR 4210.

118 *Supra* note 85, s 42(2)(a); the *Pay Equity Act*, *supra* note 90, s 8(1)(a), does not apply to pay differences arising from "a formal seniority system that does not discriminate on the basis of gender"; the *Equal Wages Guidelines, 1986*, SOR/86-1082, s 16(b), include an exception for "seniority, where a system of remuneration that applies to the employees provides that they receive periodic increases in wages based on their length of service with the employer." The federal Guidelines also create exceptions for, among other things, red-circling and a procedure for introducing phased-in wage reductions.

that they not discriminate on the basis of gender. In the pay equity context, in *Hamilton-Wentworth District School Board v. Ontario Secondary School Teachers' Federation*,<sup>119</sup> the Ontario Pay Equity Hearings Tribunal commented that in order to demonstrate that a formal seniority system is not discriminatory on the basis of gender, it would be necessary to show that the job rate of a male job class is equally available to the members of the female job class for which it is the comparator. If one class of employees receives benefits that the other class cannot obtain, the exemption for seniority-based distinctions does not apply. The same requirement should arguably be imposed on two-tier compensation systems that make distinctions not on the basis of gender, but on the basis of date of hire. Creating two entirely separate scales based on the date of hire means that an employee hired after the dual tiers are set up will be treated differently from an employee hired earlier, and someone with  $x$  years of seniority in the lower tier will never be paid the same as someone with  $x$  years of seniority in the upper tier. The differential is thus not truly based on differences in seniority.

Defenders of two-tier systems might also argue that they are a legitimate way of transitioning to a lower-wage system. The federal *Equal Wages Guidelines*<sup>120</sup> and the *Ontario Pay Equity Act*<sup>121</sup> sanction a practice known as red-circling,<sup>122</sup> to permit wage differentials in limited cases where employees move from one job to another. However, under the *Equal Wages Guidelines*, the exception applies only where an employee is assigned to a lower-paid (and lower-value) job while maintaining a higher rate of pay carried down from a previous higher-paid (and higher-value) job. That clearly is not the situation in a two-tier wage system, where the jobs in both tiers not only have the same value but are essentially the same job. Similarly, the red-circling provision under the *Ontario Pay Equity Act* applies only where a job's value has been downgraded as the result of the

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119 2009 CanLII 60545.

120 *Equal Wages Guidelines*, *supra* note 118, s 16.

121 *Pay Equity Act*, *supra* note 90, s 8.

122 Red-circling is the practice of not reducing the wages or salary of an employee even though he or she may now be doing the same job as a lesser-paid employee. It is commonly used when a more senior employee is reassigned to another job as a result of a downsizing or reorganization, or where a job has been reclassified.

application of a gender-neutral evaluation, and the incumbent's salary has been frozen. In the case of a two-tier scheme, the pay differential between the two tiers is not related to a change in the assessment of the value of a job.

The cost of a particular accommodation is often raised in human rights cases in support of an employer argument that implementing the duty to provide accommodation will cause undue hardship to the employer. *Meiorin* posits that an employer cannot demonstrate that an otherwise discriminatory standard is a *bona fide* occupational requirement unless the employer also demonstrates "that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer."<sup>123</sup> Although undue hardship may "take as many forms as there are circumstances,"<sup>124</sup> and although the Supreme Court has said that financial costs of possible methods of accommodation must be taken into account,<sup>125</sup> the mere fact that one accommodation method may be more costly than another does not demonstrate that implementing it will amount to undue hardship. The Supreme Court has said that in order for the financial costs of an accommodation to be considered an undue hardship, those costs must be substantial, and that what counts as substantial may vary with the size of the employer's operations.<sup>126</sup>

This discussion highlights many of the difficulties which are likely to be faced in attempting to frame a human rights claim challenging two-tier provisions. Those difficulties raise the question of whether it might be better to press for specific, legislated standards as a way of responding to the problem. Quebec has done exactly that, and the final part of this paper examines the Quebec legislation as a possible model for other Canadian jurisdictions to follow.

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123 *Meiorin*, *supra* note 115 at para 54.

124 *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561 at para 12.

125 *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at 520-521, 72 DLR (4th) 417.

126 *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970.

**(d) Creating a New Employment Standard:  
The Quebec Model**

Quebec has forged a unique response to two-tier wage and benefit schemes, embedding within its *Labour Standards Act* a prohibition on the use of such schemes.<sup>127</sup> This was in response to their growing use in that province during the 1990s, and to concerns that they may not be in line with the Quebec *Charter*.

A series of studies, recounted by Michel Coutu,<sup>128</sup> clearly suggested that two-tier clauses had a detrimental effect on younger workers. In assessing whether those clauses were discriminatory, Coutu noted the need to take into account such complicating issues as their effect on retirement policies and on levels of youth unemployment. He also noted that there were significant disincentives to bringing complaints about two-tier schemes before the Quebec Human Rights Commission. In particular, the rigorous standard of proof required statistical evidence, with the result that it would be expensive and time-consuming to press a complaint.

These concerns played a large part in the legislative decision to deal with the problem of two-tier schemes by amending labour standards legislation in 1999. That decision was also, in part, a response to the internal dynamics within unions that led to differential treatment between a younger cadre of workers hired after a specified date and a group of older union members who sought to protect their existing level of wages and benefits.<sup>129</sup> A significant feature of the legislation is that disenchanted workers can bring a complaint directly to the Commission des normes du travail without having to exhaust

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127 *An Act respecting labour standards*, RSQ c N-1.1, ss 87.1-87.3 [*Labour Standards Act*].

128 *Supra*, note 32.

129 Marie-Josée Legault, "Too Bad, You Were Too Late Coming In!" in Janice Foley & Patricia Baker, eds, *Equity – The Path to Renewal* (Vancouver: UBC Press, 2009) 39; Christian Brunelle, "The Emergence of Parallel Identity-Based Associations in Collective Bargaining Relations" in Law Commission of Canada, ed, *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2003) 166.

any recourse under a collective agreement, or even to establish actual discrimination.<sup>130</sup>

Under the language of the Quebec *Labour Standards Act*, no collective agreement, individual employment contract or decree may impose on employees, solely on the basis of date of hiring, a condition of employment on a matter covered by labour standards legislation that is inferior to the conditions applied to other employees doing the same tasks in the same employment.<sup>131</sup> Not surprisingly, this raises a number of interpretative issues: the kinds of differences that are covered; whether differential treatment is solely related to the date of hiring; and the scope of the exceptions for temporary differentials and for those based on seniority,<sup>132</sup> years of service and red-circling.

Most labour standards are covered, in particular those set out in Parts I to V.1, VI and VII of the statute, or in a regulation. These include wages, hours of work, holidays, annual leave, rest periods, family and parental leave, and notice of termination. “Wages” are broadly defined to include “benefits having a pecuniary value due for the work or services performed by an employee.”<sup>133</sup> This ensures that differences in benefit entitlements, including pensions, are covered by the prohibition on two-tier arrangements. A Quebec Court of Appeal decision in 2011 confirmed the wide scope of the definition of wages, holding that a premium paid to firefighters hired before 1998 to compensate them for overtime opportunities lost from the hiring of temporary workers was a form of wages.<sup>134</sup>

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130 *Labour Standards Act*, *supra* note 127, s 102. Human rights statutes typically provide that if arbitration under a collective agreement can appropriately deal with the substance of a complaint, the human rights tribunal may defer consideration of the complaint until the outcome of that arbitration. See, for example, British Columbia *Human Rights Code*, RSBC 1996, c 210, s 25, and Ontario *Human Rights Code*, *supra* note 111, s 45.1.

131 *Labour Standards Act*, *supra* note 127, s 87.1.

132 For instance, the Quebec Court of Appeal has confirmed that the prohibition of two-tier provisions does not prevent an employer from designating employees as probationary, with reduced benefits, for a limited time. *Syndicat des chauffeurs et chauffeurs de la Société de transport de Sherbrooke, section locale 3434 du Syndicat Canadien de la Fonction Publique c Société de transport de Sherbrooke*, 2010 QCCA 1599.

133 *Supra* note 127, s 1(9).

134 *Commission des normes du travail c Sherbrooke (Ville de)*, 2011 QCCA 325 at paras 32-33, application for leave to appeal dismissed, 2011 CanLII 56025 (SCC).



The prohibition relates only to situations where the differentiated conditions apply to employees doing the “same tasks” in the “same establishment.” This appears to tie it to older notions of equal pay for equal work, rather than to the more modern pay equity approach that looks to differential wages or benefits for employees who do work of equal value. There are two very significant exceptions to its operation. First, differences attributable to seniority are allowed, thus apparently protecting traditional job grids that provide higher levels of pay to more experienced employees. Finally, a very significant limitation exempts temporary wage rules if they apply to employees performing the same task *and* the difference is “progressively limited within a reasonable time.”<sup>135</sup>

Possibly more problematic is the requirement that the condition be “solely” based on the date of hiring. In *Progistix-Solutions inc. c. Commission des normes du travail*,<sup>136</sup> the collective agreement grandfathered employees who previously worked for a division of Bell Canada, which had been bought by Progistix-Solutions. The former Bell employees were given higher salaries, even though they were doing the same jobs as newer employees hired after the takeover. The Quebec Court of Appeal rejected Progistix-Solutions’ argument that the differences in pay rates were not solely due to the date of hiring of the newer employees. It concluded that there was no need for evidence on the exact date of hiring of each employee, as it was clear that all employees being paid at the higher rate were hired before the takeover, and that the lower-paid employees were hired after the takeover. Although the collective agreement did not specify date of hire as the criterion for differentiation, it had the *effect* of creating a disparity between two groups of workers performing the same job. In rejecting the employer’s argument that the differential was based on the employee’s classification and wage rate at the time the collective agreement came into force, the Court noted that it would be naïve to expect that the employer would explicitly create a disparity of treatment on the basis of date of hire.

Another recent decision highlights the problem that a claimant may have in demonstrating that differential treatment is based solely on the date of hire. In *Commission des normes du travail c.*

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135 *Supra* note 127, s 87.3.

136 2009 QCCA 2054.

*Centre jeunesse des Laurentides*,<sup>137</sup> a collective agreement provision effectively grandfathered the five-week vacation entitlement of lawyers hired before the collective agreement came into effect, and gave new hires only four weeks. That differential was held not to be based solely on the date of hiring as it could also be attributed to the unionization of the workers and the normalization of standards in the public sector.

The importance of the exclusion of temporary two-tier provisions from the regulatory regime is highlighted in several cases. In the *Progistix-Solutions* case,<sup>138</sup> a majority of the Quebec Court of Appeal noted that the employer had offered no evidence that it had made any efforts to eliminate the disparity between old and new employees within a reasonable time. A concurring opinion by Justice Beauregard asserted that it might be acceptable to freeze or even lower the wages of the favoured group until the other group caught up. The Court also rejected the employer's argument that the union should be held jointly liable for the breach, and noted that the Act created a special exception for claims relating to two-tier provisions, allowing employees direct access to the Labour Standards Commission without first having to pursue remedies under a collective agreement.

However, in *Association des pompiers de Laval c. Commission des droits de la personne et des droits de la jeunesse*,<sup>139</sup> the Quebec Court of Appeal held that the *Labour Standards Act* provision permitted age-based discrimination in the form of temporary two-tier arrangements, thereby barring claims under the Quebec *Charter*. The irony is that a scheme which relieves a claimant of the necessity of proving age-based discrimination also precludes the claimant from succeeding in an age-based discrimination claim where a two-tier arrangement is temporary.

While the labour standards approach taken in Quebec may indeed facilitate the ability of workers to challenge two-tier provisions, Coutu has pointed out that the specific provisions in the Quebec statute do not eliminate all injustices that might arise from two-tier wage systems, and he has argued that there might still be room for

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137 2011 QCCQ 12600, aff'd 2012 QCCA 620.

138 *Supra* note 136.

139 *Laval*, *supra* note 99.

complaints under the Quebec *Charter*.<sup>140</sup> The difficulty of proving that the date of hire was the “sole” cause of the differential treatment, and the exemption for temporary two-tier arrangements, significantly limit the reach of the provisions. Nevertheless, the Quebec model does mark a commitment to treat young workers and potential workers as full citizens, and to address issues of intergenerational equity.

#### 4. CONCLUSION

The words by John Kay quoted at the beginning of this paper neatly capture the dilemma that we face. Major employers in Canada, sometimes with union complicity and sometimes in the face of union opposition, have turned to two-tier compensation schemes as a way of cutting costs. Younger workers bear the brunt of such action. They end up working in the same jobs as an older generation of workers, but without the same benefits. The effect of the reductions may be felt in the short term in the form of lower wages, shorter vacations and fewer health benefits, or in the longer term in the case of the substitution of defined benefit plans by defined contribution plans. These differences in the treatment of workers raise fundamental questions of equity, including a concern for the imposition of employment conditions on those with minimal voice.

The law as it stands fails to address these inequities adequately, and there is little political will to provide voice to those who are detrimentally affected. Equal pay provisions in employment standards and human rights statutes and specialized pay equity statutes do not really address age-related inequities. In most jurisdictions they apply only to sex-based discrimination, and thus provide no basis for a claim that it is illegal to pay different age cohorts differently for doing the same work. A union’s duty of fair representation is not likely to place major constraints on a union’s agreeing to such provisions, in part because labour boards are quite deferential to bargaining choices made by unions and in part because boards are reluctant to conclude that the DFR extends to persons not yet hired when a collective

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140 This point is confirmed to some extent by the fact that a number of cases have since been dealt with under the Quebec *Charter*. Some of those cases are discussed above, in connection with human rights complaints.

agreement is made. As for a human rights complaint, it is likely to be fraught with considerable but perhaps not insurmountable difficulties, including the challenge of demonstrating that differential treatment of younger workers constitutes discrimination and the possibility that the employer might successfully argue that a two-tier scheme is a *bona fide* occupational requirement. A targeted legislative response, like that undertaken in Quebec, may be a better way to proceed, but is not likely to receive much political support in the current economic environment. Even if enacted, it may well (as in Quebec) exclude temporary two-tier arrangements and leave complainants with the major task of proving that differential pay and benefits are solely attributable to differences in the date of hire. It could also have the unintended consequence of further undermining the likelihood of a successful human rights claim.

This is a major issue of intergenerational equity. As with most issues of this kind, it is very difficult for a younger generation of workers to have a voice in setting the social and economic policies under which they will be governed. We are left, as Kay put it, with “a bizarre paradox of perverse collective action.”<sup>141</sup>

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141 *Supra* note 1.