Defending Age Distinctions in Employee Benefits after the Elimination of Mandatory Retirement

*Robert E. Charney & Matthew Horner**

Approaching the issue through their review of several recent court and tribunal decisions, the authors argue that the legislative policy choice in Ontario and other jurisdictions to permit age-based distinctions in the provision of benefits to employees over age 65, notwithstanding the abolition of mandatory retirement, was not only reasonable but necessary. That choice, in their view, represents a fair, and amply justified, balance between the right of individual employees to continue working past 65, and the right of employees as a collectivity to freely negotiate benefit provisions and group insurance plans that are in the interests of the group as a whole.

1. INTRODUCTION

> That the system of living contrived by me was unreasonable and unjust; because it supposed a perpetuity of youth, health and vigour, which no man could be so foolish to hope, however extravagant he may be in his wishes. That the question therefore was not, whether a man would choose to be always in the prime of youth, attended with prosperity and health, but how he would pass a perpetual life under all the usual disadvantages which old age brings along with it.[1]
>
> – from *Gulliver's Travels*, by Jonathan Swift (Gulliver's observations on the Struldbruggs in the island kingdom of Luggnagg, who lived forever but suffered the natural decline of aging)

---

* General Counsel and Counsel, respectively, Constitutional Law Branch, Ontario Ministry of the Attorney General. We were counsel for the Ministry in each of the three cases discussed below, but the views expressed herein are solely our own and do not represent the position of the Ministry. At several points in this paper we refer to and rely on the expert evidence of three actuaries: J.M. Norton and J.C. Lewis, who gave evidence in the *Chatham-Kent* arbitration, and Peter Gorham, who gave evidence in WSIAT *Decision No. 512/06*.

1 Part III, ch X (Boston: Houghton Mifflin, Riverside Editions, 1960) at 170.

The legislative prohibition of "mandatory retirement" in Ontario in 2006 did not alter the invariable consequences of aging. As with Swift's fictional Struldbruggs, freedom from mandatory retirement does not change the unavoidable fact that mortality and morbidity are clearly correlated with age. As a result, the cost of actuarially sound employment benefits and group life insurance plans accelerates with age. Some benefits, including term life insurance, become prohibitively expensive after age 65. Others, such as long-term disability plans, are simply not available without an age limit.

Mandatory retirement offered a way to address the actuarial realities of old age in the workplace: when employers could require workers to retire at 65, the increased cost of certain benefits after that age did not matter. With the elimination of mandatory retirement, employers and employees must develop employment benefits that meet the needs of workers throughout the life cycle. This matter, we argue, is best left to workers and employers to determine through a process of free collective bargaining, allowing workers to prioritize benefits that do not become significantly more expensive or difficult to obtain when they reach 65.

When mandatory retirement was eliminated in Ontario, the legislature sought to balance the right of older workers to choose to continue working past age 65 with the right of all workers to negotiate employment benefits and group life insurance plans that are in their collective interests, and with the fact that most employees voluntarily retire by the time they reach 65. The fact that few workers continue to work full-time until the day they die also has significant policy implications for legislative compensation schemes such as that in the *Workplace Safety and Insurance Act* (*WSIA*). This paper will discuss three recent court and tribunal decisions that have upheld legislative policy choices imposing maximum age limits for certain workplace benefits in the post-mandatory retirement world.

The first of those cases, *Chatham-Kent*,[2] is an Ontario grievance arbitration decided in 2010, dealing with the validity of clauses in a municipal collective agreement which differentiated between employees over and under age 65 in the provision of certain benefits,

---

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

including paid sick leave, life insurance and long-term disability (LTD) coverage. That differentiation was expressly authorized by provisions of the Ontario *Human Rights Code*[3] which were a part of the legislative amendments eliminating mandatory retirement and which created an exception to the *Code*'s general prohibition of discrimination against those over 65. The *Chatham-Kent* arbitration is the only legal proceeding to date which has considered the constitutional validity of that statutory exception.

In the second case, *Withler v. Canada*,[4] decided in 2011, the Supreme Court of Canada dismissed a constitutional challenge to federal legislation which provided supplementary death benefits to federal civil servants, and which specified that a lump-sum payment made to a plan member's (i.e. an active or retired employee's) designated beneficiary upon the member's death would be reduced by ten percent for each year by which the member was over 65 (or 60 for members of the armed forces) at the time of death. *Withler* was released after the *Chatham-Kent* award but before Workplace Safety and Insurance Tribunal (WSIAT) *Decision No. 512/06* referred to immediately below. It is the most recent Supreme Court of Canada decision that is directly relevant to this issue, and in our opinion it confirms the rationale of the tribunal holdings in *Chatham-Kent* and *Decision No. 512/06*.

The third and final case we will discuss — *Decision No. 512/06*[5] — is a 2011 decision of the Ontario WSIAT, dismissing a constitutional challenge to provisions of the *WSIA* which terminated loss of earnings (LOE) benefits and replaced them with benefits for loss of retirement income when a worker turned 65 (or after two years for workers who were injured after reaching age 63). *Decision No. 512/06* is the only Ontario decision that has ruled on the validity of the age limit on loss of earnings benefits in the *Workplace Safety and Insurance Act* — a question that is directly related to the issue raised in *Chatham-Kent*.

In each of the three cases, the court or tribunal upheld the constitutional validity of the age limit in the challenged legislation.

---

3 RSO 1990, c H.19, ss 25(2.1) to (2.3).

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

5 2011 ONWSIAT 2525.

The decisions recognize the principle that even in the absence of mandatory retirement, employers, employees and government policy-makers cannot simply disregard the inevitable consequences of aging when establishing employment benefits.

Before turning to those cases, we will review the 1990 Supreme Court of Canada decision in the *McKinney* case,[6] which affirmed the constitutionality of statutory provisions allowing for mandatory retirement. We suggest that the age distinctions at issue in the three cases were alternative, less restrictive means of achieving, in a world without mandatory retirement, some of the objectives recognized in McKinney as pressing and substantial.

2. MANDATORY RETIREMENT AND THE *McKINNEY* DECISION

With few exceptions, mandatory retirement was not the product of legislation[7] but of collective bargaining. The Ontario *Human Rights Code* did not impose it, at 65 or at any other age. Before mandatory retirement was eliminated by legislative amendment on December 12, 2006, section 10(1) of the *Code* defined "age" for the purposes of

---

6 *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 [*McKinney*].

7 The most notable exception is mandatory retirement of judges. Superior court judges must retire by age 75 by virtue of section 99(2) of the *Constitution Act, 1867*, which of course is not subject to *Charter* challenge. Pursuant to sections 47(1) and 86.1(5.2) of the *Courts of Justice Act*, RSO 1990, c 43, Ontario provincial court judges and judicial officers such as case management masters also retire at 75 (the statutory scheme provides for nominal retirement at age 65, with annual reappointments to age 75). Justices of the peace are subject to the same retirement age, pursuant to section 6 of the *Justice of the Peace Act*, RSO 1990, c J.4. Mandatory retirement of judicial officers is considered necessary to reinforce their tenure, which is fundamental to judicial independence. Judges cannot be removed from office prematurely unless they are manifestly incompetent. The alternative to an objective retirement date is more rigorous performance appraisal, which would indeed pose a threat to judicial independence. The validity of mandatory retirement of Provincial Court judges was upheld by the Ontario Court of Appeal in *Charles v Ontario* (1998), 158 DLR (4th) 192, aff'g (1996), 32 CRR (2d) 337 (Ont Gen Div). The mandatory retirement age for justices of the peace was raised from 70 to 75 by judicial declaration in *Association of Justices of the Peace of Ontario v Ontario* (2008), 92 OR (3d) 16 (Sup Ct J).

protection from age-based employment discrimination as "an age that is eighteen years or more and less than 65 years."[8] This meant that employment contracts could not provide for mandatory retirement "at a fixed age of less than 65"[9] unless the employer was able to establish that this age was a *bona fide* occupational qualification because of the nature of employment.[10] An employment contract could, however, provide for mandatory retirement at 65 or later without infringing the *Code*, and therefore without the need to show that age was a reasonable and *bona fide* employment qualification.

In *McKinney*, this definition of age in the pre-2006 *Code* was challenged under section 15 of the *Canadian Charter of Rights and Freedoms* as being impermissibly discriminatory on the basis of age. The Supreme Court of Canada concluded that the limit of 65 in what was then section 9(a) of the *Code* did infringe section 15 of the *Charter*, but La Forest J., for the majority of the Court, went on to uphold that limit as reasonable under section 1. In his section 1 analysis, after examining the evidence on the history of mandatory retirement, La Forest J. wrote:

> About one half of the Canadian work force occupy jobs subject to mandatory retirement, and about two-thirds of collective agreements in Canada contain mandatory retirement provisions at the age of 65, which reflects that it is not a condition imposed on the workers but one which they themselves bargain for through their own organizations.[11]

While he found a violation of section 15, La Forest J. was careful to distinguish age-based distinctions from the other grounds of discrimination that are enumerated in section 15:

> It must not be overlooked . . . that there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin

---

8 *Supra* note 3, s 5(1).

9 *McKinney*, *supra* note 6 at para 77.

10 The Supreme Court of Canada has held that in order to qualify as a reasonable and *bona fide* occupational qualification, the retirement age had to be objectively related "to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." *Ontario (Human Rights Commission) v Etobicoke (Borough of)*, [1982] 1 SCR 202

11 *McKinney*, *supra* note 6 at para 83.

> with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability . . . . This hardly means that general impediments based on age should not be approached with suspicion, for we age at differential rates, and what may be old for one person is not necessarily so for another. In assessing the weight to be given to that consideration, however, we should bear in mind that the other grounds mentioned are generally motivated by different factors. Racial and religious discrimination and the like are generally based on feelings of hostility or intolerance. On the other hand, as Professor Ely has observed, "the facts that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws . . . that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older", *Democracy and Distrust* (1980), at p. 160. The truth is that, while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits.[12]

As we will see, this important distinction between age and other grounds of discrimination continues to be relevant to age-based distinctions in employment benefits after the elimination of mandatory retirement. The "solid grounds" referred to by La Forest J. became even more compelling once mandatory retirement was made illegal.[13]

After reviewing the legislative debates preceding the enactment of section 9(a) of the *Code*, the Court concluded as follows about the objectives of that provision:

> The Legislature's concerns were with the ramifications of changing what had for long been the rule on such important social issues as its effect on pension plans, youth unemployment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment,

---

12 *Ibid* at para 88.

13 While the *McKinney* case arose in the context of mandatory retirement of university professors, the Court made it clear that its analysis was "not restricted to the university context," since the appellants' status as university professors was not relevant to their rights under section 9(a) of the *Code*. See *McKinney*, *supra* note 6 at para 91, where the Court said that "while evidence respecting the specific context in which the issue arises may . . . serve as an example to demonstrate the reasonableness of the objectives, it must not be confused with those objectives."

> including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship.[14]

In a nutshell, mandatory retirement was the product of free collective bargaining, and the legislature's objective in enacting section 9(a) of the *Code* was to continue to permit the parties to the collective agreement to include a mandatory retirement provision if that was to their mutual advantage in the collective bargaining process. La Forest J. had what he described as "little difficulty" in holding that the legislation was rationally connected to its objectives. It was, he said, "part of a complex web of rules which results in significant benefits as well as burdens to the individuals affected."[15] In his view, "there is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement suitable to a particular area of activity."[16] The legislation in question, he said, "allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations." Rather than being "a condition imposed on employees," it was, in his words, "actively sought" by the labour movement in exchange for a variety of employee benefits.[17] The parties to the particular collective agreement were, he concluded, in the best position to decide whether mandatory retirement should be continued, and a Human Rights Commission was not the most appropriate body

---

14 *McKinney*, *supra* note 6 at para 96. The Court later indicated (at para 97) that the objective of reducing youth unemployment should not be accorded much weight, since the "objective of forcibly retiring older workers in order to make way for younger workers is in itself discriminatory . . . ."

15 *Ibid* at para 101.

16 *Ibid.*

17 *Ibid* at paras 119-120. It is not only in unionized workplaces that the potential mutual benefits of mandatory retirement have been recognized. Many law partnerships have historically included mandatory retirement provisions in their partnership agreements. See e.g. *Fasken Martineau DuMoulin LLP v British Columbia (Human Rights Tribunal)*, 2012 BCCA 313, where the British Columbia Court of Appeal dismissed a *Human Rights Code* challenge to such provisions on the basis that a law partner is not "employed" by the partnership of which he is a member and is therefore not covered by the *Code*'s protections against discrimination in employment.

to make that assessment.[18] In subsequent cases, in upholding mandatory retirement provisions in collective agreements as well as the *Human Rights Code* provisions which permitted such agreements, the Supreme Court again treated as a significant consideration the variable interests of employees over their lifespan, and the need for the collective to negotiate with respect to all of those interests.[19]

It is worthy of note that while *McKinney* recognized free collective bargaining as an important governmental objective in the context of section 1 of the *Charter*, the Supreme Court went even further in its 2007 decision in *B.C. Health*,[20] arguably elevating it to the status of a constitutionally protected fundamental freedom under the guarantee of freedom of association in section 2(d) of the *Charter.* Although it remains unclear exactly what the Court meant by the right to bargain collectively in *B.C. Health*,[21] there can be no question that it continues to see the process of collective bargaining as a value that merits statutory protection.

---

18 *McKinney*, *supra* note 6 at para 117. The importance of free collective bargaining as the guiding principle in the justification of mandatory retirement was made even clearer in the concurring opinions of Justice Sopinka (at para 426) and Justice Cory (at paras 431-433).

19 For example, in *Dickason v University of Alberta*, [1992] 2 SCR 1103, which also considered the validity of mandatory retirement in the university context, the Court said, at para 41:

> It is safe to assume that the terms of the collective agreement pertaining to compulsory retirement were not a manifestation of an abuse of its power by the employer university. Rather, they represent a carefully considered agreement that was negotiated with the best interest of all members of the [bargaining unit] in mind.

More recently, the Federal Court of Appeal, relying on *McKinney*, upheld the constitutional validity of section 15(1)(c) of the *Canadian Human Rights Act*, which permits termination of employment when an individual has reached the "normal age of retirement for employees working in positions similar to the position of that individual": *Air Canada Pilots Association v Kelly*, 2012 FCA 209. In that decision, the Court highlighted the importance of the collective bargaining process in determining the "normal" retirement age in any given occupational group (at paras 70, 75-76, 80, 82-86).

20 *Health Services and Support-Facilities Bargaining Ass'n v British Columbia*, 2007 SCC 2007, [2007] 2 SCR 391 [*B.C. Health*].

21 The Court's clarification of *B.C. Health* in its subsequent decision in *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3, appears to represent something of a retrenchment from the broad language it had used in *B.C. Health.*

3. THE LEGISLATIVE ELIMINATION OF MANDATORY RETIREMENT IN ONTARIO

Even though *McKinney* and later cases upheld the constitutionality of mandatory retirement, political controversy over the matter continued. In 2005, the Ontario legislature passed the *Ending Mandatory Retirement Statute Law Amendment Act, 2005* (Bill 211). That Act amended the definition of age in the *Human Rights Code* to include persons over 65, in effect prohibiting the inclusion of mandatory retirement provisions in employment contracts or collective agreements. However, such provisions could be defended (in the words of section 24(1) of the *Code*) as a "reasonable and *bona fide* qualification because of the nature of the employment."

By amending the *Code* to prohibit mandatory retirement, the legislature allowed Ontarians to choose to work past age 65. However, it took steps to balance that goal with the need to protect existing pension, benefit and early retirement rights, and the freedom of employees and employers to negotiate benefit packages that differentiated on the basis of age. To that end, Bill 211 amended section 25 of the *Human Rights Code* to provide that the right to equal treatment with respect to employment without discrimination because of age would not be "infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder." The *Employment Standards Act, 2000* (the *ESA*), which was not amended by Bill 211, prohibits employers from providing a benefit plan that treats employees differently on the basis of "age," which is defined under the employment standards regulations as "any age of 18 years or more and less than 65 years."[22] Section 25(2.1) of

22 *Employment Standards Act, 2000*, SO 2000, c 41, s 44(1); O Reg 286/01, s 1. Most provinces exclude age differentiation in employee insurance plans from the discrimination provisions of their human rights statutes: *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7; British Columbia *Human Rights Code*, RSBC 1996, c 210, ss 13(3), 41(2); *Canadian Human Rights Act Benefit Regulations*, SOR/80-68, ss 3, 5, 8; New Brunswick *Human Rights Act*, RSNB 1973, c 30, ss 3(1), 3(6); Newfoundland and Labrador *Human Rights Code*, RSNL 1990, c H-14, ss 9(1), 9(5); Nova Scotia *Human Rights Act*, RSNS 1989, c 214, ss 5, 6(g); Prince Edward Island *Human Rights Act*, RSPEI 1988, c H-12, s 11; Quebec *Charter of human rights and freedoms*, RSQ c C-12, s 20.1; *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ss 16(1), (4), (9).

the *Human Rights Code* and the provisions of the *ESA*, read together, thus maintain the pre-Bill 211 status quo with respect to disability plans, life insurance plans and health benefits. Workers and unions are allowed to continue to negotiate employment benefit, pension and group insurance plans that draw distinctions between employees under the age of 65 and those over 65.

Introducing Bill 211 in the legislature, the Minister of Labour described the compromise embodied in that statute as representing a "fair, reasonable and rational approach" to ending mandatory retirement while "protecting existing pension benefits and earlier retirement rights."[23] The changes enacted in Bill 211 implicitly recognized what we would describe as four realities of the relationship between age and employment: first, that the cost of certain employee benefits accelerates with the insured's age; second, that certain employee benefits may not be available from insurance companies without an age limit; third, that the vast majority of Ontarians and Canadians retire before 65; and fourth, that the interests of employees change over the course of their life cycle, and that those differences among employees require compromise in the collective bargaining process.

Such employee benefits as life insurance, accidental death and dismemberment plans, and long-term disability plans are rarely or never provided directly by employers, but are usually purchased by employers from insurance companies under group insurance contracts. The parties to collective bargaining recognize that these benefit plans must provide for a level of risk that an insurance corporation is willing to underwrite, and that different benefit schedules and terms involve different costs. Employees may wish to maintain employment gains in other areas, such as wages and vacation pay, rather than pay higher premiums for enhanced life insurance benefits or entirely forgo benefits, such as LTD plans, which are not available without an age limit.

These realities are reflected in the three recent decisions discussed below. In all three, decision-makers recognized that age-based

---

23 Ontario, Legislative Assembly, *Official Report of Debates*, 8 June 2005 at 1420-1430 (Hon Christopher Bentley, Minister of Labour). See also Ontario, Legislative Assembly, *Official Report of Debates*, 19 October 2005 at 1550-1620 (Hon Steve Peters, Minister of Labour).

distinctions are often a necessary aspect of an employment benefits package, and that even in the absence of mandatory retirement, distinctions based on age 65 are not unconstitutional if they are supported by actuarial or other empirical evidence.

4. THE *CHATHAM-KENT* ARBITRATION AWARD

The constitutionality of the amendments made to the Ontario *Human Rights Code* by Bill 211 was questioned for the first time in 2010, in the *Chatham-Kent* arbitration[24] before Arbitrator Brian Etherington. The collective agreement between the municipality of Chatham-Kent and the Ontario Nurses' Association had historically provided for mandatory retirement. After Bill 211 was passed, the parties had agreed to (and the union membership had ratified) collective agreement terms which provided employees with different benefits once they reached age 65. For example, the life insurance benefit for employees over 65 was $5,000, compared to twice the employee's annual salary for those under 65. Employees over 65 were also denied LTD coverage.

The union brought grievances on behalf of two workers over 65, claiming that the new benefit provisions in the collective agreement discriminated on the basis of age, contrary to the *Human Rights Code*. The employer responded that section 25(2.1) of the *Code*, introduced by Bill 211, provided a complete defence to the claim. The union then brought a constitutional challenge, alleging that section 25(2.1) discriminated on the basis of age, contrary to section 15(1) of the *Charter*.

Arbitrator Etherington dismissed the grievances and the constitutional challenge. In his award, he acknowledged some of the realities of the relationship between age and employment benefits mentioned above — in particular, that some benefits (such as LTD) are not available without an age limit, that others (such as life insurance) become increasingly expensive with age, and that most workers do in fact retire before 65. While holding that section 25(2.1) did discriminate on the basis of age, contrary to section 15(1) of the *Charter*, he ruled (as had the Supreme Court in *McKinney*) that these

---

24 *Chatham-Kent*, *supra* note 2.

considerations were best considered at the justification stage of the *Charter* analysis, under section 1.[25]

The arbitrator went on to find that section 25(2.1) constituted a reasonable limit under section 1 of the *Charter.* In so holding, he recognized, at the first stage of the *Oakes* test, that Bill 211 had the pressing and substantial objective of giving older workers the freedom to continue working past age 65 if they wished, while ensuring that the elimination of mandatory retirement would not undermine the availability of certain benefit, pension and group insurance plans.[26] He also recognized that the legislation's impact on free collective bargaining between employers and employees was a relevant contextual consideration in the section 1 analysis.[27] He noted La Forest J.'s holding in *McKinney* that "[t]he operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives."[28] On the minimal impairment branch of the *Oakes* test, Arbitrator Etherington determined that the legislation was a reasonable and proportionate way of achieving those objectives.[29]

Relying further on *McKinney*, the arbitrator noted the complex task faced by the legislature in modifying a legal regime that had for years permitted mandatory retirement. "[A]ny attempt to change the law concerning mandatory retirement could," he acknowledged, "have important ramifications on many other societal norms and workplace rules and policies, including . . . pension and benefit plans, youth employment and the desirability of allowing workers to bargain collectively to organize their own terms of employment."[30] He therefore found that

> [b]y choosing to enact a blanket exemption from scrutiny under the *Human Rights Code* for employees who are 65 and older, under pension and benefit plans, the government has chosen to act with great caution by providing the maximum flexibility to employers and employees to deal with the potential

25 *Ibid* at para 109.
26 *Ibid* at paras 115-116.
27 *Ibid* at para 117.
28 *Ibid* at para 119, quoting *McKinney*, *supra* note 6 at para 105.
29 *Ibid* at para 120.
30 *Ibid* at para 121.

> disruption to such programs that might result from the presence of senior workers who chose to continue employment past age 64.[31]

In support of this finding on the need for flexibility, Arbitrator Etherington cited actuarial evidence concerning the impact of age on the cost and availability of employment benefit schemes — particularly evidence "showing that the cost becomes higher as workers enter their late 40s and 50s, and increases on a steeper curve when employees enter their 60s."[32] Indeed, the actuarial evidence indicated that the cost of providing a certain amount of life insurance for a group with an average age of 65 would be about 15 times higher than for a group with an average age of 40.[33] The arbitrator also noted that for certain types of benefits such as long-term disability insurance, all the experts agreed that some type of age limit is necessary.[34] In light of the fact that these issues relating to cost and availability required

---

31 *Ibid* at para 122.

32 *Ibid* at para 124.

33 Other actuarial evidence indicated that compared to a plan member who is 45 years old, the premium rate for the same insurance is nine times higher for plan members in the 65 to 69 age band, and 23 times higher for those in the 70 to 74 age band. Providing the same life insurance benefit to persons over 65 would also result in adverse tax consequences for employees, as the higher premiums paid by the employer would result in an increase in the income tax payable by all employees (see Affidavit of J.M. Norton FSA, sworn 13 January 2009 (filed as part of the record in *Chatham-Kent*, *supra* note 2) at para 37).

34 *Chatham-Kent*, *supra* note 2 at para 124. Long-term disability insurance is designed to provide income replacement benefits to a qualified employee beyond a minimum waiting period (typically 120 days). Such policies terminate all payments at a limiting age, almost invariably at or about 65, when retirement on an unreduced pension is available. In no Canadian LTD plans are benefits available without an age limit, and all or virtually all LTD plans provide coverage only to employees below age 65. Raising the age at which benefits are terminated from 65 to 70 would increase the cost of the plan by 20 to 25 percent (see Affidavit of J.C. Lewis FSA, FCIA, sworn 30 January 2009 (filed as part of the record in *Chatham-Kent*, *supra* note 2) at para 4). This additional cost would be borne by all employees, even though few choose to work beyond 65. In addition, most employees do retire by age 65, and their employment income is replaced by pension income. Since LTD benefits are generally higher than pension benefits, the receipt of LTD benefits after 65 would result in a windfall for injured workers, because they would be receiving income replacement for longer than they would have worked. With no age limit, LTD claimants would receive these higher payments for life, even though they would not have worked for life. This is discussed in more detail below, with respect to WSIAT *Decision No. 512/06*.

some form of age distinction, he went on to conclude that the choice of age 65 was a reasonable one, given the use of that age as the "normal" age of retirement in other pension and benefit legislation.[35]

Finally, in determining that the age distinction was a proportional means of achieving the legislation's goals, Arbitrator Etherington emphasized the negative impact that a finding of unconstitutionality would have on the ability of workers and employers to bargain collectively on workplace conditions and benefit plans, particularly in light of the Supreme Court's holding in *B.C. Health* that the right to collective bargaining is an aspect of the *Charter*-protected freedom of association.[36] He accepted the argument "that the desirability of free collective bargaining . . . cannot by itself be accepted as a basis for finding that violations of other *Charter* rights and freedoms are justifiable as long as they result from collective bargaining."[37] "Nevertheless," he held, the "importance of free collective bargaining, both as a social policy mechanism to provide for peaceful and orderly governance of productive workplace relationships and as a component of the *Charter* freedom of association, is clearly a relevant and significant factor to be weighed against the detrimental effects of the legislation and collective agreement provisions."[38]

---

35 *Chatham-Kent*, *supra* note 2 at para 125. While mandatory retirement has been eliminated in Ontario except under certain circumstances, the maximum "normal retirement date" under the *Pension Benefits Act*, RSO 1990, c P.8, s 35, continues to be within one year of when a worker reaches 65, although earlier normal retirement dates may be agreed upon.

36 *B.C. Health*, *supra* note 20 at para 87.

37 *Chatham-Kent*, *supra* note 2 at para 142.

38 *Ibid.* One of the grievors herself, the arbitrator noted, "appeared to recognize that there was a legitimate collective bargaining objective of providing better starting wages for new hires that was served by agreeing to the cost containment measures involved in the new benefit limitations for workers aged 65 or older." He went on to say:

> While this clearly has a deleterious impact on the individual equality interests of the two grievors, it demonstrates the beneficial effect of the legislation in terms of allowing collective bargaining to operate to meet the needs and circumstances of the two parties in the workplace. It leaves it open to the employer and employees to determine which balance of wages and benefits for workers, at various stages in their working lives, is most beneficial given their situation.

Ibid at para 134.

The employer and the union had negotiated a schedule of benefits for which the insured portion was known to be available from an insurance company, and which had a determinable cost to the employer. A schedule of benefits with no age limit would not have been available. A schedule of benefits which provided more benefits for workers between 65 and 71 would have been available, but would have increased the cost to the employer and would have resulted in negotiated set-offs on other wages and benefits. Alternatively, a schedule that provided reduced benefits to all employees might have been available at no greater cost to the employer, but such reduced benefits might have been insufficient for younger workers, who could have obtained higher benefits at a competitive cost outside their group employment plan.

The need to balance the competing interests that bargaining unit members have at different times in their lives is an inherent part of the collective bargaining process. Younger employees generally want higher wages, while older employees may prefer such benefits as life insurance, pensions or retirement allowances. Younger employees may want dental plans to cover orthodontic benefits for children, while older employees may want them to include denture benefits for spouses. Younger employees may prefer that compensation systems or layoff rules be based on merit or productivity, while older employees may prefer that they be based on seniority. Any collective agreement represents a compromise between the needs and wants of some workers and the needs and wants of others.

As the Supreme Court had done in *McKinney*, Arbitrator Etherington gave considerable weight to the fact that age-based distinctions in employment benefits differed from distinctions based on other characteristics, as all employees "know they will pass through the limitations and different entitlements applicable to that age group if they survive and choose to continue working."[39]

Because the issues raised in *Chatham-Kent* were closely analogous to those in *McKinney*, it is understandable that Arbitrator Etherington determined (as had the Supreme Court in *McKinney*) that the legislation violated section 15(1) of the *Charter* but was saved under section 1. As we contend below (and as we argued unsuccessfully in *Chatham-Kent*), Supreme Court equality jurisprudence has

39 *Ibid* at para 135.

evolved significantly since *McKinney*, and many of the factors relied upon by Arbitrator Etherington in upholding section 25(2.1) of the *Code* as a reasonable and justifiable limit on the grievors' *Charter* rights could well have led him to conclude that the age distinction permitted by Bill 211 was not discriminatory in the substantive sense and was therefore not an infringement of section 15(1). In age discrimination cases since *McKinney*, the Court has considered the different nature of age as a prohibited ground of discrimination within the framework of the section 15(1) analysis rather than under section 1.[40] This is consistent with the Court's recent approach to section 15(1), which focuses on the context of a particular distinction in determining whether that distinction is substantively discriminatory. The fact that age is "different," as noted in *McKinney*, is a necessary contextual factor in determining whether an age-based distinction is substantively discriminatory.

5. THE SUPREME COURT DECISION IN *WITHLER*

The Supreme Court of Canada applied its more recent approach to section 15(1) of the *Charter* in the context of age-based employment benefits in *Withler v. Canada (Attorney-General)*,[41] which was decided after the *Chatham-Kent* award. At issue in *Withler* was whether a supplementary death benefit provided by statute to federal civil servants, including retirees,[42] and to armed forces members[43] discriminated on the basis of age because it was reduced by ten percent for every year by which the plan member was over age 65 (60 in the case of members of the armed forces) when he or she died. The plaintiffs, surviving spouses of federal civil servants, received a reduced supplementary death benefit because the plan members were older than 65 at the time of their death. The plaintiffs alleged that such a reduction in benefits discriminated on the basis of age, contrary to section 15.

---

40 See e.g. *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497; *Gosselin v Quebec (AG)*, [2002] 4 SCR 429.

41 *Withler*, *supra* note 4.

42 *Public Service Superannuation Act*, RSC 1985, c P-36.

43 *Canadian Forces Superannuation Act*, RSC 1985, c C-17.

The British Columbia courts dismissed the claim, and the Supreme Court upheld their decision. While the Supreme Court did not expressly discuss the role of bargaining in the creation of the benefits in question (these benefits were conferred by statute rather than by a collective agreement[44]), the Court's decision relied on an understanding of the variety of intergenerational interests that arise in employer-employee negotiations.[45] The Court reviewed its equality jurisprudence in detail, with particular emphasis on the role of "comparator groups" in section 15 analysis. Although it expressed concerns about the formalistic use of "mirror comparator groups," it affirmed the approach it had taken in recent decisions establishing a two-part test for discrimination, in which the function of comparison remains essential to the first step:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[46]

The Court engaged in considerable theoretical discussion of comparator groups, but that matter does not, in our view, explain the result in the case.[47] The Court readily found that the impugned provisions created a distinction on the basis of age, by providing for a reduced supplementary death benefit to the surviving spouses of civil servants who were over age 65 when they died.[48] The main issue on the appeal arose at the second stage of the section 15(1) analysis: did the

---

44 This circumstance is unique to federal civil servants. In virtually every other context, such employee benefits are the product of the collective bargaining process.

45 Interestingly, even though the *Charter* challenge was directed at the terms of a statutory employment benefit package, at the outset of its decision the Court appeared to suggest that it was addressing the impugned provisions as though they were part of a broader social benefits regime. It noted that "the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people . . . ." *Withler*, *supra* note 4 at para 3.

46 *Ibid* at para 62.

47 We suspect that the Court was looking for an opportunity to revisit some of its earlier equality jurisprudence, and took the opportunity to do so in *Withler* because it was the only case on the docket to raise a section 15 issue.

48 *Withler*, *supra* note 4 at para 69.

age-based distinction violate substantive equality, or in other words, did the distinction "create a disadvantage by perpetuating prejudice or stereotyping?"[49]

As in earlier cases, the Court emphasized that context — in this case, what it described as a "broader pension scheme" — was the key to analyzing the claim of discrimination:

> It is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests. The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.[50]

The Court went on to answer that question in the negative. In terms similar to those used by Arbitrator Etherington in *Chatham-Kent*, it said that pension schemes "must balance different claimants' interests, and cannot be perfectly tailored to every individual's personal circumstances. The reality is that such schemes of necessity must make distinctions on general criteria, including age."[51] Indeed, the benefit package in issue, the Court recognized, "will often target the same people through different stages of their lives and careers," and attempt "to meet the specific needs of the beneficiaries at particular moments in their lives."[52] More specifically, the Court highlighted the fact that the supplementary death benefit was only one element in a larger package of benefits for federal civil servants, and concluded that when it was "considered in the context of the other pensions and benefits to which the surviving spouses are entitled . . . it is clear that its purpose corresponds (albeit sometimes imperfectly) to the claimants' needs. . . ."[53]

Thus, as it had done in *McKinney*, and as Arbitrator Etherington had done in *Chatham-Kent*, the Court in *Withler* recognized that it is

---

49 *Ibid* at para 30.
50 *Ibid* at para 71.
51 *Ibid* at para 73.
52 *Ibid* at para 76.
53 *Ibid* at para 77.

often in the interests of workers as a group for benefits to differ on the basis of age, and that such distinctions are not unconstitutional. In *Withler*, the Court did not expressly refer to the collective bargaining process by which such arrangements are generally reached (as indicated above, the benefit at issue in that case was provided by statute). The Court did, however, recognize that the particular distinction did not bear the hallmarks of discrimination, because it applied "horizontally to a large population with different needs at a given time, and vertically throughout the lives of the members of this population."[54] In our view, this analysis would apply with even greater force to employee benefits that are a product of collective bargaining.

The point can best be illustrated by considering this issue outside the context of collective bargaining, since collective agreements may reflect the same choices that individuals make for themselves when they purchase insurance individually. For example, individuals commonly purchase more term life or disability insurance when they are younger than when they are older. This choice reflects the reality that the cost of such insurance increases substantially with age,[55] and the need for it usually declines with age because older people have fewer dependants and have amassed more savings. Many workers over 65 are also entitled to a pension (or a survivor pension), which is paid regardless of their ability to work. Individuals who choose lower levels of coverage as they get older cannot be accused of discriminating against themselves on the basis of age. Similarly, there is no discrimination where employees (acting individually or through their collective bargaining agent) make the same choices when negotiating for benefits with their employer.

Thus, consistent with its recent jurisprudence, and in contrast to its earlier decision in *McKinney*, the Court in *Withler* considered this broader context within the parameters of section 15(1) itself, rather than leaving it to the section 1 stage. The fact that an age-based distinction was part of a broader employee benefits regime which provided a whole suite of benefits over the course of a lifetime, the

---

54 *Ibid* at para 76.

55 Actuarial evidence in *Withler* stated that the cost of term life insurance and disability insurance was 17 times higher for women at age 65 than at 35, and 22 times higher for men. See Evidence of Gordon Argue, SCC Appellant's Record, vol VI, at 46-49.

Court concluded, "confirms the absence of any negative or invidious stereotyping."[56] Therefore, there was no breach of section 15(1), and no need to justify the law under section 1.

6. WSIAT *DECISION NO. 512/06*

In December 2011, the Ontario Workplace Safety and Insurance Appeals Tribunal (WSIAT) applied the Supreme Court's *Withler* decision to hold that certain age-based distinctions in the province's *Workplace Safety and Insurance Act, 1997*[57] remained constitutionally valid after the abolition of mandatory retirement.

Section 43(1) of the *WSIA* provides governmental compensation to injured workers for loss of earnings (LOE) from the time of the injury which leads to the loss until, generally speaking, the time when the loss comes to an end. However, sections 43(1)(b) and (c) impose age-based limitations on LOE payments. Section 43(1)(b), which was not in issue in *Decision No. 512/06*, provides that those payments will end on "the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury." Section 43(1)(c), which was in issue in the case, provides an exemption to the general rule that LOE payments terminate at age 65, by allowing for two years of payments when the injury is suffered after age 63. After LOE payments under section 43(1) end because of the age limit, they are replaced by compensation for lost retirement income under section 45, for the reason explained by Paul Weiler in his 1986 report to the Minister of Labour:

> . . . one could not justify paying such a wage loss benefit for the entire life of the injured worker, because typically he would not actually lose wages for the rest of his life. The vast majority of non-disabled workers retire when they reach a certain age — typically at or around sixty-five, which is when most public and private pension plans start to pay retirement benefits. As of that time, then, the loss of *wages* benefit would also come to an end, to be replaced by a loss of *pension* benefit under which the WCB would make up the retirement income lost by workers as a result of their disability.[58]

---

56 *Withler*, *supra* note 6 at para 77.

57 SO 1997, c 16, Sch A.

58 P Weiler, "Permanent Partial Disability: Alternate Models for Compensation," December 1986 Report to the Minister of Labour at 4, 23.

Although courts and tribunals had dismissed constitutional challenges to similar provisions in the workers' compensation legislation of other provinces, *Decision No. 512/06* was the first such challenge to the age limitations on LOE benefit entitlement under Ontario's *WSIA*.[59]

The worker involved in *Decision No. 512/06* was injured in 2001 at age 63, and was therefore entitled to two years of LOE payments under section 43(1)(c). Mandatory retirement was legal in Ontario at the time, and the worker was subject to mandatory retirement and was eligible for an employer-sponsored pension when he reached 65. He claimed, however, that he had intended to work past age 65, and that he would have done so had he not been injured. Accordingly, he alleged that by limiting LOE payments to two years, section 43(1)(c) discriminated against him on the basis of age, contrary to section 15(1) of the *Charter*. In support of that claim, he put forward expert evidence speculating that the prohibition of mandatory retirement meant that individuals would work longer, and that age 65 therefore could no longer be used as a proxy for retirement.[60]

A majority of the Tribunal dismissed the *Charter* challenge, holding that section 43(1)(c) did not discriminate on the basis of age and did not violate section 15(1). Following the reasoning of the Supreme Court in *Withler*, the majority looked to the *WSIA*'s overarching purpose, which it saw as being to establish an employer-funded insurance plan that would support injured workers, consistent with the principles of insurance. It rejected the argument that the *WSIA* is a social benefit scheme for workers.[61] The Tribunal accepted actuarial evidence that most people retire by age 65, and that most insurance plans of this type (including LTD plans) have an end-date for payments which is tied to a generally accepted retirement age, such as 65.[62]

---

59 See *Laronde v New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2007 NBCA 10, 148 DLR (4th) 745; *Zaretski v Saskatchewan (Workers' Compensation Board)* (1997), 148 DLR (4th) 745, [1997] SJ No 319 (QL) (QB); *Decision 2002-811-AD*, Nova Scotia Workers' Compensation Appeals Tribunal, 27 January 2005.

60 *Decision No 512/06*, *supra* note 5 at paras 20-30, 113-117.

61 *Ibid* at para 98.

62 *Ibid* at paras 111, 112-117.

The majority acknowledged, as the worker had argued, that the elimination of mandatory retirement and changing demographic trends might raise retirement ages in the future, but it found that this was "not demonstrably the case at present."[63] Indeed, the actuarial evidence showed that while individuals consistently indicated a desire to retire early or retire late, the vast majority of individuals in fact retired between 60 and 65. Despite Bill 211, the Tribunal concluded, it remained actuarially sound to presume retirement by 65.

In addition to the fact that most private pension plans continue to set 65 as the "normal" retirement age, Canada Pension Plan (CPP) data showed that by 65, 96 percent of men and women have retired and begun to receive CPP benefits. Statistics Canada reports similarly showed a significant reduction in labour force participation between age 54 and 65.[64] And while some people do continue to earn employment income after 65, the evidence before the Tribunal was that fewer than ten percent of Canadians over 65 reported income of more than $1,300 a year.[65] The evidence also indicated that it is consistent with the principles of insurance to set a standard age to replace loss of earnings benefits with loss of retirement income benefits.[66] Because few people continue to work after age 65, any LOE benefits provided for more than a short time after age 65 are not very likely to indemnify for lost earnings.[67] Accordingly, the cessation of LOE benefits at

---

63 *Ibid* at para 113.

64 In 2008, 95.7 percent of people aged 45 to 54 were active in the labour force, compared to only 10.1 percent of people over 65.

65 These statistics are consistent with the evidence in *Withler*, where the trial judge found that the average age of retirement in the federal public service was 59 and that more than 90 percent of public service employees had retired by 66: 2006 BCSC 101 at para 138. In its 2012 Budget, the federal government proposed to gradually change the eligibility age for the Old Age Security program from 65 to 67. The change would take place over six years, starting in April 2023. The proposed changes would not directly affect the validity of current distinctions based on age 65, as Ontario legislation is not required to mirror federal legislation. Given the gradual nature of the proposed change, it remains to be seen whether such amendments would have any indirect effects on the actual retirement age of workers.

66 See Affidavit of Peter Gorham, sworn 18 May 2010, filed as part of the record in *Decision No 512/06*, *supra* note 5 at para 63.

67 Gorham Affidavit, *ibid* at paras 63, 156-157.

65, or after two years of payments for workers injured after age 63, was shown to be based on sound actuarial principles.[68]

In the result, at the first stage of the section 15(1) test set out in *Withler*, a majority of the Tribunal held that section 43(1)(c) did treat older injured workers differently from other injured workers on the basis of age, because it imposed a limitation on them that was not placed on younger workers.[69] However, at the second stage of the test, the majority concluded that in the context of the *WSIA* regime as a whole, setting a two-year limit on LOE payments for workers injured at age 63 or older "did not perpetuate disadvantage or prejudice or stereotype the worker" and was not "substantively discriminatory;"[70] thus, it did not infringe section 15(1) of the *Charter*. The majority recognized that although the two-year limit would not serve every individual in a manner that reflected his or her circumstances, it did correspond to the circumstances of the group as a whole. Most older workers who chose to (or were able to) return to work after an injury did so within two years, and the two-year limit was a reasonable policy in the context of the average age of retirement.[71]

This finding on the part of the majority of the Tribunal was, in our view, consistent with the admonition by the Supreme Court in *Withler*, that isolating the impugned provision from its legislative context "would have led to an artificial understanding of whether an equal benefit of the law had, in fact, been denied,"[72] and with the following comment by the Court: "Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered."[73]

In a dissenting opinion in *Decision No. 512/06*, a Vice-Chair of the Tribunal, who approached the *WSIA* as a social benefit scheme,

---

68 *Ibid* at paras 158-159; *Decision No 512/06*, *supra* note 5 at para 43.
69 *Decision No 512/06*, *ibid* at para 123.
70 *Ibid* at para 163.
71 *Ibid* at paras 140-143.
72 *Withler*, *supra* note 4 at para 74.
73 *Ibid* at para 67.

held that the age distinction in section 43(1)(c) was substantively discriminatory because it limited LOE payments to older workers "even in circumstances when further entitlement would be in order."[74] This conclusion was based on a failure to situate the benefit in question in its legislative context as an insurance scheme rather than a social benefit scheme, and it disregarded the Supreme Court's statements in *Withler* and *Nova Scotia (Workers' Compensation Board) v. Martin* that the mere failure to provide individualized assessment does not in itself render a law discriminatory, as long as the line-drawing is done in a way that is free from discrimination.[75]

7. CONCLUSION

In each of the three cases discussed in this paper, a court or tribunal has held that the age distinctions in employee benefit plans which were at issue were constitutional, in that they were supported by actuarial evidence that most people continue to retire by 65 and that it is more expensive to provide certain employment benefits beyond that age. Indeed, when the claimants in both *Chatham-Kent* and *Decision No. 512/06* were pressed to suggest a viable remedy for the alleged discrimination, they recognized the need for some age distinction in employee benefit plans. In *Chatham-Kent*, the grievors' expert witness admitted that "the insurance industry and governments need a 'line in the sand,' a normal retirement age, on which to base the costing of pension and group insurance plans," and the union simply suggested that age 71 would "provide a better cut off age for the limitation of age discrimination protection with respect to benefit plans and pensions" under the Ontario *Human Rights Code*.[76] Similarly, in *Decision No. 512/06*, the claimant suggested (and the dissenting Vice-Chair accepted) that a more appropriate statutory age cut-off would be 70 or 71.[77]

---

74 *Decision No 512/06*, *supra* note 5 at paras 211, 214.

75 *Withler*, *supra* note 4 at para 67; *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 SCR 504 at para 82.

76 *Chatham-Kent*, *supra* note 2 at para 123.

77 *Decision No 512/06*, *supra* note 5 at para 228.

No court or tribunal has found evidence that 70 or 71 would be a "better" or more appropriate statutory cut-off than 65,[78] and there is far more evidence to support the use of 65 as a cut-off than the higher ages proposed by the claimants. Moreover, if LOE payments were to be awarded on the basis of an individualized assessment of the age at which each worker claims that he or she would have retired had it not been for his or her injury, many injured workers would claim an intention to work to whatever maximum age the law allowed. From the perspective of an insurance scheme, making LOE payments on the basis of how long a worker "intended" to remain in the workforce would make as much sense as basing life insurance premiums on how long a person "intends" to live. Insurance premiums and benefits must be based on sound actuarial principles, not best-laid plans (whether real or alleged).

As the evidence adduced in these cases shows, Ontarians (and Canadians in general) continue to choose to retire by 65, whether for health, lifestyle or other reasons, and the cost of health-related insurance benefits continues to increase rapidly beyond that age. Meanwhile, people of all ages continue to work alongside each other, and must have access to benefit packages that give maximum value to the group as a whole and to themselves as individuals over the course of their lifecycle.

Much as Swift's Struldbruggs were freed from the constraints of death but remained subject to the realities of aging, Ontarians today find themselves freed from the constraints of mandatory retirement but still subject to the march of time. In the light of this reality, age distinctions in employment benefits do not perpetuate the prejudice or stereotyping required for a finding of unconstitutionality. Rather, they are a necessary and fair tool for providing employment benefits that meet the real needs and priorities of workers.

---

78 Where age is used as a proxy (here, a proxy for retirement), courts have held that there will inevitably be some degree of arbitrariness in choosing the specific age-based line. However, that does not render such lines discriminatory: "Provided that the age chosen is reasonably related to the legislative goal, the fact that some might prefer a different age . . . does not indicate a lack of sufficient correlation between the distinction and actual needs and circumstances." *Gosselin*, *supra* note 40 at para 57.