The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 2

Accommodating Age in the Workplace

Denying Health Coverage to Older Workers – an Advocate's View

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cpd Continuing Professional Development

Denying Health Coverage to Older Workers – an Advocate's View

Workplace age discrimination did not disappear with the elimination of mandatory retirement in Canada. Nor did the underlying prejudices that fuelled the spirited defence of the legislated age discrimination contained in the country's human rights statutes. These societal attitudes cannot be changed by law but legislative change can play a role in shaping societal behaviour, by preventing action based on those prejudices and thereby eventually may shape attitudes. And where the law is inadequate to the task of ensuring the human rights and dignity of any particular group of Canadians defined by shared characteristics that make them vulnerable to the erosion of those rights and dignity, the law must be challenged and changed.

Laws that appeared to strike a fair balance when they were enacted can become discriminatory as societal norms change and the rights and expectations of older workers has rapidly become an issue that challenges both societal norms and the intricate web of legislation, collective agreements and workplace pension and benefits programs that govern our working lives. This arises in no small part because Canadians generally are living longer, healthier lives and more are choosing to, or must, continue working well past the age of 65, the hitherto normal retirement age. The sheer size of the Baby Boom demographic, however, drives this emerging trend into a direct challenge to the status quo to change immediately, not incrementally.

The *Canadian Charter of Right and Freedoms*[1] has been used to challenge laws that discriminate on the basis of the protected grounds which include age. However, while the Court may substitute its own provision for the impugned legislative provision, it rarely does so and would normally rule the provision to be invalid, leaving time for Parliament or the provincial legislature to enact new legislation which does not offend the Charter.

The other route to legislative change is directly to Parliament or the Legislature. And that is the province of the advocate who adds the element of political interests. Indeed, in describing "age" as a "different" category of discrimination that did not require the same judicial supervision and protections as other categories such as gender or race, the Arbitrator in *O.N.A. v. Chatham-Kent (Municipality)*, [2] virtually invited boomers to take it to Parliament (at para. 139):

> "... it is difficult to view the aging but numerous boomer generation as an age group that is lacking in political clout and thus unable to protect their interests in the democratic process used to form legislative policy for the regulation of the workplace and the employment relationship."

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[1] Canadian Charter of Rights and Freedoms The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

[2] O.N.A. v. Chatham-Kent (Municipality) 2010 CarswellOnt 8919, 104 C.L.A.S. 267, 202 L.A.C. (4th) 1, 88 C.C.P.B. 95

Denying Employment Benefits as Workplace Discrimination

Equality of opportunity in the workplace is the starting point for examining the impact and validity of legislation that permits workplace age discrimination. The right to continue working past the "normal" retirement age has been upheld by the elimination of the provisions that allowed mandatory retirement in the Canadian Human Rights Act and the parallel provincial legislation.

However, when the provincial human rights codes were being changed, several provinces, including Ontario, carved out an exemption allowing for employment benefits, including health coverage, life insurance and disability insurance, to be denied to workers aged 65 and older. In monetary terms, total compensation paid to older workers is permitted to be less than that paid to workers under age 65 performing the same job.

Legislative History

The somewhat convoluted history of the Ontario provisions is described in *Chatham-Kent*[3]:

> "The Ending Mandatory Retirement Statute Law Amendment Act (2005- Bill 211) came into effect on December 12, 2006. Prior to Bill 211, there was no legislation that prescribed mandatory retirement at age 65 for workers generally. But mandatory retirement policies - and the termination of workplace benefits - at age 65 were lawful because the Human Rights Code, R.S.O. 1990, c. H. 19 only protected workers from age-based discrimination when workers were between the ages of 18 and 64.
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> For employment purposes only, prior to December 12, 2006, the Code defined "age" as meaning "an age that is eighteen years or more and less than sixty-five years". Because age-based distinctions were permitted at age 65, prior to Bill 211 most benefit plans terminated benefits at age 65. Bill 211 changed the definition of age in the Human Rights Code to remove the upper limit so that "age" is now defined as "an age that is 18 years or more". As a result, mandatory retirement at age 65 is no longer lawful for most employees and workplace rules, practices and policies that make distinctions based on age (18 or older) may be subject to complaints of age discrimination under the Code.
>
> While Bill 211 extended the right to equality in employment to older workers, it carved out an exception in the area of benefit plans so that some distinctions based on age are still permissible. Bill 211 maintained the status quo under ESA

[3] *Chatham-Kent* at paragraph 82

Regulation 286/01 which permits an employee benefit, pension, superannuation or group insurance plan or fund to make distinctions based on age where those distinctions are made on an actuarial basis. Bill 211 amended s. 25 of the Human Rights Code to provide as follows:

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

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

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

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

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

to a voluntary employee-pay-all short or long-term disability benefit plan; and
(b) a differentiation, made on an actuarial basis because of an employee's age or sex and in order to provide equal benefits under the plan, in the rate of contributions of an employer to a short or long-term disability benefit plan.

[*S. 9 was not included in the Adjudicator's description because health benefit plans were not at issue in the case before him; included here for continuity:*

9. The prohibition in subsection 44 (1) of the Act does not apply to,

(a) a differentiation, made on an actuarial basis because of sex, in the rate of contributions of an employee to a voluntary employee-pay-all health benefit plan;

(b) a differentiation, made on an actuarial basis because of an employee's sex and in order to provide equal benefits under the plan, in the rate of contributions of an employer to a health benefit plan;

(c) a differentiation in an employee's benefits or contributions under a health benefit plan because of marital status, if the differentiation is made in order to provide benefits for the employee's spouse or dependent child; and

(d) a differentiation in the rate of contributions of an employer to a health benefit plan, where there are specified premium rates and where that differentiation for employees having marital status and for employees without marital status is on the same proportional basis. O. Reg. 335/05, s. 4.]

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

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

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

Challenging the Denial of Employee Benefits

The Ontario provisions were challenged in *Chatham-Kent*[4] on the basis that they contravened the *Charter*. The Arbitrator found against the grievors: holding that while the Regulation violated the claimants' equality rights under s. 15(1) of the *Charter*, it constituted a reasonable limit pursuant to s. 1 of the *Charter*. As counsel for the Association writes in a subsequent analysis[5] of the decision:

> "The arbitrator found that the government was pursuing valid objectives in permitting age discrimination in relation to employment benefits, as the legislation overall enabled workers to work past age 65 without threatening the availability of certain benefits or impeding the process of free collective bargaining. He found that the government's use of age 65 to define the exemption from the Human Rights Code was reasonable and that the ***Regulation impaired equality rights no more than reasonably necessary to achieve the legislation's objectives***. He held that the deleterious effects of the legislation did not outweigh its benefits.
>
> *Chatham-Kent*, along with other recent jurisprudence including the Supreme Court's decision in *Withler v. Canada*, suggests that ***Charter challenges to age based distinctions in benefits plans face significant difficulty, as adjudicators afford substantial deference to plan design*** viewed in the context of overall benefits schemes designed to balance competing interests. However, in illuminating the challenges of advancing age discrimination claims in this context, *Chatham-Kent* provides important lessons for litigators seeking to

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[4] O.N.A. v. Chatham-Kent (Municipality) 2010 CarswellOnt 8919, 104 C.L.A.S. 267, 202 L.A.C. (4th) 1, 88 C.C.P.B. 95 ["Chatham-Kent"]

[5] Bisnar, D. and McIntyre, E. "Lessons for Litigators from ONA v. Chatham-Kent : A Union Perspective" (2013) 17Canadian Labour & Employment Law Journal 225, special issue on Law and Aging in the Contemporary Workplace. At page 1["*Bisnar and McIntyre*"]

> advance equality rights on the basis of age following the end of mandatory retirement. [*emphasis added*]"

In *Lessons for Litigators*[6], Bisnar and McIntyre caution that the long shadow of the Supreme Court decision in *McKinney v. University of Guelph*[7] still looms over adjudicators' analysis of workplace age discrimination in two major aspects:

> "The first is the notion that age is "different" from other protected grounds identified in s. 15 of the Charter because it is shared by individuals at different times in their lives and because there is a general correlation between increasing age and decreasing ability.
>
> The second is the level of deference given by the court to legislatures in their analysis of whether the legislation under challenge constitutes a reasonable limit on the right to equality on the basis of age within the meaning of s. 1 of the Charter. In showing deference to discriminatory legislative choices, adjudicators have looked beyond the legislation under challenge to take into account the whole range of statutory post-retirement benefits that may be available to persons over age 65."

In *Chatham-Kent*, the Adjudicator accepted that denial or differential access to employment benefits contravened the *Charter* rights of the grievors under s. 15:

> "… I have concluded that the impugned legislation is discriminatory in that it creates a disadvantage by perpetuating a stereotype or prejudice. This is revealed when the contextual factors mentioned above are considered. First the challenged provisions ***perpetuates a pre-existing disadvantage*** in that the denial of the benefit of protection against discrimination in the provision of employer benefit programs is denied ***to the same age group that was historically denied protection from mandatory retirement*** under the Code prior to the December 2006 amendments. While the 2006 amendments brought about the end of mandatory retirement, the group of workers identified by the age of 65 or greater ***had their previous disadvantage*** of denial of protection against discrimination in acquiring or maintaining employment on the basis of age ***replaced by a different disadvantage*** - the denial of protection under the Code from discrimination in the provision of employer sponsored benefits. … As the Union submitted, ***it perpetuates the notion that older workers are less valuable members of society, because it means that in effect workers who are aged 65 or older can be paid less compensation for the same work as younger workers.*** [*emphasis added*]"[8]

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[6] Bisnar, D. and McIntyre, E.: in op. cit. at p. 2

[7] McKinney v. University of Guelph, [1990] 3 S.C.R. 229 ["*McKinney*"]

[8] Chatham-Kent at para. 104

"Age" is Different

The Arbitrator ultimately used the notion that age is "different" from the other protected grounds under the *Charter* as an important factor in deciding that the impugned legislation was saved under s. 1 of the *Charter*. In assessing the proportionality of the effects of the legislation and its objectives, the Adjudicator was of the view that:

> "...***the fact that "age is different"*** from other prohibited grounds of discrimination ***should be given considerable weight*** in assessing whether the proportionality requirement is met. ***Unlike other grounds, being a given age is an attribute that is expected to be shared by everyone in the majority***, at least up to some very high age levels. Several American constitutional scholars have suggested that this means groups identified by age which are disadvantaged by ***age based legislative distinctions should not be viewed as discrete and insular minorities that warrant close judicial scrutiny and protection under constitutional equality provisions***. [*emphasis added*]"[9]

and

> "The fact that age is 'different', and that age based groups generally cannot be considered to be discrete and insular minorities requiring judicial supervision and protection under constitutional guarantees of equality is ***even more significant in the demographic context*** in which the impugned legislation was introduced and is being challenged. The post war baby boom generation are generally in their late 50's or their 60's. They are a large and significant segment of our aging workforce and aging society. According to Mr. Holmes, the size of this group, and its improving health and life expectancy as it approaches retirement age, is the motivating factor for several Western countries, including the United States, Britain and Germany, increasing the age of full entitlement to government pensions. This being the case it is difficult to view the aging but numerous boomer generation as an age group that is lacking in political clout and thus unable to protect their interests in the democratic process used to form legislative policy for the regulation of the workplace and the employment relationship. [*emphasis added*]"[10]

The Adjudicator uses the premise that everyone experiences all stages of aging to suggest that the deleterious effect of the impugned legislation would be cushioned by the fact that those bargaining for the employee benefit scheme would moderate the provisions out of self-interest:

> "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

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[9] Chatham-Kent at para. 137

[10] Chatham-Kent at para. 139

> less likely to result in significant deleterious effects in the form of substantive discrimination and more likely to attempt to maximize compensation and benefits for all employees when their working life is looked at as a whole, not simply focusing on a single age based period in that working life. ***To the extent that such rational approaches to compensation result in much richer compensation and benefit packages for all workers from the ages of 18 to 65, rather than unlimited coverage for LTD for those few workers who choose to work past age 65 (which may result in considerably less compensation and benefits for all workers up to age 65), it is difficult to find that the deleterious effects of the impugned legislation outweigh their salutary effects.*** This point becomes clearer if one considers that those who may be negatively effected [*sic*] by such age based limitations are generally, at different stages of their working life, a member of both groups. [*emphasis added*] [11]

This trade-off of rights of one age group to protect the rights of another requires the assumption that everyone has benefited from the advantages of having been in the younger group. In *Chatham-Kent*, one of the grievors had entered the profession late in life after raising her children and needed to work past age 65.She relied on the full employee benefit package, something to which she had no access while she was not employed.

While the Adjudicator referred to "those few workers" who choose to work past age 65, in fact, a great many more Canadians are working well past age 65. In the last 10 years, older workers more than doubled in the labour force from 295,000 in 2004 to 710,000 in 2014. Growth of the 65+ labour force (140%) outpaced the growth of the 65+ population (40%) from 2004-2014. In 2004, only 8% of seniors were in the labour force compared to today's 13%[12]. No doubt this increase in labour participation by seniors is largely due to the elimination of mandatory retirement at the provincial level. In fact, while only anecdotal at the moment, in a least one federally regulated workplace, more than half of the people are working past their previous mandatory retirement age in the two years since the repeal[13], effective December 2012, of s. 15(1)(c) of the *Canadian Human Rights Act* which had permitted mandatory retirement for federally regulated enterprises.

Consequently, the assumptions relied upon by the Adjudicator as to the deleterious effect of the impugned legislation are outdated given recent changes in legislation, especially the elimination of mandatory retirement at all levels, do not properly recognize the intersection[14] of age with other protected grounds like gender which

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[11] Chatham-Kent at para. 138

[12] Source: Statistics Canada, Table 282-0001.
http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2820001&pattern=282-0001..282-0042&tabMode=dataTable&srchLan=-1&p1=-1&p2=31

[13] Canadian Human Rights Act (R.S.C., 1985, c. H-6): s. 15(1)(c) Repealed, 2011, c. 24, s. 166

[14] Bisnar, D. and McIntyre, E.: in op. cit. at p. 16

exacerbates the impact of the denial of benefits and the growing trend of older Canadians continuing to work past age 65.

Sea Changes in Societal Norms in Defence of *Charter* Rights

The most promising avenue in *Charter* litigation is the courts' recognition of the fact that *Charter* rights do not exist in a vacuum but rather are defined by the factual, social and economic context in which they arise. Even *McKinney* left room for its own decision to be circumscribed – as it has been in the years since.

The Court in *McKinney* actually foretold the need to review its decision with evidence in the future. Noting that reliance on evidence based on the repeal of mandatory retirement exemptions was premature, the Court stated:

> "More important … we do not really know what the ramifications of these new schemes will be and the evidence is that it will be some 15 to 20 years before a reliable analysis can be made …We thus do not really know how many workers will opt for a longer working life in a climate where 65 is no longer the normal age and thus the nature and extent of the impact the removal of mandatory retirement would have on the organization of the workplace.[15]"

The invitation to revisit even the Supreme Court's decisions has been taken up with extraordinary success and accelerating resolution of long standing and apparently intractable societal dilemmas.

At one stage of the tortuous path to justice undertaken by forcibly retired airline pilots in *Vilven and Kelly*, now in its tenth year, the Canadian Human Rights Tribunal[16] found that:

(a) In the 16 years since the Supreme Court of Canada's decision in *McKinney*, there has been a sea change in the factual, social and economic context as well as the public and legislative attitudes toward mandatory retirement [paras. 13-34];

(b) The social science evidence regarding mandatory retirement is no longer as inconclusive as it was when *McKinney* was decided, meaning the goal of leaving mandatory retirement to be negotiated in the workplace is no longer "pressing and substantial" [paras. 44-50];

The Supreme Court of Canada in *Carter*[17], ruled that the provisions prohibiting the provision of assistance in dying in Canada unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a

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[15] McKinney supra at para 113

[16] In its decision (2009 CHRT 24), the Canadian Human Rights Tribunal ["*CHRT*"] addressed the s.1 issue by applying the test set out by the Supreme Court of Canada in *R. v. Oakes*, [1980] 1 S.C.R. 103.

[17] Carter *v.* Canada (Attorney General), 2015 SCC 5["*Carter*"]

competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

In so ruling the Court, reconsidered its own decision in *Rodriguez*[18], saying:

> "The trial judge was entitled to revisit this Court's decision in *Rodriguez*. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) ***where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.*** Here, both conditions were met. The argument before the trial judge involved a different legal conception of s.7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The ***matrix of legislative and social facts*** in this case ***also differed*** from the evidence before the Court in *Rodriguez*." [*emphasis added*][19]

In particular, the evidence on controlling the risk of abuse associated with assisted suicide demonstrated that certain societal norms had changed:

> "The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the ***widespread acceptance of a moral or ethical distinction between passive and active euthanasia*** (pp. 605-7); (2) the ***lack of any "halfway measure"*** that could protect the vulnerable (pp. 613-14); and (3) the "***substantial consensus***" in Western countries ***that a blanket prohibition is necessary*** to protect against the slippery slope (pp. 601-6 and 613). The record before the trial judge in this case contained ***evidence*** that, if accepted, ***was capable of undermining each of these conclusions*** (see *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 136, per Rothstein J.)."[*emphasis added*][20]

Bisnar and McIntyre note:

> "In the 22 years since the Supreme Court's decision in McKinney, social attitudes, public policy priorities and the law have changed significantly. Mandatory retirement has been abolished by legislatures in many Canadian jurisdictions ... ***Since 1990, many of the Supreme Court's underlying assumptions about the repercussions of ending mandatory retirement have been undermined by social science data which has led numerous superior and***

[18] Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 ["*Rodriquez*"]

[19] *Carter* - headnote

[20] *Carter* at para. 47

appellate courts have questioned and declined to follow McKinney over the course of the past decade. [*emphasis added*][21]

Eliminating Legislated Age Discrimination – the Legislative Alternative

The court process in *Vilven and Kelly* was overtaken by legislative change. The Federal Court[22] found that CHRT decision on the *Charter* issue was correct (i.e., s. 15(1)(c) could not be saved by s. 1 of the Charter). The Air Canada Pilots Association appealed.

The Federal Court of Appeal allowed[23] the appeal, set aside the decision of the Federal Court and returned the matter to the CHRT with a direction to dismiss the pilots' complaints on the ground that s. 15(1)(c) of the CHRA was constitutionally valid.

The pilots sought leave to appeal to the Supreme Court of Canada which was denied on March 28, 2013. Although reasons were not given, as is the norm, it is fair to speculate that the reason was that s. 15(1)(c)of the CHRA had been repealed in the interim. This left hanging the 200 pilots who had steered the case through courts, providing the political impetus for the federal government to make the legislative change.

It is noteworthy that this relatively obscure [to anyone not a constitutional lawyer] amendment was heralded as an election promise by the government in the 2011 federal election. Before that, it had been debated in the House of Commons as an opposition Private Members' Bill[24] and had passed second reading with bipartisan support before it died on the order papers on the election call.

The repeal of s.15 (1)(c) of the *CHRA* was re-introduced as part of Bill C- 13[25], which received its first reading on October 4, 2011. The provision was enacted in December 2011 and became effective in December 2012. This was twenty-two years after *McKinney* but still faster than the pilots' ten year ordeal. Their *Charter* rights remain to be determined but without the help of a declaration that s.15 (1)(c) was invalid as contravening the *Charter.*

Conclusion

In simple terms, the current legislation in Ontario permits employers to discriminate against older workers aged 65 and older and has survived a major *Charter* challenge in *Chatham-Kent.* However, there is at least one new case being brought before the

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[21] *Bisner and McIntyre* at p. 6

[22] *Air Canada Pilots Association v. Kelly* 2011 FC 120

[23] *Air Canada Pilots Association v. Kelly et al.* 2012 FCA 209

[24] Bill C-481, *An Act to amend the Canadian Human Rights Act and the Canada Labour Code,*

[25] *An Act to implement certain provisions of the 2011 budget as updated on June 6, 2011 and other measures*

Human Rights Tribunal of Ontario. The hearing is scheduled to proceed in or about April and May of this year. The factual context is changing underfoot as are the societal attitudes to the rights of older workers. And that "aging but numerous boomer generation" just might remind the legislators who put them into office.

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