GUIDELINE

ON AGE DISCRIMINATION

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HUMAN RIGHTS COMMISSION
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Guideline on Age Discrimination
New Brunswick Human Rights Commission

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Editor's Note

The New Brunswick Human Rights Commission (Commission) develops guidelines as part of its mandate to protect and promote human rights in the province. These guidelines are educational resources to educate the public and stakeholders about their rights and responsibilities under the New Brunswick *Human Rights Act* (*Act*).

Guideline on Age Discrimination offers the Commission's interpretation of human rights obligations in situations of age discrimination.[1] The guideline is based on the relevant decisions of boards of inquiry, tribunals, and courts; it should be read in conjunction with those decisions, and with the applicable provisions of the *Act.*

For information on rights and duties under other grounds of discrimination, review the Commission's publications on those subjects or contact the Commission directly.

Please be advised that this guideline is not equivalent to professional legal advice. In case of any conflict between this guideline and the *Act*, the *Act* prevails.

[1] The Commission thanks human rights commissions from jurisdictions across Canada for the opportunity to study and draw on their policies and documents on age discrimination.

1.0 Introduction

The *Act* prohibits age discrimination in employment, housing and sale of property, accommodations and services, notices or signs, and in memberships of professional, business or trade associations.[1]

Age is a unique ground of discrimination because unlike other prohibited grounds, like race, colour, national origin or ancestry, for instance, age is never fixed.[2] A person's age continues to advance, and an individual's age status is constantly changing. However, to a certain extent, age is also a fixed category, because it is unchangeable at any point in time, or at any stage of a person's life. For example, a "young" person will stay in the young age group for many years, making that age category a fixed condition for a certain time.[3]

> Terms like "old", "older person", "senior", and "young" are used in this document only as general markers of biological age and not to cast persons into fixed age categories. Human rights jurisprudence recognizes that persons of similar age can possess different physical, mental, or cognitive capacities.

Persons who are young at present, provided they stay alive, would pass through various age stages and arrive at "old"[4] age at some point. Therefore, it is presumable that all persons who reach advanced age will experience the limitations of old age, and perhaps even the stereotyping or discrimination that older persons can face.

Because of the complexity of age as a category, discrimination based on age has been relatively difficult to define, quantify, and address.

The following aspects about age as a ground of discrimination may be noted at the outset:

- Like gender, race, ancestry, and other forms of discrimination, age discrimination is also to a large extent built into institutional structures.
- Persons discriminated against based on age are particularly vulnerable to discrimination because age-based discriminatory policies are more likely to be accepted as normal or justified.
- People who face discrimination due to their age are also more likely to identify with other vulnerabilities, like disability, gender, or race, which compounds their experience of disadvantage. (For intersectionality, see section 1.4)

Generally, there is a trend in society (and in some jurisprudence) to view age discrimination as less harmful than other forms of discrimination.

- For example, in distribution of benefits like pensions, insurance or disability benefits, there is a tendency to see economic considerations as equally or even more important than the right to age equality.[5]

Restrictions imposed by legislation on persons of certain age groups – for example, persons not yet of legal age – fall outside the purview of human rights age protections.

- Moreover, age discrimination is sometimes justified by arguing that everyone will experience it at some point in their lives, so the score will even out in the end.[6]
    - In other words, it is agued that discrimination against older persons should be tolerated because they have already enjoyed the benefits they are being denied in old age.[7]
- Age discrimination is also presented as less harmful because it is seen as discrimination against our own selves or our "future selves", rather than "against well-defined other groups, whose oppression we may benefit from".[8]

In the employment context, age-based discrimination impacts hiring, promotion, training, and layoff decisions, and policies related to mandatory retirement.

Because employers rarely acknowledge age as a factor in their hiring or layoff decisions, age discrimination in employment has been difficult to establish,[9] unless clear evidence of discrimination is present.[10]

In the employment context, age-based discrimination impacts hiring, promotion, training, and layoff decisions, and policies related to mandatory retirement.

1.1 Definitions of Age

Age is a protected ground in all Canadian human rights jurisdictions,[11] and is also protected under Section 15(1) of the *Canadian Charter of Rights and Freedoms* (*Charter*).

The *Act* does not define age, and it does not set an age range for its age protection; thus, by implication, the *Act* extends age protection to all age groups, with some caveats.[12] Persons of advanced age are more vulnerable to age discriminatory treatment; however, persons of all age groups can become victims of age discrimination.

The literature on age discrimination identifies the following three age categories, which are helpful to understand the scope and meaning of age as a ground of discrimination:

Chronological age: This denotes the number of years a person has lived, counted from their date of birth; hence, biologically, a person may be 25 years old or 51 or 77, based on chronological time and number of years lived.

- Age related employment policies and age-based practices in housing and services use chronological age to set priorities and make decisions about persons of certain age groups.
- This approach often results in discriminatory treatment, as it uses chronological age as a blanket marker of competence or capacity and ignores differences between persons of the same age.

> Decisions and policies that impact older persons, like mandatory retirement, typically disregard biological age or individual capacity and competence, and use chronological age as a yardstick.

Biological age: This denotes the age of capacity, i.e. how much vigor, capacity for work, and other competencies a person possesses, irrespective of their chronological age.

- Decisions and policies that impact older persons, like mandatory retirement, typically disregard biological age or individual capacity and competence, and use chronological age as a yardstick.

Social age: Gerontologists (those who study ageing) use the term "social age" to describe how age is viewed by society.

- Certain social norms are attached to each age group, and behaviors are judged as appropriate or inappropriate based on age.
- Age, thus, is also a social construct, because an individual's inherent characteristics, capacity, and competence are disregarded and reduced to societal assumptions about age.
- This approach, similarly, leads to age stereotyping; it divides life into stages, assigning fixed social roles to each life stage.
- Thus, rewards and responsibilities are distributed differently for each age group, transforming biological age into social age.[13]

> Ageism can take many forms, including prejudicial attitudes, discriminatory conduct, or institutional policies and practices that enable stereotypical views about older persons.

1.2 Ageism and Age Discrimination

Age discrimination typically relates to age-based disadvantage in employment, services or housing; on the other hand, ageism, as the term is generally used, is linked more to

individual and social attitudes about age, which, in turn, lead to age stereotyping and discrimination.

While terms like racism and sexism are entrenched in the vocabulary of discrimination, ageism is less commonly used, reflecting the relative neglect of age as a ground of discrimination.[14]

> Ageism manifests itself in stereotypes and myths, outright disdain and dislike, or simply subtle avoidance of contact. These attitudes translate into discriminatory practices in employment, housing, and services.

The term ageism was introduced by American gerontologist Robert Butler:

- In a journal article published in 1969, Butler defined ageism as "prejudice by one age group toward other age groups" [and] "a form of bigotry we [...] tend to overlook".[15]
- Butler pointed out the intersectional nature of age inequality, noting the "complex interweaving of class, color and age discrimination".
- In later works, Butler argued that society's restrictive view of old age is formed by stereotyping, exclusion, and fear of older persons.[16]

Some scholars have used the term "implicit ageism" to indicate the subtle ways in which age prejudice operates.

- Like all prejudices, ageism is embedded in patterns of thinking and behavior:
    - "Unspoken assumptions, enduring myths, stereotypes, popular imagery and iconography, and societal acceptance of age-based decline as inevitable".[17]

> At the institutional level, these attitudes are reflected in legal, educational, political, medical, and welfare policies and structures.

- Attitudes toward age are internalized and are manifested in personal contact between individuals or groups:
    - At the institutional level, these attitudes are reflected in legal, educational, political, medical, and welfare policies and structures.[18]
- The medical model of age and ageism, which sees age as a problem, has bred negative perceptions about older people and hindered their social inclusion.
- Although the new knowledge economy typically privileges youth and discriminates against older workers,[19] age discrimination and ageism operate against all age groups, including youth.
    - For example, in an important case, rejecting arguments of discrimination against young adults, the Supreme Court of Canada held that young persons, as a class, have not been historically marginalized or undervalued.[20]

1.3 Stereotypes About Age and Ageing

Stereotypes about age and ageing are widespread in social attitudes and institutional practice. These stereotypes contribute to decision making in the workplace and in distribution of societal benefits; they stigmatize older persons and mark them for unequal social treatment.

By creating negative assumptions about older people, age stereotyping treats ageing as a problem and highlights its adverse consequences for society:

> Stereotyping obstructs empathy, cutting people off from the experience of others – even if, as is the case with ageism, those "others" are our own future selves.

- For example, it is assumed that age diminishes a person's working capacity, skill levels, physical strength, and cognitive ability.[21] Older persons are also seen as incapable of learning new skills.
- It is posited that the proportion of seniors is increasing, and every job held by an older worker is one less job available for younger workers.[22]
    - This stereotype is linked to the idea of "demographic as destiny" or "apocalyptic demography", which creates social panic and prejudice by suggesting that the younger generations will have to provide support for older population groups.[23]
- There is a presumption that older retired persons have fewer financial needs than people who are active in the labour market; this argument is used to rationalize poverty-level or below poverty-level public pension rates.[24]
- It is believed that older workers become less safe for the workplace as they age and are more likely to develop a disability.

By emphasizing equality and human dignity of all groups, human rights statutes contest these stereotypes of age and older persons.[25]

> By emphasizing the equality and human dignity of all groups, human rights statutes contest the stereotypes of age and older persons.

In the *McKinney* and *Stoffman* decisions,[26] the Supreme Court of Canada implicitly accepted that older professionals (professors and doctors respectively in the two cases) are not "on the cutting edge of new discoveries and ideas", endorsing the idea that creativity wanes with advancing age.

- The Supreme Court recognized that decline in skill levels due to age varies between individuals, but it rejected skills testing or performance evaluations to assess the individual competence of employees.

- The dissenting judges in *Stoffman* rejected the age stereotyping inherent in mandatory retirement, or the idea that a person becomes less competent for work on reaching retirement age:
    - "Forcing the end of a career based on age alone does not pass muster under the *Charter*, as age is surely not determinative of capacity or competence [….] One is no less competent the day after one's 65th birthday, than the day before. Fundamentally it is a question of personal dignity and fairness".

1.4 Intersectionality and Age Discrimination

The Black feminist scholar Kimberlé Crenshaw introduced the theory of intersectionality, suggesting that her two lived experiences (being black and being a woman) converged or intersected to create her identity.

> "Different kinds of discrimination – including racism, sexism, ageism, ableism, and homophobia – interact, creating layers of oppression in the lives of individuals and groups. This oppression is reinforced through economic, legal, medical, commercial, and other systems. Unless we challenge stigma, we reproduce it."
> - Ashton Applewhite, See Endnote 17

Older people's age disadvantage often intersects with other personal characteristics they identify with, like gender, race, disability, and class (social condition), compounding the experience of discrimination they encounter.

As established early in the scholarship on ageing, women of advanced age undergo a "double standard of ageing" or double jeopardy, because age and gender intersect to create more complex structures of disadvantage.[27]

For racialized older women, race becomes an additional third factor of disadvantage.

- While intersectionality makes the experience of age discrimination more severe for individuals, sometimes it results in age being regarded as a less worthy ground for attention than race and gender, for example.
- In other words, age gets hidden under the more readily recognized grounds like gender and race.
    - This has the effect of making age invisible as a marker of identity or getting overlooked in addressing discrimination.
    - Age disadvantage is also seen as less serious by arguing that older persons have not faced historical, structured discrimination that women and non-white races have suffered through gender-biased laws and institutionalized racism respectively.

    - Scholarship, however, has shown that older people have also been historically disadvantaged, but their historical marginalization has been hidden from the public eye.[28]

Age-based employment policies like mandatory retirement create more disadvantage for certain groups, like women and first-generation immigrants.

- Gerontology and medical science have established that biological ageing is linked to social factors, and it is not predetermined by genetics.
    - A person's lower socio-economic status, for instance, determines how that person will age, linking the ground of age with protected grounds like social condition.[29]
- Age-based employment policies like mandatory retirement create more disadvantage for certain groups, like women and immigrants.
    - Many women's careers are shortened because of breaks to raise children and attend to family responsibilities, so they do not accumulate enough pension benefits at the conventional retirement age.[30]
    - Many social programs were designed at a time when the workforce was primarily male, so these programs are inherently disadvantageous to women workers.[31]

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    - Also, women are more vulnerable to ageism and age discrimination because they are dominant in the service industry, which emphasizes youth and beauty and undervalues older women.[32]
    - Similarly, first-generation immigrants often tend to have shorter careers in the Canadian labour force, resulting in restricted access to public pensions and other benefits that compels them to continue working beyond retirement.

1.5 Age Discrimination and International Law

The rights of older persons are implicitly protected in the International Bill of Human Rights.[33]

- However, there is no legally binding UN document that extends specific protections to older persons.[34]

The *International Convention on the Protection of All Migrant Workers and Their Families* (1990) is the only UN convention that mandates against age discrimination, in the restricted context of migrant workers.

- The UN has issued resolutions, principles, and plans[35] for the protection of older persons, but these impose no legal obligations on nation states to combat age discrimination.[36]
- Consequently, nation states are not obligated to include the status of older persons in their reports to UN human rights bodies.
- The exclusion of age discrimination from UN human rights treaties and conventions allows state legislatures the freedom to regulate age discrimination based solely on internal, domestic considerations.

1.6 Good Practices to Avoid Age Discrimination

General good practices to prevent age discrimination in employment include the following:

- Job advertisements should not include or hint at age limits, implicitly or explicitly.
- Hiring should be done and seen to be done on grounds of ability, not age.
- Individualized performance appraisals and not the age of employees should be the basis to assess job competence or work fitness.
- Older workers at risk of losing jobs should have the option of effective re-training programs, pre-retirement preparation, and flexible or phased retirement.

> Employers should institute age neutral policies that advance equal opportunities regardless of age; policies should be based on individual competence and not on age proxies.

- Mandatory retirement should not be implicitly or explicitly imposed on employees.
    - Much of the anti-ageism literature argues that mandatory retirement should be replaced by more flexible arrangements like phased retirement (or flexible retirement), “decade of retirement”, and part-time work, to avoid the traumatic “cliff edge” switch from full-time work to total retirement.[37]

1.7 Practices that Show Evidence of Age Discrimination

Workplace policies or practices that courts and tribunals regard as evidence of age bias or age discrimination in employment include, among others, the following:

- A younger person replaces an older laid-off employee in the same or similar job role.
- Sudden and unjustified complaints about an older worker's job at the time of workplace downsizing or restructuring.[38]

- Comments, hints, or insinuations from management that clearly point to ageist assumptions or age bias.
- Official documentation or memos that show evidence of age discriminatory policies, practices, or attitudes.
- A pattern of eliminating older workers from the workplace.[39]

2.0 General Principles of Age Discrimination Jurisprudence

Age is a protected ground under Section 15(1) equality rights of the *Charter*.[40] Similarly, all 14 Canadian human rights statutes include age as a prohibited ground of discrimination.

Neither Section 15(1) of the *Charter* nor any of the human rights statutes specify an age limit or range for their age protection guarantees. Theoretically, therefore, all age groups are included in these protections, with certain caveats.[41]

2.1 Application and Scope of the Charter

According to Section 32(1) of the *Charter*, the *Charter* applies to all matters "within the authority" of the federal parliament and government, and of the provincial governments and legislatures.

The *Charter* guarantees age-equality rights and all Canadian human rights jurisdictions classify age as a protected ground of discrimination. The *Charter* applies to the public sector, government laws and policies, but it does not apply to private entities.

- The scope of the *Charter*, therefore, extends to government ministries and departments (federal and provincial), and to laws and policies passed by federal and provincial legislatures.
    - The *Charter*'s application to certain sectors, like universities and hospitals, is subject to interpretation, and depends on the extent of government control over these bodies.
    - For complaints that fall outside the purview of the *Charter*, discrimination, including age discrimination, is contested under the human rights statutes of the respective provinces, territories, or the federal government, as the case may be.
    - The Commission does not have powers to enforce rights guaranteed under the *Charter*. These rights are typically enforced by the courts.

2.2 Judicial Approaches to Age Discrimination Under the *Charter* and Human Rights Statutes

While age discrimination jurisprudence is marked by some internal inconsistencies, court and tribunal decisions have developed the following general approaches toward various aspects of age discrimination:

> The rights and freedoms granted in the *Charter* are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

1) ***Bona Fide* Requirement (BFR) Defence in Age Discrimination:** The BFR defence is crucial in age discrimination complaints under human rights statutes.
   - To succeed in a BFR defence, employers must show that they treated an older employee differently to fulfill a *bona fide* (good faith) occupational (work-related) requirement (BFR).[42]
   - Courts put BFR claims under strict analysis, and employers must provide tangible evidence to substantiate BFR claims.
   - In addition to the BFR defence, employers are also required to show that they explored all viable alternatives before implementing the age discriminatory rule or practice. (For more on BFR, see section 4.0)

2) ***Charter* "Reasonable Limits" and BFR in Human Rights Statutes:** In age discrimination complaints under the *Charter*, courts may justify Section 15(1) age equality violations under the *Charter*'s Section 1 "reasonable limits" exception, which is seen as equivalent to the BFR exception under human rights statutes.[43]

Case Law Example – To justify an age discriminatory rule, employers must show that the rule is rationally connected to its objective, is reasonable and instituted in good faith, and has minimal adverse impact on those affected by it: *According to the provisions in their collective agreement, nurses over the age of 65 were entitled to reduced pension and insurance benefits.[44] The arbitrator agreed that the provisions infringed Section 15(1) of the Charter but they were justified under its Section 1 exception. Applying the Oakes Test,[45] the arbitrator found that the age-specific benefits package was rationally connected to the objective to abolish mandatory retirement and ensure reasonable benefits for all employees. While less discriminatory benefit plans were available in other jurisdictions, the municipality was not obligated to adopt the "absolutely least intrusive means possible to attain its objective", under the minimal impairment condition of the Oakes Test. The negative financial impact faced by senior nurses did not outweigh the beneficial effects the provisions had for pension and insurance plans.*

3) **Benefits Plans and Age Discrimination:** Courts have been reluctant to apply individualized assessment in age discrimination cases involving benefit plans like insurance, pensions, and sick or disability leave. (For more on pensions plans, see section 3.0)

In discrimination complaints involving distribution of benefits, courts seek to strike a balance between the social and economic considerations of benefit plans and the age equality rights of senior workers.

- Courts consider the economic sustainability of these plans and the overall effect of these plans on all employee groups, not just those impacted because of age.
- Individual hardship suffered by senior workers are sometimes seen as justified because of the larger public good that the benefit plans are designed to offer.
- Insurance, pension, and benefit program providers may be required to show statistical data to justify the rules, benefits or premium arrangements that disadvantage certain groups based on their age.
- Plan providers must justify that age discriminatory provisions in benefit plans are reasonably necessary for the plans to operate and be economically sustainable.
- The Supreme Court of Canada has noted that human rights values cannot be overridden by business expediency alone, and plan providers must show that they explored all other practical alternatives before implementing an age discriminatory rule.[46]

The Supreme Court of Canada has noted that human rights values cannot be overridden by business expediency alone, and pension plan providers must show that they explored all other practical alternatives before implementing an age discriminatory rule.

Case Law Example – If statistical evidence supports that an age-specific insurance policy is reasonable, a prima facie age discriminatory rule in the policy would be justified: *The complainant alleged that his insurance company charged him higher premiums for automobile insurance because he was a single male under age 25; the premiums were classified by age, sex, and marital status, and thus discriminated on these grounds.[47] According to the Supreme Court of Canada, higher insurance premiums for young, unmarried male drivers was prima facie discrimination under Ontario's Human Rights Code; however, the discriminatory rates were protected by Section 21 (now Section 22) of the code, which permits reasonable and bona fide differentiations in automobile insurance based on age, sex, marital status, family status or disability. Statistical evidence presented in court showed that young male drivers were involved in more serious accidents than other drivers, resulting in higher insurance claims involving these groups; the higher premiums were thus based on sound and accepted insurance*

practices. Since no alternative statistical data on risk classifications was available, the insurance company was justified in charging more premiums from young male drivers. The dissenting note in the judgement emphasized that age, sex, and marital status have never been isolated in statistics used by insurers to determine risk, and the insurance industry has relied on myths and stereotypes of age to impose its standard. As an alternative, the insurer company could have set rates for drivers under 25 years based on individual accident records and driving experience.

Case Law Example – If a benefits plan discriminates based on age, the plan's providers must provide evidence that the age-specific rule is necessary to operate the plan in a cost-effective way: *A sick leave plan that denied benefits to persons over the age of 55 was found discriminatory based on age.[48] The Saskatchewan Human Rights Code prohibits age discrimination in employment, but Section 16 of the code stipulates that the prohibition should not jeopardize "the operation of any term or condition" of a bona fide group or employee insurance plan. The court determined that the employer's sick leave plan failed the objective test of BFR (set by the Supreme Court of Canada in the Etobicoke[49] case): that the age discriminatory provision must be "reasonably necessary" to operate the benefits plan in a viable and cost-effective manner.*

Case Law Example – If an age-based rule in a benefits plan does not impact the overall financial needs of those affected by it, individual evidence of hardship may not be enough to prove that the rule is discriminatory: *Widows of deceased plan members challenged the constitutionality of two statutes that reduced their federal supplementary death benefits proportionally for each year that their husbands were older than 60 and 65 years respectively at the time of their deaths.[50] The Supreme Court of Canada upheld the statutes and rejected the need of individual assessment on a case by case basis. Relying on the Kapp Test,[51] the Supreme Court acknowledged that the provisions drew a distinction based on age, but there was no evidence of stereotyping and prejudice; moreover, the overall needs of the surviving spouses were met by the supplementary death benefits.*

4) **Stereotyping, Prejudice, and Loss of Dignity in Age Discrimination Complaints:** Age discrimination may be hard to prove, unless complainants can present clear and substantial evidence of disadvantage and deliberate neglect by employers.

To prove age discrimination, applicants must show that they were treated differently because of an age-related characteristic, and that the treatment was based on stereotype and prejudice.

   - Stereotyping, prejudice, and injury to dignity because of age discrimination have been difficult to quantify in legal terms.

- In the absence of other supporting circumstances, individual hardship suffered by a complainant may not be enough to make a finding of age discrimination.

Case Law Example – Injury to personal dignity and adverse emotional/psychological impact of age-specific welfare rules is difficult to substantiate: *The complainant filed a class action suit on behalf of approximately 85,000 persons whose welfare rates were reduced to below subsistence levels under a provision of Quebec's Social Aid Regulations.*[52]

To arrive at a finding of age discrimination, courts require tangible evidence of age-based stereotyping and prejudice against a complainant.

- ✓ *The regulations cut welfare rates of single employable people between the ages of 18 and 30; recipients had the option of increasing their welfare amounts by participating in one of three education or work training programs.*
- ✓ *The complainants argued that the regulation was discriminatory under the following provisions: Sections 7 of the Charter (right to life, liberty and security of the person); Section 15(1) of the Charter (equality); and Section 45 of Québec's Charter of Human Rights and Freedoms (financial assistance ensuring an acceptable standard of living).*
- ✓ *In a split decision, the Supreme Court of Canada ruled that the Québec regulations did not contravene Section 15(1) of the Charter. The Supreme Court rejected the argument that the regulation marginalized young welfare recipients, put them at physical and psychological risk, and violated their dignity. The objective of the regulation was to train young people to integrate into the workforce, and they had the option to increase their payments by participating in training programs. The court did not find evidence of adverse effects of the regulation; the principal complainant's history of homelessness and poverty was attributed to "personal problems" rather than flaws in the welfare system.* [53]
- ✓ *The dissenting note in the case found no flaw in the provided evidence and highlighted the problems in the eligibility rules of the training programs. The dissent emphasized that the program inflicted psychological and physical harm (by providing inadequate subsistence), impacted human dignity, and stereotyped young people. The program also violated Section 7 of the Charter, which imposes a positive obligation on the government to provide adequate social assistance to eligible recipients.*

Case Law Example – Age stereotyping and financial loss suffered by individuals deemed insufficient to merit discrimination: *In keeping with a provision in Ontario's Workplace Safety and Insurance Act, an employee's Loss of Earnings (LOE) benefits (being paid to him due to a workplace injury) were terminated when he turned 65 because he had sustained the injury when he was 63-years-old.*[54] *The said provision placed a two-year limit on LOE benefits for workplace injuries suffered by those aged 63 or above. The worker contended that the section discriminated based on age and was in violation of Section 15(1) of the Charter.*[55] *The tribunal concluded that while the legislation did create a distinction based on age, it was not discriminatory or based on prejudice and stereotypes. A violation of the Charter was not found, and the two-year limitation was declared "effective in meeting the actual needs of the group as a whole [in a] financially responsible and accountable manner".*[56]

The dissenting note in the case found the section discriminatory because it failed "to take into account the claimant's already disadvantaged position within Canadian society as a senior worker […], thereby perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society."

Case Law Example – Age-related benefit provision did not violate human dignity and was inadequate proof of age discrimination: *The New Brunswick Court of Appeal ruled that Section 32.8(5) of the New Brunswick Workers' Compensation Act, which freezes long-term compensation benefit payments when an injured worker turns 65, did not violate Section 15(1) of the Charter because it neither impaired the human dignity of those over 65 nor marginalized senior workers based on age.*[57]

5) **Age Discrimination of Younger Groups:** Age discrimination against younger persons has been harder to establish in courts, because they are not generally considered as a historically marginalized age group.

Case Law Example – Stereotyping of younger persons not endorsed by Supreme Court: *Under the Canada Pension Plan, to be eligible for survivor's pension, a spouse must be at least 35 years old.*[58] *The complainant was widowed at the age of 30, so she was denied the survivor's pension. She challenged that the CPP provision was discriminatory based on age under Section 15(1) of the Charter. The Supreme Court of Canada acknowledged that Section 15(1) prevents violations of human dignity and prohibits stereotyping, prejudice, and disadvantage. However, the court noted that while the CPP provision differentiated based on age, younger persons were not historically marginalized and faced fewer risks of long-term disadvantage than older people. The purpose of the provision was to facilitate older widows and widowers, and it did not stereotype, exclude, or devalue adults under age 35.*

6) **Dismissal of Older Employees on Performance Grounds:** If an employer can prove with conclusive evidence that the termination of an older employee was because of performance issues, age discrimination would be difficult to establish.

To justify a senior employee's dismissal on performance issues, an employer must provide clear evidence of the alleged performance concerns.

   - However, if an older worker is laid off for performance issues, the performance standard used to make the decision must be applied with uniformity, fairness, and equality toward all age groups.
   - If a younger person is hired to fill the position of a laid-off senior worker, or if performance issues are raised suddenly without prior record of poor performance, courts would be more likely to see age discrimination as a factor in the adverse treatment.

Case Law Example – Dismissal of senior worker based on performance issues was justified because the employer used identical across-the-board assessment criteria for all workers: *A 59-year-old employee with a long service record was dismissed because he failed to meet the new performance evaluation measures set in place by the employer.*[59] *The employer's new work model required new skill sets and the majority workforce comprised of much younger employees. The tribunal determined that age discrimination was not a factor in the termination: the complainant had received the same training as other employees; the complainant's performance was measured by the same standards applied to other employees; and the employer had not coerced older workers to quit their jobs.*[60]

Before disciplining a senior employee on performance grounds, employers must provide reasonable accommodation to the employee, like alternative work options or transfer to another position.

Case Law Example – Dismissal of senior employee established as age discrimination because employer could not provide evidence of poor job performance: *The complainant, a 69-year-old salesman, was the best employee in the organization and there were no complaints about his performance.*[61] *He was terminated based on "lack of potential in the area serviced by him"; however, this issue was raised for the first time in the letter of termination. Later, his position was filled by a younger person. The board of inquiry held that the evidence of age-based discrimination was overwhelming, and no other reasonable explanation for the termination was tenable.*

Case Law Example – Employer did not take requisite steps to facilitate senior employee's job role, so dismissal for performance issues was invalid: *The employer*

dismissed a 59-year-old manager on performance issues, but the tribunal found that age discrimination was a factor in the termination.[62] The employee did not have prior managerial experience; she underwent a comprehensive performance assessment, but only one meeting was held to discuss her performance issues. No plan for improvement was made, and the employee was not informed that her job could be in jeopardy. These omissions were contrary to the employer's performance assessment policy, so age discrimination was held as a factor in the dismissal.

Case Law Example – Dismissal of senior worker was not age discrimination because of clear evidence of unsatisfactory job performance: *An Ontario Board of Inquiry found that the dismissal of a senior employee was justified because it was based on unsatisfactory job performance and because the company was making changes to overcome its financial problems.[63]*

7) **Special Programs and Age Discrimination:** Clearly defined age-specific criteria in collective agreements, programs or policies will violate human rights statutes, unless they can qualify as special programs:

If it is shown that an age-specific criterion is part of a legitimate special program, it would not be discriminatory under human rights law.

   - If *prima facie* age discriminatory measures meet the statutory requirements of special programs, they will not violate human rights law. For more on special programs, see the Commission's publication, *Special Programs and the Meaning of Equality and Discrimination* (Guidelines (gnb.ca))

Case Law Example – An age-based special program designed to grant preference to particular age groups is not discriminatory: *A provision in a collective agreement allowed employees with 25 years of service to take extended vacation time beginning at age 61; the complainant, who had 25 years of service but was under 61, argued that the provision discriminated against him based on age.[64] The board agreed with the respondent that the vacation benefit for older employees qualified as a special program under Section 14 of the Ontario Human Rights Code. The pre-retirement vacation provision was specifically designed to alleviate older workers, who experienced hardship in the transition from full-time employment to full retirement.*

Case Law Example – If an age specific provision does not meet the statutory requirements of a special program, it will not be saved by invoking special program status: *As a protection for senior workers, a clause in a collective agreement provided that at least one out of every five electricians hired by the employer would be over 50 years of age.[65] When the employer laid off an electrician who was over 50 years old, the union bought a grievance claiming violation of the collective agreement. The employer argued that the collective agreement clause (which had been introduced 30 years ago)*

should be declared void, because it contravened the provincial human rights code by privileging one age group (older workers) over another (younger workers). The board held that older workers were not a disadvantaged group; the claim that older workers were less likely to find work was based on an age stereotype. The board also rejected the argument that the clause was a special program to protect older workers under Section 14(1) of the Ontario code, as no rational connection between the age specification and the purpose of the special program was shown. The clause protecting senior workers was thus held invalid, and the dismissal did not violate the collective agreement.

8) **Job Restructuring Under the Pretext of Laying off Older Employees:** Dismissing older employees because of job restructuring may be discriminatory, unless the age discriminatory policies are proven as a BFR or backed by other reasonable justification.

> Unless job restructuring is shown as a BFR, laying off older workers under that policy may be ruled as discriminatory.

Case Law Example – If job restructuring is advanced as the reason for an age discriminatory practice or rule, the rule's rationale should be backed by credible evidence: *A 67-year-old government employee's contract was not renewed when the position she was working on was restructured.[66] The employer argued that the new position was created so that employees could serve in that role for longer terms of 5, 10 or 15 years, and the complainant was not likely to hold the position for such durations. However, according to the tribunal, the requirements for the position discriminated against older employees under Alberta's Human Rights Code, and no evidence was presented to suggest that the complainant could not grow or sustain in that role. Age discrimination was thus ruled as a factor in the dismissal. However, if an employer can establish that differential treatment of an employee is due to performance issues and is not age related, discrimination would be more difficult to substantiate.*

9) **Reasonable Conduct of Parties in Age Discrimination Complaints:** In establishing their findings based on a balance of probabilities, courts look at the overall reasonable conduct of parties to determine if age discrimination was a factor in differential treatment.

> The overall reasonable conduct of parties is an important consideration in age discrimination analysis.

Case Law Example – To establish age discrimination, complainants must show good faith, reasonableness, and consistency of conduct: *A professor at the University of New Brunswick was retired at age sixty-five.[67] After a complaint to the Human Rights Commission, the University agreed to employ him for two more academic*

years. At the end of the two years, the professor filed a second complaint with the Commission alleging age discrimination against the University for refusing to continue his employment. He argued that the original agreement was void because it amounted to contracting out of rights guaranteed under the NB Human Rights Act. The Court of Appeal stated that the complainant agreed to the settlement of his first complaint with full understanding of its contents, and the terms of the settlement were clear and unambiguous. In that context, the settlement was made in accordance with the Act and did not amount to unlawful contracting out of its protections.

Case Law Example – To prove age-based discrimination, a complainant may have to show that all employees in that age group suffered the same level of discrimination: *According to a school board policy, retired teachers were required to have certification either in French, music, technology, or special education, if they wanted to enlist as occasional teachers.[68] However, new teaching graduates did not require these certifications to get on the occasional list. The complainant, a retired teacher, was denied occasional work because she did not possess the requisite certifications; she alleged that the policy was discriminatory against retired teachers based on age, under Section 5(1) of the Ontario Human Rights Code. The tribunal held that the distinction was not age-based; instead, it gave preference to individuals who had potential to become permanent teachers in the future. Moreover, other senior teachers, such as permanent part-timers, teachers transferring from other jurisdictions, and new graduates receiving pensions from past employment, were also not subject to the certification requirement, which showed that age was not a consideration in the policy. The decision implied that, to establish prima facie age discrimination in employment, a complainant may have to show that the discrimination affected all senior workers.*

10) **Human Rights Tribunals Have Concurrent Jurisdiction to Hear Discrimination Complaints Based on Collective Agreements:** In complaints based on collective agreements, an arbitration board is the first forum of adjudication, but that does not exclude human rights tribunals or boards from hearing these complaints. Human rights boards and tribunals have concurrent jurisdiction over human rights complaints arising from collective agreements.[69]
    - Labour arbitration deals with interpretation and enforcement of collective agreements, whereas human rights tribunals adjudicate violations under human rights statutes.[70]
    - It is a fundamental principle of human rights jurisprudence that collective agreements must not violate or contract out of human rights obligations. Collective agreements, therefore, should not contain age discriminatory provisions like mandatory retirement. (For more on mandatory retirement, see section 3.0)

3.0 Mandatory Retirement and Age Discrimination

Mandatory retirement was first adopted in early Twentieth Century in industrialized Western economies to replace less productive senior workers; gradually, mandatory retirement provisions were incorporated in national laws, social security, and pension plans.[71]

Mandatory retirement can be introduced through employment policies, hiring contracts, collective agreements, or employment, pension, and retirement plans.

> The Hudson Bay Company was the first Canadian employer to introduce sickness and old age provisions for its employees in the Eighteenth Century, and the Grand Trunk Railway brought the first industrial pension plan in Canada. Canada's *Social Security Act* was passed in 1951, and the *Old Age Security Act* was restructured through the 1960s and 1970s; in 1965, the Canada/Quebec Pension Plan (CPP/QPP) came into force and normalized retirement as part of the life course.
>
> - Lynn McDonald, See Endnote 14

Until recently, mandatory retirement was the most widespread and systemic mechanism for institutionalized age discrimination.[72]

3.1 Mandatory Retirement in Human Rights Jurisdictions

All Canadian jurisdictions disallow mandatory retirement because it discriminates based on age, a prohibited ground in all 14 human rights statutes. However, mandatory retirement is permitted under certain exceptions, which vary slightly across the jurisdictions.

- All human rights statutes permit mandatory retirement if it can be shown as a BFR.[73]
- Furthermore, mandatory retirement is permitted when specific federal or provincial statutes regulate a mandatory retirement age for certain professions like airline pilots, firefighters, police officers, and federal judges.
- Apart from this, some human rights jurisdictions include additional exceptions that allow mandatory retirement in specific contexts:

> "Mandatory retirement is both the leading form of age discrimination and the driving force behind the wider development of ageism in modern societies. It is an age discriminatory social process designed to exclude older people *en masse* from the workforce".
>
> - Alan Walker, See Endnote 72

- The human rights statutes of five Canadian jurisdictions expressly prohibit mandatory retirement, except when it can be shown as a BFR.[74]
- Human rights laws of eight Canadian jurisdictions allow mandatory retirement in pension plans under a strict exception. In these jurisdictions, to justify a mandatory retirement provision in a pension plan, the plan provider must show that the mandatory retirement rule is necessary for the operation and sustainability of the pension plan.[75]

Five Canadian jurisdictions explicitly prohibit mandatory retirement, while Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, and Saskatchewan allow mandatory retirement in pension plans under strict exceptions.

- In New Brunswick, the *Act* allows mandatory retirement in pension plans if the plan providers can show that the plan is *bona fide* and established in good faith for the benefit of all employees.[76]

3.2 Definitions of Retirement

Retirement scholarship concedes that retirement is difficult to define, particularly in present-day context because the nature of contemporary work has undergone a shift in recent decades.

Instead of linear, stable career trajectories, short-term and gig work is now commonplace; workers are more likely to shift jobs and switch careers during their lifespan, acquiring complex work histories and career profiles. In the postmodern economic environment, the traditional idea of retirement is changing.

In general terms, mandatory retirement is a workplace practice according to which "the working relationship terminates at a fixed age";[77] it is an age-mandated end to employment.

The traditional concept of retirement is shifting because of the changing imperatives of the postmodern economy.

Retirement is also conceived and described in other ways:

- "Complete withdrawal" from the workforce.
- Significant reduction of work hours and duties.
- Reduced work engagement or "phased retirement", either by incrementally reducing work duties with the principal employer or by taking a less demanding "bridge" job.

- Becoming a recipient of employer pension, state pension or old-age security pension.[78]

3.3 Arguments in Support of Mandatory Retirement

In the debate on mandatory retirement, there are two main arguments: first, arguments that emphasize the importance of larger economic necessities, i.e. growth of organizations, financial sustainability of pension plans, etc.; and second, arguments that draw attention to the individual circumstances of persons in the so-called retirement age group, i.e. their work competence, need to continue working, personal and social factors, etc.

> "Forced removal from the work force strictly on account of age can be extraordinarily debilitating for those entering their senior years."
>
> *McKinney* – Dissenting note

Many arguments supporting mandatory retirement are based on age stereotypes or ageist views about the relative incompetence of older employees. These arguments trump economic necessity over individual rights and include the following:

Most arguments supporting mandatory retirement are based on age stereotypes or ageist views about the relative incompetence of older employees. These arguments trump economic necessity over individual rights.

- Older employees have less capacity to adapt to technological change compared to younger workers.
- There is statistical decline in productivity associated with ageing:
  - Decline in productivity hinders an employer's efforts to drive innovation and maximize profits.
- Mandatory retirement ensures sharing of jobs between older and younger workers:[79]
  - Younger workers have families to support, so they are more deserving than older workers to keep their jobs.
- Mandatory retirement preserves the dignity of older workers who are no longer capable of performing job duties adequately, because it saves them from the humiliation of dismissal.
- Individual performance appraisals of older workers (instead of mandatory retirement) are expensive and cumbersome for both employers and employees, and they also give rise to perceptions of discriminatory treatment.[80]
  - Without mandatory retirement, companies will incur costs to monitor the performance of senior workers, which will divert resources from other initiatives and reduce productivity.

3.4 Arguments against Mandatory Retirement

Following is a summary of arguments advanced against the imposition of mandatory retirement:

> Classifications like older generation, baby boomers, welfare generation, and so on, can be misleading, because there is wide diversity among population sub-groups, and assigning generational characteristics can lead to age stereotypes and flawed policy choices.
>
> – John Macnicol, See Endnote 13

- Decline of physical and mental capacities does not happen suddenly when a person reaches a certain age (65 years, for example); instead, there is great variation in physical and cognitive ability across individuals in different age groups.
- Senior workers forced into retirement encounter major challenges to re-employment. They are likely to draw public pension benefits sooner than if they had continued working, which puts pressure on tax, pension, and health care systems.
- Imposition of a specific retirement age denies free choice to those who wish or need to continue working. Many older workers have financial and family obligations and cannot afford early retirement.
- There is no empirical evidence that working capacity declines with age, except in professions that require physical strength and endurance:
    - Senior workers are equally creative and innovative.
    - The post-industrial knowledge-based jobs require less physical dexterity, but require caution, responsibility, knowledge, experience, and leadership, which older workers can provide.[81]

> Groups on the bottom of the economic ladder – manual workers, low-paid industrial or retail workers, the "retirement underclass" – suffer severely from mandatory retirement imposition; many are pushed to become reliant on income support or disability benefits.

- Keeping senior workers in the labour market will diminish labour shortages and promote stability of public pension and benefit programs.
- Effects of mandatory retirement vary by economic status:
    - The typical early retiree projected by pro-retirement groups belongs to a minority – well-paid professionals who retire on salaried pensions and supplement their income by consultation and part-time work.
    - Groups on the bottom of the economic ladder – manual workers, low-paid industrial or retail workers, the "retirement underclass"[82] – suffer severely from mandatory retirement imposition; many are pushed to become reliant on income support or disability benefits.

- Mandatory retirement creates psychosocial problems for those eliminated by compulsion from the workforce; these groups face poverty, exclusion, social isolation, and disruption of social networks – they slip into sickness or disability in large numbers, burdening the health and welfare systems.

Instead of using crude age proxies to impose mandatory retirement, employers should conduct performance appraisals to assess the working capacities of senior workers on an individualized basis.

- With increase in lifespan, the retirement phase after traditional cut-off age of 65 years, for example, could keep people in the retirement phase for 20-30 years, straining the social security and pension systems.
- Concepts like pension and retirement are constructs of the old welfare state:
    - In the postmodern economy, pathways to retirement are complex, diverse, and multilayered.
    - The traditional life course that defines life in generational terms[83] (youth, middle age, old age) is shifting; society will become more "ageless" as active ageing becomes the social norm.[84]

- Instead of using crude age proxies to impose mandatory retirement, employers should conduct performance appraisals to assess the working capacities of senior workers on an individualized basis.

3.5 General Principles of Mandatory Retirement Jurisprudence

While mandatory retirement complaints are addressed within their specific circumstances and contexts, human rights jurisprudence established from the outset that mandatory retirement rules cannot be implemented in an arbitrary, discriminatory, or unreasonable manner.[85]

From the outset, human rights jurisprudence on mandatory retirement has recognized that mandatory retirement rules cannot be implemented in an arbitrary, discriminatory, or unreasonable manner.

In an early case, the Supreme Court of Canada identified two broad arguments advanced by employers in support of mandatory retirement: economic factors and reasons of public safety.[86]

- If public safety is the main reason for a mandatory retirement policy, it is generally easier for employers to establish a BFR justification for their retirement rule.

- Contrarily, if employers argue that a mandatory retirement policy is put in place to ensure economic productivity of their business, it would be relatively difficult to justify the policy as a BFR, without an assessment of the individual capacity of retiring workers.

> Economic sustainability of pension or retirement plans and the health and safety of employees or the public are two crucial components in a mandatory retirement analysis.

- If a practical alternative to mandatory retirement is shown to exist, mandatory retirement may be deemed unreasonable and discriminatory.[87]
- A BFR should not impose undue burdens on the employees to whom it applies.[88]
- Where a discriminatory rule (mandatory retirement) is established as unreasonable based on available evidence, employers should consider the option of individualized assessment to evaluate the competence of older employees.[89]
- If an age of retirement is prescribed in a statute that has received royal assent, it is difficult to challenge mandatory retirement under that statutory arrangement.[90]
- Involuntary retirement (when an individual retires unwillingly), which uses subtle forms of pressure on employees to retire, has not received due judicial attention.
    - According to the Organization of Economic Cooperation and Development, involuntary retirement happens when "duress by colleagues, unions and society at large [pushes retirees] to stand aside and make way for younger people, or because [they fear loss of] longer-term security in their jobs".[91]

3.6 Supreme Court of Canada on Mandatory Retirement

In an early decision on mandatory retirement, the Supreme Court of Canada set the tone for its subsequent position on the issue when it drew a distinction between "retirement" and "discharge" (dismissal).[92]

The Supreme Court held that an employer does not have the same onus to justify retirement as it does to justify a discharge, implicitly allowing a window to employers to retire older employees through various retirement schemes.

3.6.1 Mandatory Retirement as Violation of the *Charter*

In the 1990s, the Supreme Court of Canada disposed of four cases on mandatory retirement, all of which had challenged mandatory retirement under the *Charter*.

The cases involved universities, a hospital, and a community college, sectors in which the applicability of the *Charter* is open to interpretation.

- The Supreme Court first ruled on the question of the *Charter*'s applicability to these sectors.
    - The Supreme Court declared that the *Charter* did not apply to the universities or the hospital under review, but it applied to community colleges.
    - According to the Supreme Court, if the *Charter* did apply to universities, the mandatory retirement rule would violate age equality rights under Section 15(1) of the *Charter*.
    - However, this violation would be justified under the "reasonable limits" exception of Section 1 of the *Charter*.

According to the Supreme Court of Canada, mandatory retirement violates the *Charter*, unless it can be shown as a reasonable limit on *Charter* rights under Section 1.

- Additionally, because these four cases originated in Ontario and British Columbia – whose human rights statutes at that time protected against age discrimination up to age 65 – the Supreme Court adjudicated whether this limited protection violated Section 15(1) (age equality rights) of the *Charter*.
- The legality of the mandatory retirement of the complainants was decided in the context of the above two issues, i.e. the scope of equality rights under the *Charter* and whether the *Charter* applies to sectors like universities and hospitals.

The McKinney Case[93]
Mandatory Retirement Justified in University Setting

The case involved eight professors and one librarian employed at four Ontario universities, who challenged their mandatory retirement at age 65. The Supreme Court held that the Charter did not apply to universities because they were legally autonomous bodies that enjoyed independence from government in all internal matters.[94] Hence, the internal decisions of universities including retirement were not government decisions. However, according to the Supreme Court, if the Charter did apply to universities, mandatory retirement policies would violate Section 15(1) of the Charter but would be justified as a reasonable limit under Section 1. The Supreme Court accepted the goals of mandatory retirement policies advanced by the universities: flexibility in resource allocation and faculty renewal, enhancing academic freedom, and minimizing intrusive

"The breach of s. 15(1) cannot be justified under s.1. There is no convincing evidence that mandatory retirement is the *quid pro quo* of the tenure system. The value of tenure is threatened by incompetence, not by the aging process. The presumption of academic incapacity at age 65 is not well founded"
-- Dissenting note in *McKinney*

modes of performance appraisal. According to the Supreme Court, Section 9(a) of the Ontario Human Rights Code (now repealed – the section defined age as 65 years, thus legalizing mandatory retirement past age 65) protected against age discrimination, but also preserved the integrity of pension plans and job opportunities for young workers.

Additionally, in the **Harrison Case**[95], which involved the same issues as *McKinney*, the Supreme Court of Canada used the arguments advanced in *McKinney* to validate mandatory retirement and endorse the existing definitions of age (by age limits) included in the British Columbia *Human Rights Code* at that time.

The Vancouver General Hospital Case[96]
Mandatory Retirement Justified in Hospital Setting

Physicians at the Vancouver General Hospital alleged that their retirement at age 65 violated Section 15(1) of the Charter and age protections of the British Columbia Human Rights Act. The Supreme Court of Canada held that the relevant hospital regulation was not a delegated legislation but a rule on the internal management of hospitals. Despite significant government control over its activities and governance, the Vancouver General Hospital enjoyed independence in management and administration, including decisions regarding mandatory retirement. The Supreme Court held that the Charter did not apply to the hospital's mandatory retirement policy; repeating its reasoning in the McKinney decision, the Supreme Court declared that even if the Charter had applied to the hospital, the Charter violation would have been justified as a Section 1 limit on the equality rights of older physicians.

The socio-demographic of the workplace has changed considerably since the 1990s (when the Supreme Court last reviewed mandatory retirement) – now mandatory retirement is recognized as an urgent social issue that impacts the age equality rights of various marginalized groups.

The Douglas College Case[97]
Mandatory Retirement of College Faculty Violates *Charter*

A British Columbia community college, pursuant to its collective agreement, retired two faculty members after they reached age 65. The Supreme Court of Canada upheld the decision of the arbitrator and British Columbia Court of Appeal that the Charter applied to the community college and the mandatory retirement provision violated Section 15(1) of the Charter. The Supreme Court acknowledged that a collective agreement was "law" within the meaning of Section 15(1) of the Charter; the arbitration board was a "court of

competent jurisdiction" per Section 24(1) of the Charter; and, an arbitrator had authority to adjudicate Charter complaints to interpret the collective agreement between a college and its faculty association.[98] *According to the Supreme Court, universities as well as community colleges depended on government funding, but community colleges were managed directly by the government and were not free in the management of their internal affairs. A community college was like a crown agency through which the government operated a system of post-secondary education. Thus, the Charter applied to community colleges and its retirement policy violated Section 15(1) equality rights.*

Research has established that mandatory retirement infringes on the equality rights of various vulnerable groups, including women, minimum-wage workers, immigrants, new Canadians, and so on.

- The Supreme Court of Canada has not deliberated on the issue of mandatory retirement since the 1990s.
    - The socio-demographic of the workplace has changed considerably since that time, and mandatory retirement is now recognized as an urgent social issue.
        - For example, scholarship and research have established that mandatory retirement infringes on the equality rights of various vulnerable groups, including women, minimum-wage workers, immigrants, new Canadians, and so on.

3.6.2 Mandatory Retirement as Violation of Human Rights Statutes

Four early Supreme Court of Canada decisions on mandatory retirement deliberated the question of mandatory retirement as violation of human rights statutes. These cases suggest that the validity of a mandatory retirement rule under human rights law depends on whether the employer can prove it as a BFR.

In mandatory retirement challenges under human rights statutes, the onus is on employers to justify mandatory retirement as a BFR.

The Etobicoke Case[99]
The Burden of Proof to Establish BFR Rests on the Employer

A unanimous Supreme Court of Canada verdict stated that the retirement of firefighters at age 60 violated the Ontario Human Rights Code because the employer could not establish its mandatory retirement policy as a BFR. The employer provided "impressionistic" evidence and made general assertions about firefighting being a young

person's work. The evidence lacked essential details about the nature of the duties performed by firefighters, the conditions of their workplace, and the effect of these conditions on employees, particularly on those near retirement. The Supreme Court of Canada also rejected the argument that the mandatory retirement provision was justified because it was agreed upon by the parties to the collective agreement. Parties in a collective agreement cannot contract out of human rights law, which is based on public policy and fundamental legal principles.[100]

> Parties in a collective agreement cannot contract out of human rights law, which is based on public policy and fundamental legal principles.
>
> - Supreme Court in *Etobicoke*

The Winnipeg School Case[101]
Collective Agreements Cannot Contract out of Human Rights Statutes

In a unanimous decision, the Supreme Court of Canada upheld the decisions of lower courts that the mandatory retirement at age 65 of a schoolteacher, as per the collective agreement, contravened the Manitoba Human Rights Act's prohibition of age discrimination. The Supreme Court rejected the argument that the relevant provision of the Public Schools Act could be construed as an exception to the Human Rights Act. The SCC disagreed with the contention that an employer and union can contract out of the provisions of a human rights statute, reiterating the status of human rights legislation as fundamental law that prevails over other laws.

> Human rights statutes are quasi-constitutional laws that prevails over other laws in case of conflict.
>
> – Supreme Court of Canada

The Saskatoon City Case[102]
Retirement Established as BFR and Individual Testing Ruled Out

The Supreme Court of Canada reinstated a board decision which had found that the complainant was not discriminated against under the Saskatchewan Human Rights Act when he was retired from his position of Chief Fire Prevention Officer at age 60. Applying the Etobicoke Test,[103] *the court found that the age qualification was imposed in good faith, and it was reasonably necessary for job performance. Reiterating its earlier position, the Supreme Court of Canada ruled out individualized testing to determine job fitness; it endorsed that applying the BFR rule to groups of employees was a more reasonable and practical approach. Thus, the judgement implied that it is appropriate for employers to use the age of employees (60 years in this instance) as a proxy to make retirement rules, instead of assessing older employees for job fitness on an individual basis.*

The Dickason Case[104]
Mandatory Retirement Deemed Reasonable Under Circumstances

> The dissenting note in the case rejected the contention that age was synchronous with intellectual decay and youth with innovation; it drew attention to the impact of forced retirement on the health and self-esteem of the retired faculty.
>
> - Dissenting note, *Dickason*

In a split 4-3 decision, the Supreme Court of Canada upheld the mandatory retirement at age 65 of a female faculty member at the University of Alberta. The complainant had challenged the retirement under Alberta's Individual Rights Protection Act (IRP), the provincial human rights legislation at that time. Section 7(1) of the IRP provided protection against age discrimination to those aged 18 years or older; Section 11.1 of the IRP allowed violations of the IRP that were deemed "reasonable and justifiable in the circumstances". Using the reasoning in McKinney[105], the Supreme Court held that while the university's mandatory retirement policy contravened Section 7(1) of IRP, it was justified under its Section 11.1 exception. According to the court, parties may not contract out of human rights law, but a collective agreement may be based on evidence that justifies the reasonableness of a practice that appears discriminatory on its face; a policy which is the result of a fair and freely negotiated collective agreement supports the meaning of reasonableness as conceived in Section 11.1 of the IRP. The Supreme Court accepted that the university's objectives for establishing mandatory retirement (protection of tenure, academic renewal, planning and resource management, and retirement with dignity) were rationally connected to the policy and justified the limitation on the rights to age equality.[106]

The Potash Case[107]
Section 4(6)(a) of the New Brunswick *Human Rights Act* permits mandatory retirement in *bona fide* pension and retirement plans

The only other mandatory retirement case adjudicated by the Supreme Court of Canada hinged on defining the meaning of a bona fide pension or retirement plan, as referenced in Section 4(6)(a) of the New Brunswick Act. According to the Supreme Court of Canada, as envisaged in Section 4(6)(a), a bona fide retirement or pension plan means a legitimate plan, which was adopted in good faith and not to defeat the rights protected under the Act. According to the Supreme Court, Section 4(6)(a) has a different purpose than the BFR provision in Section 2.2 of the Act. Section 2.2 requires employers to defend discrimination as a BFR, but Section 4(6)(a) does not provide the same BFR exception for retirement or pension plans. Therefore, Section 4(6)(a) does not attract the Meiorin Test[108] to assess the legitimacy of mandatory retirement in bona fide pension or retirement plans. Plan providers only have to show that a retirement or pension plan is bona fide, i.e. it is legitimate or genuine (it is registered under the Pension Benefits Act)

and it was adopted in good faith, in accordance with good business practices, and not to defraud plan members.[109]

3.7 Other Principles Governing Mandatory Retirement

Besides the Supreme Court's decisions summarized above, relevant lower court and tribunal decisions indicate additional judicial approaches to mandatory retirement. These principles may be summarized below:

The onus is on employers or pension providers to establish rational connection, good faith, and reasonableness of a retirement rule.

- Evidence of age discrimination must be clear, and if a BFR is argued in support of mandatory retirement, the evidence should be substantial and consistent.[110]
    - The onus is on employers or pension providers to establish rational connection, good faith, and reasonableness of a retirement rule.

- Employers must not adopt measures or behave in ways that would amount to coercing an older employee to consider early retirement.
    - Tribunals review the context and circumstances of an employer's behavior and decisions to make a finding whether age discrimination was a factor in a given scenario.
    - A tribunal drew a distinction between offering an incentive of retirement and the manner in which such an incentive is offered: It is not discriminatory if a retirement incentive is communicated and made available to a prospective employee; however, if there are signs that coercion was used to pressurize the employee to accept the retirement proposal, it would amount to age-based discrimination.[111]
        - For example, a manager having an informal conversation over coffee with an employee about the employee's retirement plans was not considered discriminatory.[112]
        - It is not discriminatory to provide an employee with information about retirement options, particularly when the employee has requested the information.
    - Tribunals have recognized that an employer has the right to plan its future staffing and other business requirements, and it is legitimate for employers to consider the prospective retirement of an employee for such planning.
        - For example, if an employer is offering a training program, it may decide to omit from the training an employee who is about to retire based on the rationale that the said employee would not benefit from the training. Such different treatment would be seen to stem from the

employee's voluntary retirement plans, rather than from age discrimination.

- However, a tribunal ruled that an employer used coercive tactics when its manager phoned two retired acquaintances and put them on speaker phone to explain the advantages of retirement to a senior employee.[113]

> Any form of coercion to compel a senior employee into retirement is construed by courts as evidence of discriminatory treatment related to age.

- Similarly, it amounted to age discrimination when a manager discouraged a senior employee from applying for a permanent position, citing the position's competitiveness.

Case Law Example – Inquiring about an employee's retirement plans and asking them to set a retirement date ruled discriminatory

A tribunal found that inquiries made about the retirement plans of an employee by her employer were discriminatory.[114] The employer had concerns about a 58-year-old employee's performance, but the performance issues were not sufficiently serious to warrant termination. On two occasions, the employer asked the employee to set a retirement date. The employer did not have any policies that required employees to provide a retirement date, and the tribunal concluded that the employer would not have made such inquiries to a younger employee.

Case Law Example – Financial hardship faced by older employees after termination may not be sufficient to establish age discrimination, if other evidence of discrimination is not present

A 50-year-old employee was terminated during a workplace restructuring.[115] He would have qualified for full early retirement pension at age 53 but had to settle for a significantly reduced pension. The Federal Court of Appeal found that age was not a factor in the termination; there was no evidence to suggest that the restructuring process was aimed at eliminating older workers. The financial hardship an older worker may experience after termination is not enough to constitute age discrimination.

Case Law Example – An employer who is laying off older workers may be required to consider these workers' prospects of future employment

Courts have considered prospects of future re-employment as a factor in the termination of older workers. For example, a court determined that a 70-year-old machine operator

was entitled to an 18-month notice period due to his limited future job prospects.[116] In another case, the court directed that the notice period of an older employee be extended by one month, to enable the employee to participate in a benefits program.[117]

Case Law Example – A BFR rule for mandatory retirement must be consistent, reasonable, and equally applicable to all stakeholders

If safety considerations are treated as a BFR, the employer should show that the safety standard was applied uniformly to all employees.

A bus driver for the New Brunswick School Board, who had passed all required fitness and medical tests and had a clean driving record, was retired from his position at age 65 under a clause of the provincial Education Act.[118] The department argued that it could not accommodate school bus drivers over the age of 65 because of safety considerations. According to the department, no perfect tests exist to assess the fitness of older drivers, so the cut-off date of 65 years was a reasonable age proxy for driver retirement. However, according to the board, the department permitted drivers over 65 to transport children on chartered trips in and out of the province, which contradicted their logic of setting a mandatory retirement age of 65 years for full-time drivers. The retirement rule was not justified as a BFR. The department was directed to devise viable safety assessments for drivers over 65, rather than creating a blanket retirement rule in violation of age equality.[119]

Case Law Example – A generous retirement package does not diminish the fact of age discrimination

The employer was downsizing its operation in a bid to revitalize the workplace, cut costs, and reorganize work priorities.[120] In pursuant of this objective, employers were interviewed and informed of the need for reduced staffing. In determining which staff to lay off, the company documents expressed interest to retain people with "career potential", which the board interpreted as a euphemism for age discrimination. Even though the complainant was offered a generous early retirement package, it did not prevent the board from ruling that age discrimination was a factor in the layoff decision.

Case Law Example – Special programs cannot discriminate internally against groups they are designed to protect

The Ministry of Health provided visual aids to persons under 25 years of age, and the complainant, a 71-year-old man, was refused the visual aid because he did not meet the age criteria of the program.[121] The Court of Appeal rejected the argument that the initiative was a special program under Section 14(1) of Ontario's Human Rights Code. While

special programs were protected from a discrimination challenge, they were required to promote substantive equality, not just formal equality. Restrictions within special programs should be rationally connected to their objectives and the programs should not discriminate internally against the disadvantaged groups they are designed to protect.

Special programs are exempt from discrimination challenges, if they promote substantive equality (not just formal equality), are rationally connected to their objectives, and do not discriminate internally against groups they are designed to protect.

Case Law Example – If age stereotyping is unequivocally established, it is substantial evidence to make a finding of discrimination

In this early case, 40-year-old man was refused an apprenticeship.[122] The employer hired many persons in the 40-to-65 age range but did not hire any person in that age category for the apprenticeship program. The evidence established that the employer had considered the age of employees when determining whether they might adapt to certain job requirements, like performing menial tasks, taking on minimal responsibility, or accepting low pay and shift work. The board concluded that age stereotyping was one of the reasons for the refusal to hire and ruled in favor of the complainant.

4.0 BFR, Duty to Accommodate, and Undue Hardship in Age Discrimination

Case law on the accommodation of older workers is not as developed as it is for the accommodation of other grounds like disability, race, sex, etc.[123]

- Tribunals tend to balance an employer's duty to accommodate older workers with the reasonable financial and performance needs of a business or workplace.[124]

- In mandatory retirement complaints, age has been accepted as a BFR in a substantial body of case law.
    - However, outside of mandatory retirement, it is generally more difficult for employers to prove differential treatment based on age as a BFR.

> Employers have a positive duty to accommodate the reasonable accommodation needs and requests of older employees. The duty to accommodate ends at the point of undue hardship, or when it would become excessively difficult for the employer to accommodate a senior employee.

- Employers have a positive duty to accommodate the reasonable accommodation needs of older employees.
    - However, the duty to accommodate ends at the point of undue hardship, or when accommodation becomes excessively difficult for the employer.[125]

- Human rights law recognizes that "some hardship" is an aspect of accommodation.
    - Only "undue hardship" can justify an employer's refusal of accommodation.[126]
    - The Supreme Court of Canada has outlined the general parameters of undue hardship in relation to the employer's duty to accommodate.

4.1 The Supreme Court of Canada on Undue Hardship

According to the Supreme Court, an employer can be said to suffer undue hardship if accommodating an employee would have one of the following consequences:[127]

- The financial cost of the accommodation is so high that it would alter the nature or viability of the employer's operations or business.

- Potential health or safety risks (for workers, members of the public, or the environment) are so serious that they outweigh the requested accommodation.[128]
- The employee requesting accommodation is unable to perform essential duties of the job:
    - However, employers should not presume that older employees would be unable to perform their duties.
    - The decision about work competence should be made after an accurate, ethical, and individualized assessment, and not merely based on the age of an employee.

> The employer must provide direct and objective evidence of undue hardship. For example, to justify excessive financial cost as a BFR, an employer must show clear and quantifiable cost estimates.

- Accommodation would result in disruption of a collective agreement.
- Accommodation would cause problems with the morale of other employees and seriously impact their work and job functions.
- Accommodation would lead to an interchangeability of the workforce and facilities.

Other factors to consider in assessing if an employer has reached the point of undue hardship in its duty to accommodate an employee include:

- The employer's previous efforts at accommodation.
- The employee's response and participation in the accommodation efforts of the employer, because courts have recognized that accommodation is a collaborative process between employee and employer and, in certain cases, the union.[129]
- The size of the workplace and availability of alternative work options.
- The general financial health of the employer's business.

The employer must provide direct and objective evidence of any of the above undue hardship factors. For example, to show excessive financial costs of accommodation, clear and quantifiable estimates should be presented, not just vague impressions about potential expenses.

4.2 Basic BFR Principles in Age Discrimination Complaints

The following basic principles of BFR are evident from human rights case law and age discrimination jurisprudence:

- The Supreme Court of Canada has stated that a BFR inquiry has subjective and objective components.[130]
    - The subjective component of the BFR test ensures that the age discriminatory rule was adopted in good faith[131] and for a valid occupational (work-related) requirement, and not to discriminate against an employee.[132]
    - The objective part of the BFR test ensures that a discriminatory rule is reasonably necessary for efficient job performance and for the safety of employees and the public.
    - The employer must furnish tangible evidence to justify the *prima facie* discriminatory rule.
        - For example, to justify the retirement of police officers at age 60 as a BFR, the employer presented substantial evidence on cardiovascular disease and decline of aerobic capacity among police officers past age 60.[133] This was deemed as fulfilling the objective component of the BFR test.
    - It may be noted that the composite Meiorin Test[134] has now replaced the SCC's earlier subjective and objective tests.

A blanket, all-serving age-based retirement rule does not qualify as a BFR.

- A blanket, all-serving age-based retirement rule may not qualify as a BFR.
    - If the discriminatory rule applies to employees of a certain age group, the employer may show that individual testing to assess employee competence is not a viable alternative to the rule.
    - The onus is on the employer to demonstrate that individual testing would result in undue hardship.[135]

If a discriminatory rule disadvantages employees of a certain age group, the onus is on the employer to demonstrate that assessing the competence of older employees through individual testing would cause undue hardship to the employer.

Case Law Example – BFR not tenable without substantive evidence: *In this early decision on the plausibility of a BFR claim, a board of inquiry rejected the employer's BFR defence for retiring a firefighter at age 60.[136] The employer failed to establish that the complainant's continued service was a threat to public safety. Endorsing best practices to assess mandatory retirement, the board held that a retirement decision should not be imposed through the blanket yardstick of chronological age but should be assessed on individual capacity for job performance. The board found no evidence of physical or mental degeneration that would impact the fireman's duties; contrarily, the board stated*

that as a shift captain the complainant's main duty was to provide leadership, which was in no way impacted by his age.

Case Law Example – Physical testing for job fitness accepted as BFR: *According to company policy, temporary employees had to undergo a manual dexterity test to qualify for permanent positions as postal clerks with Canada Post.*[137] *Older employees argued that the test was discriminatory based on age, because it put them at a disadvantage compared to younger employees. The court found that the dexterity test was a reliable tool to assess job performance and suitability of candidates, and it was thus a BFR; without the test, the employer would suffer undue hardship, incurring higher costs for training and staff organization. The court did not explore the option of accommodation on a case-by-case basis.*

Case Law Example – A BFR rule should be reasonably necessary for its stated purpose: *A 64-year-old applicant was offered employment as an arena attendant on condition that he would undergo testing that involved lifting of heavy objects.*[138] *During the testing, the complainant's heart rate exceeded a certain level and the employment offer was withdrawn. The employer argued that the heart rate standard was necessary to ensure employee safety during the job. Applying the Meiorin Test*[139]*, the tribunal concluded that the standard was rationally connected to job performance and was adopted in good faith, but it was not reasonably necessary for the work of an arena attendant. There was no evidence that the complainant was medically unfit to perform his job duties, or that the increased heart rate put him at greater health risk. Moreover, the employer failed to establish that it would suffer undue hardship by modifying the heart rate standard or by individualized assessment.*[140]

A rule or standard applied to a senior worker must meet the Supreme Court's three-part Meiorin Test: It must be rationally connected to job performance; it must be adopted in good faith; and it must be reasonably necessary to achieve a work-related purpose.

Case Law Example – Employee competence should be tested individually, not on a universal age-based criterion: *In this early case, a long serving crane operator at Saint John Shipbuilding was forced into retirement at age 65.*[141] *The retirement policy was strictly age-based, and did not consider job qualifications or physical competence, even though the job was safety-sensitive and required alertness, good hearing, and visual competence. The retirement policy applied automatically to all employees, not only those who operated cranes or performed other potentially dangerous work. The respondent argued that because the policy applied to all employee equally, it made no distinctions between employees and was not discriminatory. It argued that age was a BFR because of the dangerous nature of the job. The board rejected the BFR defence because the*

company was enforcing a universal policy based on chronological age. The complainant was reinstated, subject to passing medical tests to determine his fitness for job duties.

- In certain professions, like airline pilots, firefighters, bus drivers etc., safety considerations are presumed as a BFR, but employers must still show that the retiring workers would pose substantial risk to the safety of employees, the public or the environment.

In certain professions, like airline pilots, firefighters, bus drivers etc., safety considerations are presumed as a BFR, but employers must still show that the retiring workers would pose substantial risk to the safety of employees, the public or the environment.

Case Law Example – If it is established that an age discriminatory rule protects public safety, it would qualify as a BFR: *In its initial hiring of bus drivers, a bus company refused to hire persons over the age of 40, arguing that this practice was a BFR under Section 15(1)(a) of the Canadian Human Rights Act.[142] The tribunal accepted that the respondent adopted the policy in good faith, so it satisfied the subjective part of the BFR test. Regarding the objective part of the test, the tribunal noted that if drivers aged 40+ years started in entry level positions at low seniority they would have to deal with a lot of job stress; since there was no way of predicting a person's capacity to cope with stress, it was reasonable to use age as a marker to assess that capacity. Because bus driving involved public safety, age-based evidence of stress was acceptable to discharge the employer's burden of proof for a BFR. The non-hiring of older drivers was thus justified.*

Case Law Example – If an employer justifies an age-based rule on grounds of public safety but does not provide substantial supportive evidence, the rule would not be deemed a BFR: *The employer was unable to establish that its policy of refusing to hire new bus drivers over the age of 35 was a BFR.[143] The evidence that there is a relationship between age and inability to cope with stress was rejected by the tribunal. The tribunal noted that the employer's policy pre-dated human rights legislation, and it was conceivable that the original policy was intentionally discriminatory based on age, as recognized in current human rights law.[144] The case was appealed first to the Human Rights Review Tribunal and then to the Federal Court of Appeal, both of which confirmed that the bus company had failed to prove that its 35-year hiring age limit was a BFR.[145]*

Case Law Example – If an age discriminatory rule is not supported by evidence, it would not qualify as BFR: *Air Canada required that applicants for pilot positions who were over the age of 27 should have more qualifications than younger applicants.[146] Air Canada sought to justify its policy on public safety and economic grounds, but it was not seen as a BFR because evidence was lacking to justify the age specification as a safety measure. In another federal case, the issue was whether a group of pilots and flight attendants had been discriminated against when they were not transferred from the*

Department of Transportation to the Department of National Defence.[147] *The Federal Court of Appeal found that age was a factor in the transfer decision, and the department could not demonstrate the viability of the age specification as a BFR under the circumstances.*

Endnotes

[1] *Human Rights Act*, RSNB 1973, s. 2.1, and ss. 3-8 [*Act*].

[2] Other grounds of discrimination, like religion, marital status, or social condition can also undergo change as markers of a person's identity, in step with a person's altering circumstances or life choices.

[3] Pnina Alon-Shenker. "'Age is Different': Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting" at 38-39. *Canadian Labour and Employment Law Journal* 31 (2013). [Alon-Shenker. "Age is Different"].

[4] Terms like "old", "older person", "senior", and "young" are used in this guideline as general markers of biological age and not to lump individuals in fixed age typologies. Anti-ageism literature and human rights jurisprudence acknowledge that persons of the same biological age have different physical, mental, and emotional capacities; for this reason, rigid categorization of individuals as "old" or "young" are misleading and inaccurate. These terms, therefore, when used in this guideline, should be read with the requisite caveats that attach to them. Note, for example, that the World Health Organization recognizes that the term "old" is a social construct: it "defines the norms, roles and responsibilities that are expected of an older person and is frequently used in a pejorative sense". *World Report on Ageing and Health*. Geneva: World Health Organization, 2015. [WHO].

[5] For example, in a 2010 decision, an arbitrator noted that "age is different from other prohibited grounds of discrimination" [and] "unlike other grounds, being a given age is an attribute that is expected to be shared by everyone in the majority." The decision acknowledged that parties in the complaint would suffer some harm due to their age, but it noted that age-based distinctions should give way to "due consideration of important social and economic practices and values". *Ontario Nurses Association v Chatham-Kent (Municipality)* (2010), 88 CCPB 95, 202 LAC (4th) 1.

[6] C.T. Gillin and Thomas R. Klassen. "The Shifting Judicial Foundation of Legalized Age Discrimination". In *Time's Up! Mandatory Retirement in Canada.* Eds. C.T. Gillin, David MacGregor, and Tomas R. Klassen. Toronto: Lorimer, 2005. (45-73). The authors argue that because the Supreme Court of Canada justified age discrimination on social and economic grounds in *McKinney v University of Guelph*, [1990] 3 SCR 229 [*McKinney*] and other cases, these reasons have been accepted as legitimate in subsequent age discrimination analysis.

[7] Implicitly endorsing this view, the Supreme Court of Canada stated that every individual will experience both youth and old age, and that this fact undermines the argument that particular age groups face arbitrary discrimination. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84. [*Gosselin*].

[8] Alon-Shenker. "Age is Different", *supra* note 4.

[9] In the precedent setting *McKinney* case (*supra* note 6), the Supreme Court of Canada acknowledged that as a ground of discrimination age has received less judicial attention than other prohibited grounds.

[10] For example, a 43-year-old complainant pleaded that the Canadian Armed Forces discriminated against him because of his age when they hired a younger officer for a position the complainant had also applied for. Even though one of the interviewers had scribbled the complainant's age in the margin of his assessment notes, the court did not consider it as sufficient evidence of age discrimination in the hiring process. *Bradley v Canada (AG),* [1999] FCJ No. 370 (FCA).

[11] Quebec was the first human rights jurisdiction to include "age except as provided by law" in its list of protected grounds in 1962, followed by British Columbia (1964) and Ontario (1966). By the 1970s, all Canadian jurisdictions had included age discrimination as a protected ground in their human rights statutes. In the NB *Act*, age was added as a ground in 1973.

[12] For example, age restrictions imposed by law for persons not of legal age fall outside the purview of human rights age protections. Previously, some human rights statutes defined age by setting age limits. For example, when age was added as a ground in the NB Act in 1973, the following definition of age was also included: "Age means 19 years of age and over" – this definition was repealed in 1992. British Columbia and Saskatchewan had an age range of 19-64 in their human rights statutes, while the Ontario Act set a range of 18-64 years. These age specifications have now been removed, as they restricted the scope of age protections for certain age groups.

[13] John Macnicol. *Age Discrimination: An Historical and Contemporary Analysis.* New York: Cambridge UP, 2006 at 5. [Macnicol].

[14] The World Health Organization defines ageism as follows: "Stereotyping and discrimination against individuals or groups on the basis of their age; ageism can take many forms, including prejudicial attitudes, discriminatory practices, or institutional policies and practices that perpetuate stereotypical beliefs". WHO, *supra* note 4. The

International Longevity Center describes institutional ageism as “missions, rules and practices that discriminate against individuals and/or groups because of their older age”. Qtd. in Lynn McDonald. “The Evolution of Retirement as Systemic Ageism.” In *Ageism and Mistreatment of Older Workers: Current Reality, Future Solutions*. Eds. Patricia Brownell and James J. Kelly. Springer eBook, 2013. 69-90. [McDonald].

[15] Robert N. Butler. “Age-Ism: Another Form of Bigotry”. *The Gerontologist* 9.4 (1969). 243-46. As chair of the District of Columbia Advisory Committee on Aging, Butler was involved in setting up public housing for older people. He noted that “middle-aged, middle-class white citizens” reacted with hostility against a proposal to build special housing for low-income elderly African Americans. Ageism, according to Butler, is rife in American society, which has “traditionally valued pragmatism, action, power, and the vigor of youth over contemplation, reflection, experience, and the wisdom of age” (243).

[16] Robert N. Butler**.** “Ageism”. *The Encyclopedia of Ageing*. Ed. George L. Maddox. Vol. 1. New York: Springer, 2001 at 35. [Butler, “Ageism”]. Butler notes: “Ageism thus manifests itself in stereotypes and myths, outright disdain and dislike, or simply subtle avoidance of contact; discriminatory practices in housing, employment and services of all kinds; epithets, cartoons and jokes. At times ageism becomes an expedient method by which society promotes viewpoints about the aged in order to relieve itself from the responsibility toward them, and at other times ageism serves a highly personal objective, protecting younger (usually middle-aged) individuals – often at high emotional cost – from thinking about things they fear (aging, illness and death)”.

[17] Macnicol, *supra* note 13 at 26. Commenting on surveys in US and Britain, Macnicol states that age discrimination becomes especially difficult to prove when statistical and economic reasons are advanced in its support, and when age discrimination is institutional and indirect. In a recent book, Ashton Applewhite weighs in on ageism as follows: “Like all discrimination, ageism legitimizes and sustains inequality between groups, in this case, between the young and the no-longer-young. Different kinds of discrimination – including racism, sexism, ageism, ableism, and homophobia – interact, creating layers of oppression in the lives of individuals and groups. The oppression is reflected in and reinforced by society through the economic, legal, medical, commercial, and other systems that each of us navigate in daily life. Unless we challenge stigma, we reproduce it” (xviii). Ashton Applewhite. *This Chair Rocks: A Manifesto Against Ageism.* New York: Celadon Books, 2019. [Applewhite].

[18] Macnicol, *supra* note 13 at 27. Other research has suggested, along with Butler (*supra* note 16), that age prejudice stems from fear of our own mortality. See, for example, "Ageism: Denying the Face of the Future". Jeff Greenberg, Jeff Schimel, and Andy

Martens. In *Ageism: Stereotyping and Prejudice against Older Persons*. Cambridge MIT Press, 2002. Dissenting judges in the Supreme Court of Canada's decision in *Dickason v University of Alberta*, [1992] 2 SCR 1103 at 34 [*Dickason*] endorsed the same idea: "Because, in our society, old age tends to be less associated with wisdom and tranquility and more with infirmity and dependence, we fear it. We may be *more likely* to discriminate against elderly people, in a futile attempt to distance ourselves from what will inevitably occur to each one of us". The term gerontophobia is sometimes used to denote this phenomenon: "fear of ageing and dislike, even hatred, of old people". Applewhite, *supra* note 17, at 4.

[19] Margaret Thornton and Trish Luker. "Age Discrimination in Turbulent Times". *Griffiths Law Review* (2010) 19.2. [Thornton and Luker]. The authors argue that the traditional industrial economy had more stable and structured work careers, whereas the profit-driven neo-liberal culture has created a risk society (as theorized by Ulrich Beck), which pushes policy makers to view age discrimination as "an economic labour market issue rather than an equality issue".

[20] *Gosselin*, *supra* note 7, at paras. 32 and 38, among others. The Supreme Court of Canada noted that age-based distinctions are a common and necessary means of ordering society, and that invoking of age as a ground does not automatically prove pre-existing disadvantage and discrimination. The court also observed that age discrimination is not as widespread and rampant as discrimination based on race or religion.

[21] As Applewhite (*supra* note 17) suggests at 8: "Stereotyping obstructs empathy, cutting people off from the experience of others – even if, as is the case with ageism, those 'others' are our own future selves". Gerontologists have argued that one way to defy stereotypes about ageing is to shift thinking about age from lifecycle to lifecourse. The idea of lifecycles imposes rigid categories like childhood, youth, adolescence, and middle age, and generates stereotypes and discrimination. The term lifecourse, on the other hand, implies ageing as a continuous process, and removes fixed or limiting connotations attached to each life phase. Macnicol, *supra* note 13 at 5.

[22] Macnicol, *supra* note 13. This is a widespread view, which has been criticized as the "lump-of-labour fallacy".

[23] *Ibid.* In *The Imaginary Time Bomb*, British economist Phil Mullan argues that the modern world's fear of an ageing population – the so-called "grey tsunami" – is wrong. Instead, this fear mongering has been used "to justify further reductions in the role of government in the economy and the curbing of the welfare state". Qtd. in Applewhite, *supra* note 17.

[24] McDonald, *supra* note 14.

[25] In an important Supreme Court of Canada decision (*Dickason*, *supra* note 18), which endorsed mandatory retirement of professors at a fixed age, the dissenting judgement stressed that the purpose of human rights legislation was to eliminate stereotypes. It noted that the assumption that older academics were less productive and original than their younger colleagues was based on an age stereotype.

[26] *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 [*Stoffman*]. For *McKinney*, see *supra* 6.

[27] Sontag, Susan. "The Double Standard of Aging". Eds. Vida Carver and Penny Liddiard. *An Ageing Population*. Berkshire: Open University Press, 1978. 72–80.

[28] For example, Macnicol, *supra* note 13, identifies systematic past sufferings of older people "in overcrowded Poor Law infirmaries, demeaning casual jobs, stoical domestic poverty, and so on" (25).

[29] Alan Walker. "The Neglect of Ageing". International Network for Critical Gerontology. https://criticalgerontology.com/neglect-of-ageing. January 26, 2018. Walker notes: "Chief among the social factors that determine how we age, or if we age, are socio-economic status, diet, air quality and employment". McDonald, *supra* note 14, endorses this view: "Aging is a socially constructed process that is conditioned by one's location in the social structure and the economic, political and social factors that affect it." According to Macnicol, *supra* note 13: "The biology of ageing is mediated through social processes and attitudes. Normal ageing, divorced from socioeconomic processes, is very difficult to define" (129). The World Health Organization defines health as "a state of complete physical, mental, and social well-being, and not merely the absence of disease and infirmity" (qtd. in Macnicol at 129).

[30] In *Dickason* (*supra* note 18), two dissenting judges noted that the potentially devastating consequences of mandatory retirement outweighed its benefits to employers. Drawing attention to the intersection between age and gender discrimination, the dissenting opinion highlighted that women workers were more vulnerable to the negative effects of mandatory retirement, because they tended to have lower paying jobs and their careers were often interrupted by family obligations: "These socio-economic patterns, combined with private and government pension plans which are calculated on years of participation in the workforce, in some ways make mandatory retirement at age 65 as much an issue of gender as of age discrimination". See also, *Fraser v Canada (Attorney General)*, 2020 SCC 28: The Supreme Court of Canada held that the inability of RCMP members (mostly women) enrolled in a job-sharing program to buy back pension credits

produced an unequal impact for women, and loss of these pension benefits due to job-sharing and temporary reduction in working hours, therefore, violated these women's equality rights under section 15(1) of the *Charter*.

[31] For example, Old Age Security (OAS) provides a universal indexed grant to all seniors over 65 and may be supplemented by the Guaranteed Income Supplement (GIS). Full OAS and GIS benefits may assist married seniors to approach the poverty line but are below the poverty line for single seniors. Since women make up a disproportionate share of senior singles, especially in the oldest groups, these programs are unable to lift older women out of poverty. Further, Canada Pension Plan (CPP) benefits are tied to contributions made by workers and their employers based on a percentage of average earnings. As a result, women, who are more likely to work in lower-paying jobs and for shorter periods, receive significantly less in CPP benefits than their male counterparts. Women also tend to work in sectors like retail that often do not offer employee pension plans and where earnings are not enough to enable employees to contribute to RRSPs.

[32] As Thornton and Luker (*supra* note 19) observe: "Women work in the retail and service sectors, with lower pension coverage. Moreover, they earn lower wages and have fewer retirement savings plans (RRSPs), which leaves them no alternative except to continue working as long as their health and job performance allows. Mandatory retirement policies, therefore, can cause severe economic hardship to women. Women groups argue that even the history of mandatory retirement has centered on men's retirement and elides the experience of women workers".

[33] The *Universal Declaration of Human Rights,* the *International Covenant on Civil and Political Rights* (1966), and the *International Covenant on Economic, Social and Cultural Rights* (1966) are collectively referred as the International Bill of Human Rights.

[34] The *International Convention on the Protection of All Migrant Workers and Their Families* (1990) is the only UN convention that mandates against age discrimination, in the restricted context of migrant workers.

[35] In 1982, the UN World Assembly on Ageing issued the *Vienna International Plan of Action on Ageing.* In 1991, the UN General Assembly passed a resolution, *Principles for Older Persons*, which emphasized five areas for the amelioration of older people: independence, participation, care, self-fulfillment, and dignity. In 2002, the Second World Assembly on Ageing adopted two documents: *A Political Declaration* and *Madrid International Plan of Action on Ageing*, spelling out a three-priority agenda: older persons and development; health and well-being in old age; and supportive environments for older persons. Prior to these initiatives, in 1938, the International Labour Organization had published a report that documented the discrimination faced by older workers in several

countries. *Report of the Office on the Question of Discrimination Against Elderly Workers*. International Labour Office, 1938.

[36] Under international law, only conventions and treaties are legally binding on signatory states, obligating states to conform their domestic legislation with the provisions of the international conventions. Declarations convey a high level of political concern but have no binding effect for state compliance. Similarly, resolutions express an agreement to take future action on the proposed issues, while programs of action make recommendations to member states to address the stated concerns.

[37] Macnicol, *supra* note 13.

[38] *Kearns v Dickson Trucking Ltd. (1988)*, 10 CHRR D/5700 (Can. Trib.).

[39] "Policy on Discrimination Against Older People Because of Age". Ontario Human Rights Commission, 2007.

[40] Section 15(1) of the *Charter* reads as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[41] See endnote 12.

[42] *Bona fide* occupational requirement or qualification is referenced in case law as BFOR or BFOQ. However, because Section 2.2 of the *Act* uses the words "*bona fide* requirement or qualification" (without the word "occupation"), this guideline abbreviates it as BFR.

[43] Section 1 of the *Charter* reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In *McKinney*, *supra* note 6, the Supreme Court of Canada stated that Section 1 of the *Charter* serves the same purpose in *Charter* challenges as the BFR defence under human rights acts.

[44] *Ontario Nurses Association v Chatham-Kent (Municipality)* (2010), 88 CCPB 95, 202 LAC (4th) 1. According to the employer's Collective Agreement, nurses over 65 could claim a maximum of 60 days as paid sick leave, while those below 65 were eligible for a maximum of 119 days. Similarly, nurses over the age of 65 could accumulate up to 60 days of sick leave, but those below 65 had no limit. Also, nurses over 65 were entitled to $5,000 in life insurance benefits, but the entitlement of those under 65 were twice their

annual salary. Nurses 65 years or older were also denied long-term disability and accidental death and dismemberment coverage.

[45] A Section 1 justification under the *Charter* must pass the Oakes Test, established by the Supreme Court of Canada in *R v Oakes*, [1986] 1 SCR 103. Under the Oakes Test, to override a constitutionally protected right (the age equality right in Section 15, for instance), a discriminatory rule must meet prescribed standards of proportionality and reasonableness.

[46] *Zurich Insurance Company v Ontario (Human Rights Commission)*, [1992] 2 SCR 321.

[47] *Ibid.*

[48] *Heidt v Saskatoon (City)*, (1988), 9 CHRR D/5380 (Sask. Bd. Inq.).

[49] *Ontario (Human Rights Comm.) v Etobicoke*, [1982] 1 SCR 202 [*Etobicoke*].

[50] *Withler v Canada (Attorney-General)*, [2011] 1 SCR 396.

[51] *R. v Kapp*, 2008 SCC 41: In its most important equality decision since *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 [*Law*], the Supreme Court moved away from a focus on human dignity, and returned the discrimination lens to the Andrews Test (established in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143): To prove discrimination, an applicant must show that they were treated differently because of an enumerated or analogous ground, and the treatment was based on stereotype and prejudice.

[52] *Gosselin, supra* note 7.

[53] Likewise, court and tribunal decisions have established that restricting student summer jobs to students aged 18-24 is not discriminatory under the ground of age. See, for example: *Mayo v Iron Ore Co. of Canada (2002)*, 43 CHRR D/65.

[54] *Decision No 512/06,* 2011 ONWSIAT 2525 (CanLII).

[55] In a similar case, *Zaretski v Saskatchewan (Workers' Compensation Board),* [1997] 8 WWR 422, the Saskatchewan Court of Queen's Bench ruled on Section 68(2) of the Saskatchewan *Workers' Compensation Act 1979,* which denies loss of earnings benefits to workers over the age of 65 and substitutes them with significantly lower annuity benefits. The court held that the Saskatchewan law violated Section 15(1) of the *Charter*

but it was justified under the *Charter*'s Section 1 exception, because creating a distinction between lost earning benefits and retirement benefits was a reasonable and rational objective that had been applied proportionately. Leave to appeal to the Saskatchewan Court of Appeal was dismissed in the case, [1998] S.J. No. 319. Similarly, leave to appeal to the Supreme Court of Canada was also dismissed, [1998] SCCA No. 305), January 28, 1999.

[56] The decision gave preference to broader social and economic considerations over age equality rights of senior workers. The minority dissenting note found the section discriminatory because it failed "to take into account the claimant's already disadvantaged position within Canadian society as a senior worker […], thereby perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society."

[57] *Laronde v New Brunswick (Workplace Health, Safety and Compensation Commission), 2007* NBCA 10, 312 NBR (2d) 173.

[58] *Law*, *supra* note 51.

[59] *Riddell v IBM Canada*, 2009 HRTO 1454 (QL) [*Riddell*].

[60] In *Price v Top Line Roofing Ltd*, 2013 BCHRT 306, the British Columbia Human Rights Tribunal stated at para 77: “If job performance is the issue, an employer must treat the older employee with the same respect accorded to all employees, that is, notice of the job performance problems and an opportunity to meet the workplace standard”.

[61] *Kearns v Dickson Trucking Ltd. (1988)*, 10 CHRR D/5700 (Can. Trib.).

[62] *Clennon v Toronto East General Hospital*, 2009 HRTO 1242 [*Clennon*].

[63] *Adams v Bata Retail (1989)*, 10 CHRR D/5954 (Ont. Bd. Inq.). For a similar judicial finding, see *Watchman v Canada Safeway Ltd.* (1992), 16 CHRR D/322 (BCCHR).

[64] *Broadley v Steel Co. of Canada Inc. (1991)*, 15 CHRR D/408 (Ont. Bd. Inq.).

[65] *International Brotherhood of Electrical Workers, Local 353 v Black & McDonald Limited, 2010 CanLII 58144 (ON LRB).*

[66] *Cowling v Alberta (Employment and Immigration) (No 2)*, 2012 AHRC 12. In *Quebec (Commission des droits de la personne) c. Cie Miniere Quebec Cartier (1994)*, 23 CHRR

D/408, the company dismissed an older manager as part of its corporate reorganization. However, evidence showed that managers over 52 years of age were disproportionately impacted by the new changes. No evidence of reasonable accommodation (like transfer to another position) was presented, so age discrimination was established. However, this decision was reversed by the Québec Court of Appeal in *Compagnie minière Québec cartier c. Québec (Commission des droits de la personne)*, 1998 CanLII 12609 (QC CA), which found that the complainant was dismissed due to productivity issues and age was not a factor in the dismissal. The court also concluded that the employer's retirement program constituted sufficient termination notice.

[67] *Kuun v University of New Brunswick (1984)*, 6 CHRR D/2557 (NBCA).

[68] *Law v Thames Valley District School Board*, 2011 HRTO 953 (CanLII).

[69] *Northern Regional Health Authority v Horrocks*, 2021 SCC 42. See also: *Robson v University of New Brunswick,* 2022 CanLII 40804 (NB LEB).

[70] In an early case, *Derkson v Flyer Industries Ltd. (1977)*, (Unreported), the board rejected defences of *res judicata* or *estoppel* (which argued that the matter had been dismissed at arbitration) and justified hearing the case under the human rights umbrella because the issues, parties, and remedies were different before the two forums. Qtd. in Walter Tarnopolsky and William Pentney. *Discrimination and the Law*. Toronto: Thomson and Carswell, 2004 (Part II 7-23) [Tarnopolsky].

[71] Pnina Alon-Shenker. "Ending Mandatory Retirement: Reassessment". *Windsor Review of Legal and Social Issues 35* (2014). 22-53. [Alon-Shenker, "Reassessment"]. In 1889, Germany became the first state to introduce a social security pension system for those 70 and over (later changed to 65); Great Britain introduced its old age legislation in 1908, and the US *Social Security Act* came into effect in 1935. In the Canadian context, according to Lynn McDonald, *supra* note 14, the Hudson Bay Company was the first Canadian employer to introduce provisions for sickness and old age for "deserving" employees as early as the Eighteenth Century. The Grand Trunk Railway brought in the first industrial pension plan in Canada, as a "management tool" to earn employee loyalty and retain or get rid of employees as needed. Canada's *Social Security Act* was passed in 1951, and the *Old Age Security Act* was restructured through the 1960s and 1970s; in 1965, the Canada/Quebec Pension Plan (CPP/QPP) came into force and normalized retirement as part of the life course. McDonald reveals that a 1938 Queen's University survey had found that 70 percent of Canadians had no old age income protections.

[72] Alan Walker. "Active Ageing in Employment: Its Meaning and Potential". *Asia-Pacific Review 13.1* (2006). 78-93. Walker notes: "Retirement is both the leading form of age

discrimination and the driving force behind the wider development of ageism in modern societies. [It] is an age discriminatory social process designed to exclude older people en masse from the workforce".

[73] Under the BFR rule, mandatory retirement would be justified if employers or pension providers can demonstrate with tangible evidence that the mandatory retirement policy is an occupational (work-related) necessity, and they would suffer undue hardship without the mandatory retirement provision. Courts apply strict rules to assess the legitimacy of BFR claims.

[74] In the federal jurisdiction, and in Ontario, Quebec, Manitoba, and the Yukon, mandatory retirement is expressly prohibited, except under very limited conditions or if it is proven as a BFR.

[75] The human rights statutes of Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, and Saskatchewan allow mandatory retirement if its prohibition would affect "the operation of a *bona fide* retirement or pension plan". This wording, which is unanimous in the statues of all these jurisdictions, allows mandatory retirement only under a strict condition: the pension plan provider must provide proof that the mandatory retirement provision is necessary for the plan's operation and sustainability.

[76] Section 4(6)(a) of the *Act* allows "the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan". In *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc.,* [2008] 2 SCR 604 [*Potash*], the Supreme Court of Canada interpreted the meaning and scope of this section. According to the Supreme Court, under Section 4(6)(a), the employer or plan provider is not obligated to prove that the retirement rule is necessary to the pension plan's operation and sustainability. To establish the plan's legality, the plan provider must prove its *bona fide* status: the provider must show that the plan is registered under the provincial *Pension Benefits Act*, it was instituted in good faith, and it was set up in the best interest of employees.

[77] Alon-Shenker. "Reassessment", *supra* note 71.

[78] Macnicol, *supra* note 13 at 37-38.

[79] Macnicol, *supra* note 13, calls it the "lifeboat principle", which assumes that there is a fixed number of jobs in a nation's economy at any given time, and a just sharing of jobs is thus mandated. The principle was advanced by British employers and trade unions in

the 1930s, 1970s, and 1980s during times of economic recession and high unemployment (43).

[80] The dissenting note in *McKinney, supra* note 6, rebutted this argument at 430-31: "Are objective standards of job performance a demeaning affront to individual dignity? Certainly not when measured against the prospect of getting 'turfed out' automatically at a prescribed age, and witnessing your younger ex colleagues persevere in condoned relative incompetence on the strength of a 'dignifying' tenure system. The elderly are especially susceptible to feelings of uselessness and obsolescence. Forced removal from the work force strictly on account of age can be extraordinarily debilitating for those entering their senior years."

[81] In the same vein, as Macnicol, *supra* note 13, points out, it can also be argued (even though such binary oppositions are not conducive to productive discussions) that there is a downside to the so-called “youth society” that new employers promote. Macnicol notes: “Youth correlates with high levels of crime, single parenthood, unemployment, suicides, homicides, drug abuse, traumatic deaths of all kinds, motor vehicle accidents, high health and education expenditure, and so on” (4).

[82] *Ibid.* at 52.

[83] *Ibid.* Macnicol defines a “generation” as a “25-year birth cohort” and argues that classifications like older generation, baby boomers, welfare generation etc., are misleading; there is wide diversity among population sub-groups and assigning generational characteristics to groups leads to age stereotypes and flawed policy choices.

[84] *Ibid.*

[85] See, for example, Professor Bora Laskin’s arbitration decision in *Re Rexall Drug Co. Ltd. And International Chemical Workers’ Union, Local 279 (1953)*, 4 LAC 1468. Tarnopolsky, *supra* note 70. (Part II, 7-19).

[86] *Etobicoke*, *supra* note 49.

[87] *City of Saskatoon v Sask. Human Rights Commission and Craig [1989] 2 SCR 1297* at p. D/212, para 20. See also the Supreme Court of Canada’s comment in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR [*Dairy Pool*] at page 518: “If a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be *bona fide*”.

[88] *Brossard (Town) v Quebec*, [1988] 2 SCR 279.

[89] In *Air Canada v Carson*, [1985] 1 FC 209 at p. D/2850 [*Carson*], the federal Court of Appeal held that the employer's policy not to hire pilots over the age of 27 was discriminatory: "It seems entirely reasonable to enquire if it is not possible or practical to deal with those pilots on an individual basis rather than preventing their initial employment by a blanket refusal to hire".

[90] *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*], where the Supreme Court of Canada rejected the argument that the mandatory retirement of Canadian Airlines pilots under a federal statute was discriminatory.

[91] As the OECD has acknowledged, one aspect of involuntary retirement is that retirees are made to feel that the benefits they are being offered at mandatory retirement might not be available when they face redundancy later in their careers (qtd. in McDonald, *supra* note 14). A 2005 study based on StatsCan's *General Social Survey in Canada* (2002) concluded that 30 percent of early retirees reported that they had retired involuntarily. Qtd. in G. Schellenberg, M. Turcotte, and B. Ram. "Preparing for Retirement". *Canadian Social Trends 78* (2005): 8-11.

[92] *Bell Canada v Office and Professional Employees' International Union Local 131*, [1974] SCR 335.

[93] *McKinney*, *supra* note 6. The *McKinney* judgement has found frequent references in tribunal and courts decisions on mandatory retirement. For example, in *Vilven v Air Canada*, [2009] CHRD 24, the tribunal noted the Ontario Superior Court's approach to the issue of mandatory retirement: "In *Association of Justices of the Peace of Ontario*, the Ontario Superior Court of Justice found that the provision in the *Justices of the Peace Act* which provides for mandatory retirement of justices of the peace at the age of 70 violated s. 15(1) of the *Charter* and was not saved by s. 1. The Court noted that in the course of only three decades, there has been a striking change in the legislation and public attitudes concerning mandatory retirement in Ontario [….] The Court contrasted the situation in Ontario in 2008 to the social and economic context in which *McKinney* was decided in 1990. In the 16 years since the Supreme Court of Canada's decision, there has been a sea change in the attitude toward mandatory retirement in Ontario. The Ontario legislature confirmed that mandatory retirement involves age discrimination and abolished it in the public and private sectors in December 2006" (paras. 20-21).

[94] The dissenting note in the case argued that the *Charter* applied to universities like Guelph, because universities performed an important public function and the government exercised considerable control over them.

[95] *Harrison v University of British Columbia*, [1990] 3 SCR 451.

[96] *Stoffman*, *supra* note 26.

[97] *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570. This was revised by the Supreme Court of Canada in *Cooper*, *supra* note 90, which restricted the jurisdiction of human rights commissions and tribunals over *Charter* issues, on ground that this would violate the doctrine of separation of powers between the executive and the judiciary.

[98] *Cooper*, *supra* note 90.

[99] *Etobicoke*, *supra* note 49.

[100] *Ibid*., at p. 213, the Supreme Court declared that parties cannot contract our of human rights obligations: “Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy”.

[101] *Winnipeg School Div. No. 1 v Craton*, [1985] 2 SCR 150.

[102] *Saskatoon City*, *supra* note 86. See also, *Moose Jaw (City) v Sask. Human Rights Commission and Day*, (1989), 11 CHRR D/217 (SCC), where the Supreme Court of Canada used the same reasoning to reject that the mandatory retirement of a firefighter at age 62 violated the Saskatchewan *Human Rights Act*.

[103] In *Etobicoke*, *supra* note 49, at para 208, the Supreme Court of Canada set down subjective and objective tests for BFR: “To be a *bona fide* occupational qualification and requirement, a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and […] not for ulterior or extraneous reasons aimed [to] defeat the purpose of the *Code*. In addition, […] in an objective sense, [the requirement must be] reasonably necessary to assure the efficient and economical performance of the job”. The Etobicoke Test was revised by the unified approach to assess discrimination adopted by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Comm.) v BCGEU*, [1999] 3 SCR 3 at para 54 (now referred as the Meiorin Test): “An employer may justify the impugned standard by establishing on the balance of probabilities: (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; (2) that the employer adopted the particular

standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer". It may be noted that the subjective and objective components of BFR had earlier been suggested in *Cosgrove v City of North Bay*, 1976 BOI 75A.

[104] *Dickason*, *supra* note 18. The dissenting judgement in the case noted that the university had not considered alternatives to mandatory retirement; it challenged the assumption of the majority that forced retirement enhanced the intellectual strength of the university by infusing young talent into academia. The dissent also rejected that age was synchronous with intellectual decay and youth with innovation, equating these ideas with the very stereotypes that human rights law sought to eliminate. The dissenting note also stated that the majority judgement had not taken into consideration the impact of forced retirement on the health and self-esteem of the retired faculty.

[105] *Supra*, note 6.

[106] The board of inquiry decision in the *Dickason* case above merits a quick summary, particularly on the question of mandatory retirement in the university context. The board criticized the university's mandatory retirement argument that younger faculty showed more academic creativity and resilience. The board stated that the university had not demonstrated that elimination of mandatory retirement would significantly reduce job prospects for young academics. Moreover, a short-term effect on the appointment of younger academics did not justify the wholesale dismissal of all competent academics over 65. The university had also failed to show why alternative non-discriminatory practices would not achieve the same or better results than mandatory retirement. The board decision also drew attention to the detrimental effects of mandatory retirement on the health and self-esteem of senior faculty.

[107] *Potash*, *supra* note 76.

[108] See *supra*, note 103.

[109] The Supreme Court of Canada also rejected that Section 4(6)(a) attracts the Reasonableness Test to analyze if a mandatory retirement provision in a pension or retirement plan is justified. The Reasonableness Test was used by the Supreme Court of Canada in *Zurich* (*supra*, note 46); the test is based on Section 11 (1)(a) of the Ontario

Human Rights Code, which provides an exemption from discrimination where "the requirement, qualification or factor is reasonable and *bona fide* in the circumstances".

[110] See, for example: *Hope v St. Catherines (City) (1998)*, 9 CHRR D/4635 (Ont. Bd. Inq.).

[111] *Riddell*, *supra* note 59**:** While the severance offer made by the employer in this case was not an offer of early retirement, the tribunal nevertheless endorsed the notion that it was not discriminatory if an employer simply makes early retirement incentives available to employees.

[112] *Clennon*, *supra* note 62.

[113] *Deane v Ontario (Ministry of Community Safety and Correctional Services)*, 2011 HRTO 1863 (QL).

[114] *Weiler v Farncomb Kirkpatrick & Stirling Surveying Ltd (No 2)*, 2009 HRTO 528 (QL).

[115] *Durrer v Canadian Imperial Bank of Commerce*, 2008 FCA 384 (QL).

[116] *Kotecha v Affinia Canada ULC*, 2014 ONCA 411 (QL).

[117] *Gillies v Goldman Sachs Canada Inc*, 2001 BCCA 683 (QL).

[118] *Way v New Brunswick (Education) (2011)*, CHRR Doc. 11-3018 (NB Bd. Inq.).

[119] See also, for example, *Gerlach v Canada Trust Company (1990)*, 14 CHRR D/211 (BCCHR), where the mandatory retirement of a switchboard receptionist was found to violate the British Columbia *Human Rights Code* because no evidence was presented to substantiate a BFR. In a similar case, *MacDonald v Regional Administrative School Unit No. 1*, (1992), 16 CHRR D/409 (PEI Bd. Inq.), the board of inquiry upheld the mandatory retirement of school bus drivers at age 65. Expert medical evidence indicated that, as a group, drivers over the age of 65 are more likely to have accidents, and that it is impossible to test drivers individually to determine who is likely to develop health problems or create risks for others.

[120] *McKee v Hayes-Dana Inc. (1992)*, 17 CHRR D/79 (Ont. Bd. Inq.).

[121] *Ontario (Human Rights Commission) v Ontario (Ministry of Health) (1989)*, 21 CHRR D/259 (Ont. CA).

[122] *O'Brien v Ontario Hydro, (1981)*, 2 CHRR D/504 (Ont. Bd. Inq.).

[123] Alon-Shenker, “The Duty to Accommodate Senior Workers: Its Nature, Scope, and Limitations”. *Queen’s Law Journal 38.1* (2012). 165-208.

[124] *Ibid*. at 191.

[125] The Supreme Court of Canada has laid out the fundamental principles of the duty to accommodate and undue hardship: “The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future”. *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 SCR 561 (CanLII). See also, the SCC judgement in the *Meiorin* case, *supra* note 103.

[126] *Clean Harbors Canada Inc. v Teamsters, Local Union No. 419,* [2013] CLAD No. 393.

[127] *Dairy Pool*, *supra* note 87 at para 62.

[128] There is some ambiguity in the existing jurisprudence as to what constitutes “serious” or “sufficient” risk to public safety to qualify as a definite BFR. The question was discussed in *Etobicoke* (*supra* note 49), but the exact nature and level of risk determination appears subjective or decided on a case-by-case basis.

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

[130] *Large v Stratford (City)*, [1995] 3 SCR 733 [*Stratford*]. The subjective and objective components of the BFR test were defined by the Supreme Court of Canada in the Etobicoke case (*supra* note 49) – later, this was revised by the unified approach adopted by the Supreme Court in the Meiorin Test (*supra* note 103).

[131] The good faith standard for BFR has been criticized in subsequent jurisprudence, because it contradicts the human rights precept that intention or good faith is not relevant in establishing *prima facie* discrimination. See, for example: *Robinson v Canada (Armed Forces) (1991)*, 15 CHRR D/95 at p. D/117.

[132] *Stratford*, *supra* note 130: The Supreme Court also stated that if an employer and a union act in good faith and agree that a rule is reasonably necessary, their agreement should not be needlessly scrutinized to probe if both parties genuinely believed in the necessity of the rule when it was adopted. This pronouncement was refuted in the minority

dissenting note in the case; it has also been seen to contradict the tenet articulated at other times by courts that collective agreements cannot willfully violate human rights principles.

[133] *Stratford*, *supra* note 130.

[134] See *supra*, note 103.

[135] *Wardair Canada Inc. v Cremona (1992)*, 146 NR 69 (Fed. CA).

[136] *Hadley v City of Mississauga*, 1976 BOI 74.

[137] *Bastide v Canada Post Corp*, 2005 FC 1410 (QL). Leaves to appeal in the case were dismissed at the Federal Court of Appeal (2006 FCA 318) and the Supreme Court of Canada (2019 SCC 67) levels.

[138] *Tearne v Windsor (City)*, 2011 HRTO 2294 (QL). In *Etobicoke*, *supra* note 49 at p. 208, the Supreme Court of Canada clarified that the burden of proof for BFR is "according to the ordinary civil standard of proof, that is upon a balance of probabilities".

[139] *Supra*, note 103.

[140] In *Winsor v Provincial Demolition and Salvage Ltd.*, [2000] NHRBID No. 1 (Nfld. Bd. Inq.), a 55-year-old complainant applied for a construction job and was told that his age was a factor in not being hired. The respondent did not attend proceedings to present a BFR defence, so the board of inquiry found in favor of the complainant.

[141] *Little v Saint John Shipbuilding and Drydock Co. (1980)*, 1 CHRR D/1 (NB Bd. Inq.).

[142] *Canada (Canadian Human Rights Commission) v Voyageur Colonial Ltd. (1980)*, 1 CHRR, D/239 [*Voyageur*]. It may be noted that the Meiorin Test has now replaced the subjective and objective tests used in this case.

[143] *Canada (Human Rights Commission) v Greyhound Lines of Canada Ltd. (1984)*, 6 CHRR D/2512 (Can. Trib.).

[144] *Ibid.*, at p. 22-23. This decision should be read as reversing the conclusion of the *Voyageur* case (*supra* note 142), as both cases had exactly similar circumstances.

[145] *Canada (Canadian Human Rights Commission) v Greyhound Lines of Canada Ltd*., 1987 CanLII 5315 (FCA).

[146] *Carson*, *supra* note 89.

[147] *Cranston v Canada (1993)*, 22 CHRR D/22 (Can. Trib.). The case has a convoluted history, going through appeals, cross appeals, referrals, and reconstituted tribunals, etc. A judicial review motion was filed against this decision, and the judicial review verdict was appealed at the Federal Court.