IN THE MATTER OF AN ARBITRATION

(Under the *Labour Relations Act, 1995*)

BETWEEN:

UNIVERSITY HEALTH NETWORK
(TORONTO GENERAL SITE)

("UHN")

-AND-

ONTARIO NURSES' ASSOCIATION

("ONA")

AND IN THE MATTER OF an arbitration of ONA Grievance CM-34, dated May 12, 2012 (Benefits after age 70) under collective agreement between the parties;

BEFORE: G. T. SURDYKOWSKI – Sole Arbitrator

APPEARANCES:

For UHN: Brian O'Byrne, Counsel; Marc Rodrigue, Counsel; David Brook, Director of Labour Relations; Marina Eckert, Intern, Human Resources.

For ONA: Philip B. Abbink, Counsel; Michael Mandarino, Student-at-Law; Judy Mcllwaine, ONA Labour Relations Officer; Cyndra McGoldrick, ONA Bargaining Unit President.

HEARING HELD IN TORONTO, ONTARIO ON MAY 8, 2013; WRITTEN SUBMISSIONS COMPLETED MAY 27, 2013.

AWARD – PHASE 1

I. WHAT THIS CASE IS ABOUT

1. ONA grieves that UHN has discriminated against the grievor contrary to the collective agreement, the Ontario *Human Rights Code* (the "Code") and the Ontario *Employment Standards Act* (the "ESA") by discontinuing the grievor's collective agreement benefits when she reached age 70. ONA also asserts that this is contrary to the *Canadian Charter of Rights and Freedoms*.

2. The parties agreed to bifurcate the proceeding into two (potential) phases. Notwithstanding Article 3.03 (and ONA's submissions in that respect) there isn't really a collective agreement issue as such. The collective agreement serves as a portal to the Code, ESA and *Charter* issues. The focus of Phase 1 is on the Code/ESA issue. If necessary, the *Charter* Issue will be deal with in Phase 2. This Award deals only with Phase 1.

II. THE FACTS

3. The parties filed the following Agreed Statement of Facts (and the documents referenced in it):

> 1. University Health Network ("**UHN**") is an organization that consists of four teaching hospitals - Toronto General Hospital, Toronto Western Hospital, Princess Margaret Hospital and the Toronto Rehabilitation Institute - located in downtown Toronto. UHN has approximately 15,000 employees.
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> 2. Ontario Nurses Association ("**ONA**") represents registered nurses at all four hospitals. One bargaining unit consists of the registered nurses at Toronto General Hospital and Toronto Western Hospital. There is a separate bargaining unit for the registered nurses at Princess Margaret Hospital and a separate bargaining unit for the nurses at the Toronto Rehabilitation Institute. ONA also represents radiation therapists at Princess Margaret Hospital in a separate bargaining unit.
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> 3. The grievance in this case - ONA Grievance CM-34, dated May 12, 2012, (Attached at **TAB 1**) involves the Toronto General Hospital and Toronto Western Hospital bargaining unit.
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> 4. The current collective agreement between UHN and ONA covering the Toronto General Hospital and Toronto Western Hospital bargaining unit consists of a central portion (Attached at **TAB 2**) and a local appendix (Attached at **TAB**

3). This collective agreement came into effect on April 1, 2011 and expires on March 31, 2014.

5. ONA is grieving that UHN violated Article 17 of the collective agreement by discontinuing semi-private hospital insurance, extended health care benefits and dental benefits for active full time nurses after they reached their 70th birthday.

6. Article 17 of the central portion of the collective agreement spells out the respective obligations of the employer and full time nurses to contribute towards the premium coverage for various insurance plans subject to the terms and conditions of those plans and as set out in the agreement. The semi-private hospital insurance plan, the extended healthcare benefits plan and the dental benefits plan all provide for coverage of active full time nurses up to age 70. No coverage is provided for active full time nurses who are 70 years of age or older.

7. The semi-private hospital insurance, the dental plan and the extended health care plan are all self-insured by UHN, although it has an ASO arrangement with Sun Life which adjudicates all claims.

8. Active full-time nurses who are less than 70 years of age have their contribution to premiums in respect of semi-private hospital insurance, extended health care benefits and dental benefits deducted from their pay.

9. UHN pays for the remaining portion of the premium cost of these benefits on behalf of active full-time nurses who are less than 70.

10. Part-time nurses do not have access to the various benefit plans set out in Article 17. Such nurses are paid a percentage in lieu of fringe benefits in accordance with Article 19.01(c) of the collective agreement.

11. The facts giving rise to the grievance were as follows:

(a) Ms. Maureen McWilliams is a long service employee of UHN. Her service date with the Hospital is February 21, 1972.

(b) Ms. McWilliams turned age 70 on March 10, 2012. She was advised by UHN's Human Resources Department that her benefit coverage would cease once she reached age 70. She was told that no members of the ONA bargaining unit, are provided with semi-private hospital insurance, extended health care benefits or dental benefits after they reach age 70. UHN ceased deducting Ms. McWilliams' share of the premiums for extended health care benefits and dental benefits once she reached age 70 and UHN also ceased paying its share of the premiums for extended health care benefits and dental benefits on behalf of Ms. McWilliams once she reached age 70.

12. UHN's witness would testify that it acted in accordance with the last subparagraph of Article 17.01(g) in terminating the semi-private hospital insurance, extended health care benefits and dental benefits for Ms. McWilliams once she reached age 70. That paragraph reads as follows:

> "Semi-private hospital insurance, extended health care benefits and dental benefits will be extended to active full-time nurses from the age of sixty-five (65) and up to the nurse's seventieth (70th) birthday, on the same cost share basis as applies to those nurses under the age of sixty-five (65)."

13. UHN does not pay Ms. McWilliams a percentage in lieu of benefits. UHN's witness would testify that the reason for this is that under the collective agreement, only part-time nurses receive a percentage in lieu of benefits.

14. The last subparagraph of Article 17.01(g), which is set-out above, first came into the collective agreement as a result of an interest arbitration award of a Board chaired by Christopher Albertyn, dated March 5, 2007.

15. In the collective agreement that was in effect between the parties prior to the Albertyn award (the one expiring March 31, 2006), Article 17.01(g) read:

> "For purposes of health and welfare benefits under Article 17.01, dependant coverage is available to the nurse, to cover her or his same sex partner and their dependants, in accordance with the terms and conditions of the plans.
>
> For those employees transferring from part-time to full-time, there will be no waiting period for benefits except as provided by the plan, if the part-time has over 450 hours worked. Where the nurse has not worked more than 450 hours, she or he will be given credit for those hours worked from date of hire."

16. For the renewal of that agreement, ONA proposed amending Article 17.01(g) by adding to the first paragraph the following sentence:

> "No nurse, spouse or dependant of a nurse shall be disentitled to any benefit provided in this agreement by virtue of being age 65 or greater."

17. This ONA proposal was opposed by the participating hospitals (including UHN) during negotiations and it (along with other outstanding "central" issues) went to interest arbitration before a Board of Arbitration consisting of Christopher Albertyn, Roy Filion and Elizabeth McIntyre.

18. ONA's written submissions to the Board of Arbitration regarding this issue are attached at **TAB 4**.

19. The participating hospitals' submissions to the Board of Arbitration regarding this issue are attached at **TAB 5**.

20. The Board of Arbitration's award is attached at **TAB 6**. As a result of this award, a new third subparagraph was added to Article 17.01(g) which read as follows:

> "**Benefits Aged 65 and Older**
>
> Semi-private hospital insurance and extended health care benefits will be extended to active full-time nurses from the age of sixty-five (65), and up to the nurse's seventieth (70th) birthday, on the same cost share basis as applies to those nurses under the age of sixty-five (65)."

21. In the subsequent central collective agreement (the one expiring March 31, 2011), the third paragraph of Article 17.01(g) was amended by agreement of the parties to include dental benefits. There was no other amendment to the third paragraph of article 17.01(g) in that collective agreement nor in the subsequent (and current) collective agreement which expires March 31, 2014 although ONA, during the course of negotiations for both agreements, had proposed amendments which, had they been accepted, would have eliminated the age limit of 70 in Article 17.01(g).

22. ONA and the participating hospitals did however bargain other benefit improvements for the collective agreement that expired on March 31, 2011 and the collective agreement that expires on March 31, 2014. Attached at **TAB 7** are the provisions of Article 17 from each of the collective agreements that expired on March 31, 2008 and March 31, 2011 and the collective agreement that expires on March 31, 2014.

23. Article 3.03 was first awarded by O'Shea in 1981. The wording of Article 3.03 of the central portion of the agreement has remained largely unchanged other than additions and amendments brought forth as a result of changes to the Code through the years. The words at the end of Article 3.03 "ref: *Ontario Human Rights Code*" were first included in the central agreement which expired on March 31, 2001, and were intended by the parties to mean that the provisions of the *Ontario Human Rights Code* dealing with discrimination would be applicable when interpreting that article. This paragraph is only applicable to the current grievance.

24. The parties agree that this case will involve the interpretation of various provisions of the *Human Rights Code* and also the *Employment Standards Act, 2000* and Ontario Regulation 286/01. Attached at TAB 8 for reference purposes are copies of the current *Human Rights Code*, the current *Employment Standards Act, 2000*, and the current Ontario Regulation 286/01 - all as amended.

25. The *Human Rights Code*, R.S.O. 1990, c.H19 contained the following definition of "age":

> "s.10(1) - in Part (I) and in this Part:
>
> "age" means any age of 18 years or more and less than 65 years.

26. By virtue of S.O. 2005 c.29 section 1, this definition was changed to read as follows:

> "s.10(1) - in Part (I) and in this Part:
>
> "age" means any age of 18 years or more.

27. This amendment came into effect on December 12, 2006, although the statute which contained the amendment was passed in 2005.

28. Other changes that were made to the *Human Rights Code* at the time the definition of "age" was amended, included the addition of sections 25(2.1), (2.2) and (2.3). These sections remain in the *Code* today: Sections 25(1) to 25(2.3) inclusive of the *Code* currently read as follows:

> "s. 25(1) - **Employment conditional on membership in pension plan**. - The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or an contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination.
>
> s.25(2) - **Pension or disability plan.** - The right under section 5 to equal treatment with respect to employment without discrimination because of sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the Employment Standards Act, 2000 and the regulations thereunder.
>
> s.25(2.1) - **Same.** - The right under Section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the Employment Standards Act, 2000 and the Regulations thereunder.

s.25(2.2) - **Same.** - Subsection (2.1) applies whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer.

s.25(2.3) - **Same.** - For greater certainty, subsections (2) and (2.1) apply whether or not "age", "sex" or "marital status" in the Employment Standards Act, 2000 or the Regulations under it have the same meaning as those terms have in this Act."

29. Section 1 of Ontario Regulation 286/01 reads, in part, as follows:

"s.1 - For purposes of part XIII of the Act and this Regulation,…

"age" means any age of 18 years or more and less than 65 years…"

30. Part XIII of the *Employment Standards Act, 2000* deals with Benefit Plans. Part XIII consists of two sections - s.43 and s.44 - and they provide as follows:

"s.43 - In this Part "employer" means an employer as defined in subsection 1(1), and includes a group or number of unaffiliated employers or an association of employers acting for an employer in relation to a pension plan, a life insurance plan, a disability insurance plan, a disability benefit plan, a health insurance plan or a health benefit plan.

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

1. Employees
2. Beneficiaries
3. Survivors
4. Dependants

s.44(2) - No organization of employers or employees and no person acting directly on behalf of such an organization shall, directly or indirectly, cause or attempt to cause an employer to contravene subsection (1).

31. Attached at **TAB 9** is a summary published by the Legislative Assembly of Ontario giving the chronology with respect to Bill 211 - Ending Mandatory Retirement Statute Law Amendment Act, 2005 which became S.O. 2005 c.29.

32. Attached at **TAB 10** are excerpts from the Hansard transcripts for June 7, 2005 dealing with first reading of Bill 211.

33. Attached at **TAB 11** are excerpts from the Hansard transcripts for October 19, 2005, dealing with second reading of Bill 211.

34. Attached at **TAB 12** are excerpts from the Hansard transcripts for October 24, 2005, dealing with second reading of Bill 211.

35. Attached at **TAB 13** are excerpts from the Hansard transcripts for October 27, 2005 dealing with second reading of Bill 211.

36. Attached at **TAB 14** are excerpts from the Hansard transcripts for November 16 and 17, 2005 dealing with the vote on second reading for Bill 211.

37. Attached at **TAB 15** are the transcripts of the Standing Committee on Justice Policy Debates for November 23 and 24, 2005 dealing with Bill 211.

38. Attached at **TAB 16** are excerpts from the Hansard transcripts for November 24, 2005 and December 7 and 8, 2005 dealing with third reading of Bill 211.

39. Attached at **TAB 17** is an excerpt from the Hansard transcript for December 12, 2005 confirming that Bill 211 was given Royal Assent on December 12, 2005.

40. Attached at **TAB 18** is an information circular on the Ministry of Labour website dealing with Benefit Plans.

41. Attached at **TAB 19** is an excerpt from the Policy and Interpretation Manual dealing with the *Employment Standards Act, 2000* published by the Employment Standards Branch of the Ministry of Labour dealing with Section 44(1) of the *Employment Standards Act*.

42. Attached at **TAB 20** is the submission of the Ontario Human Rights Commission to the Standing Committee on Justice Policy dealing with Bill 211, dated November 23, 2005.

43. The parties agree that arbitrator Surdykowski remains seized in respect of any allegation by ONA that various provisions of the *Human Rights Code* as well as the *Employment Standards Act, 2000* and Regulation 286/01 violate Section 15 of the Charter dealing with age discrimination. Both parties reserve the right to call further evidence regarding the alleged violation of the Charter in the next phase of the hearing.

44. The parties agree that arbitrator Surdykowski remains seized with respect to remedy, if necessary, and both parties reserve the right to call further evidence regarding remedy.

III. SUBMISSIONS

4. The following abbreviated summary of the parties' submissions at the May 8, 2013 hearing highlights the essence of their respective positions.

(a) ONA

5. ONA submits that the grievor is being discriminated against contrary to the Code because she is being denied benefits which are part of the collective agreement compensation package solely on the basis of her age.

6. ONA submits that any applicable statutory exceptions to the s. 5 (of the Code) right to equal treatment with respect to employment without discrimination must be strictly construed, and that any collective agreement provision is void to the extent that it is inconsistent with the legislation so construed. ONA argues that Article 17.1(g) of the collective agreement imposes a burden and denies the grievor a compensation benefit solely on the basis of her age, and that this is impermissible notwithstanding s. 25 of the Code. ONA submits that the Code is paramount legislation and that to the extent that the ESA exceptions are inconsistent with the Code they do not apply.

7. Counsel provided a matrix analysis of ESA Regulation 286/01 in support of ONA's submission that discrimination over age 65 with respect to health benefit plans is not permitted because s. 9 of ESA Regulation 286/01 permits such differentiation on the basis of sex or marital status, but not on the basis of age, which means that a health benefit plan which discriminates on the basis of age does not comply with the ESA and is therefore also contrary to the Code.

8. In a closely related alternative argument, ONA submits that Article 17.01(g) constitutes differential compensation treatment on the basis of age, which is a prohibited ground, and that it therefore violates the Code.

9. Counsel filed a Book of Authorities containing the following decisions in support of ONA's submissions: *C.N.R. v. Canada (Human Rights Commission)*, [1987] S.C.J. No.42 (S.C.C.); *Battleford and District Co-operative Ltd. v. Gibbs*, [1996] S.C. R.566 (S.C.C.); *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] S.C.J. No. 63 (S.C.C.); *Ontario Nurses' Association v. Orillia Soldiers' Memorial Hospital*, [1999] O.J. No. 44 (Ont. C.A.); *Ontario (Director, Disability Support Program) v.*

Tranchemontagne, [2010] O.J. No. 3812 (Ont. C.A.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J No. 12 (S.C.C); *Ontario Cancer Treatment and Research Foundation v. Ontario (Human Rights Commission)*, [1998] O.J. No. 193 (Div. Ct.); *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (Meiorin Grievance)*, [1999] S.C.J. No.46 (S.C.C.); *Hendrickson Spring (Stratford Operation) v. United Steel Workers of America, Local 8773 (Ewaniuk Grievnance)*, [2009] O.L.A.A. No. 648 (Solomatenko); *Re Salvation Army Grace Hospital and Ontario Nurses' Association*, [1986] O.L.A.A. No. 43 (Roberts); *Royal City Ambulance Services Ltd. v. Ontario Public Service Employees Union, Local 231 (Ontario Health Premium Grievance)*, [2008] O.L.A.A. No. 135 (Roberts); *London (City) v. Canadian Union of Public Employees, Local 101 (Union/policy Grievance)*, [2007] O. L.A.A. (Marcotte); *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No.46 (S.C.C.); Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th 3d. (Markham, Ontario: LexisNexis, 2008).

(b) UHN

10. UHN denies any violation of the collective agreement, Code or ESA. It says that its treatment of the grievor is entirely consistent with the collective agreement, and argues that Article 17.1(g) does not violate the Code because the *prima facie* age discrimination under that provision is specifically permitted by s. 25 of the Code.

11. UHN submits that it has agreed to continue benefits to employees over the age of 65 but less than 70 even though it was not obliged to do so. UHN argues that it is otherwise entitled to treat employees under 18 or over 65 in any way it likes for benefits purposes so long as it complies with the ESA, which it asserts it has. Counsel submits it is clear from the case law that an employer can do what it is doing in this case with, he points out, ONA as its collective bargaining partner (notwithstanding that Article 17.1(g) was imposed by an interest Board of Arbitration over ONA's objection).

12. Counsel reviewed the legislative and collective bargaining history as demonstrated by the documentary evidence is support of UHN's submission that the issue is *res judicata*, or that issue estoppel applies, and that in the circumstances raising the issue in this grievance constitutes bad faith and abuse of process. In that respect, counsel points to ONA's repeated attempts to obtain the same result it seeks in this proceeding in collective bargaining and interest arbitration. UHN argues that it is inherently bad faith and an abuse of process for a party to seek a benefit or remedy in a grievance arbitration which it repeatedly sought and failed to obtain in bargaining or interest arbitration. That is particularly so in this case, says counsel, because although ONA did not achieve its collective agreement goal in bargaining or interest arbitration it obtained other benefits as

"tradeoffs" in those collective bargaining processes. Counsel says this attempt by ONA simply doesn't pass the "smell test".

13. In support of its *res judicata*/issue estoppel assertion, UHN argues that the issue was dealt with by the Albertyn interest Board of Arbitration in the *Participating Hospitals and O.N.A.*, [2007] 88 C.L.A.S. 301 proceeding. UHN submits that the concepts of *res judicata* and issue estoppel apply notwithstanding that that was an interest arbitration proceeding, and that the grievance in this proceeding is really a collateral attack on the Albertyn decision.

14. UHN also argues that s. 44 of the ESA applies equally to everyone in these circumstances

15. *Participating Hospitals and O.N.A.*, [2007] 88 C.L.A.S. 301 (Albertyn, Chair); *Chatham-Kent (Municipality) and O.N.A.*, (2010) 202 L.A.C. (4th) 1 (Etherington); *Toronto (City) and C.U.P.E., Local 79*, [2011] 105 C.L.A.S. 283 (Randall), aff'd *C.U.P.E. v. Toronto (City)*, (2012) 218 L.A.C. (4th) 1, ONSC 1158 (Div. Ct.) – "*Toronto (City) #1*"; *Strathroy-Caradoc (Municipality) Police Services Board v. Strathroy-Caradoc Police Assn.*, (2012) 216 L.A.C. (4th) 199 (Cummings); *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 CanLII; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (SCC) – "*Toronto (City) #2*"; *Doering v. Grandview (Town) (1975)*, [1976] 2 S.C.R. 621 (S.C.C.), generally referred to as "*Doering*"; *Las Vegas Strip Ltd. v. Toronto (City)*, (1996) 30 O.R. (3d) 286 (Ont. Gen. Div.), aff'd (1997) 32 O.R. (3d) 651 (Ont. C.A.); *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (SCC); *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 (SCC).

(c) Reply

16. I accepted the parties' agreement to submit mutual written "reply" argument. UHN delivered its 7-page written reply on May 17, 2013, and ONA delivered its 16-page written reply on May 27, 2013 (both in accordance with the agreed to schedule).

17. The essence of the reply submissions (which as my summary demonstrates are comprehensive) are as follows.

(i) UHN

18. UHN reiterates its submission that there is no violation of the Code when employees over age 70 are excluded from a collective agreement benefit plan generally

available to employees. UHN submits that it is clear from a statement by the then Minister of Labour, from the debates in the Legislature, and from the Ontario Human Rights Commissions' submission to the Standing Committee dealing with Bill 211 that everyone recognized that the purpose of the amendment to the definition of "age" in the Code was to prohibit mandatory retirement, but that this was not intended to alter the *status quo* with respect to benefit plans, and in particular the right of employers to either provide or not provide insured benefits to employees aged 65 and older in their sole discretion (or as required by a collective agreement).

19. Counsel detailed another "before and after" review. He points out that before the Code defined age as "any age of 18 years or more and less than 65 years", so that discrimination on the basis of age 65 or older was not prohibited and employers were free to decide whether or not to provide benefits to employees who were 65 or older. If they chose to stop benefits at age 65 or 66 or 70, this was not improper since it did not offend the Code. Because Ontario Regulation 286/01 under the ESA deals with benefit plans and provides that in the Regulation and Part XIII of the ESA "age" is defined as "any age of 18 years or more and less than 65 years", after the Code's definition of age became "any of age of 18 years or more" it was necessary to add sections 25(2.1), (2.2) and (2.3) in order to maintain the before "age" amendment *status quo*. That is, the effect of the addition of sections 25(2.1), (2.2) and (2.3) to the Code is that it continues to not be a violation of the Code for an employer not provide benefits available to other employees to employees over 65 years of age. Accordingly, and as UHN submits the arbitrators in *Chatham-Kent (Municipality)* and *Strathroy-Caradoc (Municipality)* recognized, the Code and the ESA read together only prohibit discrimination on the basis of age against employees with respect to benefits between ages 18 and 65 and that benefit plans which discriminate against employees over age 65 and over, or in this case over age 70, are not unlawful.

20. UHN submits that there is no merit to ONA's alternative argument that even if Article 17.01(g) is not contrary to the express provisions of the Code it is still contrary to the Code because the grievor is now getting less compensation than nurses who are less than 65 because this is no more than the "flip side" of ONA's first argument. Whether characterized as a benefit or as compensation, the fact is that the benefit or compensation in question involves the application of a benefit plan and the Code permits an employer to discontinue benefits for employees age 65 or older. UHN submits that accepting ONA's argument would render sections 25(2.1), (2.2) and (2.3) of the Code meaningless and defeat their purpose. Pointing to the Supreme Court of Canada's decision in *Rizzo and Rizzo Shoes Limited*, and the Ontario Court of Appeal's decision in *Orillia Soldiers' Memorial Hospital*, UHN submits that ONA's argument leads to an unreasonable

internally inconsistent application of the Code which is inconsistent with its purpose of s. 25.

21. UHN submits that ONA's matrix analysis of ESA Regulation 286/01 is not helpful because the definition of "age" in it is "any age of 18 years or more and less than 65 years" and this case concerns age 70 and over, and that the prohibition against age discrimination for benefits purposes therefore ends at age 65.

22. UHN submits that contrary to ONA's submission, s. 5 is the section in the Code that sets out the right to be free from discrimination in employment on the basis of certain prohibited grounds, and s. 25(1) specifies that s. 5 is infringed if employment is denied or made conditional upon enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance which makes a distinction, preference or exclusion on the basis of a prohibited ground of discrimination. UHN argues that s.25 does not apply in this case because the grievor has not been denied employment, and her employment has not been made conditional in any way. The only thing the grievor doesn't have that full time nurses under age 70 have is certain benefit coverage which sections 25(2.1), (2.2) and (2.3) of the Code, read together with ESA benefits Regulation O. Reg. 286/01 make clear is not a violation of the Code.

(ii) ONA

23. Relying on the Supreme Court of Canada's decision in "*Toronto (City) #2*", ONA submits that there is no basis for UHN's assertions of *res judicata* or issue estoppel. ONA argues that the strict requirements for the application of *res judicata* or issue estoppel are not met in this case, and that even if they are it is appropriate for me to exercise my discretion not to apply either doctrine on the basis of fairness. ONA cites *Danyluk* and *Penner* in support of its alternative submission that I have a residual discretion not to apply *res judicata* or issue estoppel and that it would be unfair and work an injustice to do so in this case.

24. Citing *Brown & Beatty,* 1:0000, *Revera Retirement LP v. Armstrong*, [2010] O.J. 2470; 195 L.A.C. (4th) 191 (Div. Ct.), and *Winnipeg Regional Health Authority v. M.G.E.U.*, (2006) 156 L.A.C. (4th) 142 (Peltz), ONA submits that the purpose and issues addressed in an interest arbitration is significantly different from those of a grievance rights arbitration. ONA points out that the Albertyn Board gave no reasons for awarding Article 17.01(g), and says that the issue of whether Article 17.01(g) contravenes the Code has never been determined on the merits of concrete facts. Counsel submits that it was not incumbent on ONA to challenge the interest arbitration decision which awarded that

provision because that collective agreement awarded expired before any bargaining unit employee, including the grievor, reached age 70.

25. ONA submits that there is equally no merit to UHN's abuse of process submission, because there is no basis for a suggestion that the grievance herein is oppressive or vexatious, or that it violates the fundamental principles of justice. ONA advances substantially the same arguments it makes with respect to the application of *res judicata* and issue estoppel in that respect.

26. ONA submits that the *Chatham-Kent (Municipality)*, *Toronto (City) #1*, and *Strathroy-Caradoc* arbitration decisions which UHN relies on are distinguishable on the facts, that the comments in those decisions are *obiter*, and or of little persuasive value in this case. (I do not find it necessary to detail counsel's assertions in that respect.)

27. ONA denies that the statements of the Minister of Labour or anything else said in the Legislature or to the Standing Committee are probative of any issue before me (citing *Rizzo and Rizzo Shoes Limited*). Further says counsel, the political statements gathered in Appendix A to ONA's written reply are either equivocal or support ONA's assertion that the principal purpose of Bill 211 was to protect the rights, dignity and self-esteem of older workers.

28. ONA disagrees with UHN's submission regarding the meaning and application of *Rizzo and Rizzo Shoes Limited*, and the Ontario Court of Appeal's decision in *Orillia Soldiers' Memorial Hospital*. Counsel submits that: "If the purpose of the Code is to protect rights as stated in the preamble, and the purpose of Bill 211 is to protect the rights of older workers as stated repeatedly in the Hansard transcripts, an interpretation which defeats those purposes is absurd." That is, that it is UHN's interpretation which leads to an absurd result. ONA also submits that s. 25 of the Code recognizes a meaningful distinction between benefits per se and benefits as a form of compensation and that benefits are a subset of compensation. ONA argues that the Code also recognizes that exclusion from a benefit plan deprives individuals of valuable compensation, and that discrimination results without equalization in that respect. Counsel submits that benefits are a form of conditional compensation, and that permitting discrimination in a scheme which insures against future uncertainties "in no way logically implies that it is permissible to discriminate in respect of the compensation paid by the employer to, or on behalf of, an employee" and that: "To argue otherwise is a fallacy: treating unlike things as being identical."

29. ONA submits that UHN's reading of s. 25 is overly restrictive and not supported by the wording of s. 25(1). ONA argues that it is also inconsistent with the overall

structure of both s. 25(1) and the Code read as a whole, and particularly the paramount right in s. 5. ONA also argues that as a bargaining unit employee the grievor could not bargain directly with UHN and it is an inescapable condition of the grievor's employment that she is subject to the discriminatory benefits plan.

30. ONA submits that the Article 3.03 prohibition against discrimination indicates that the parties' intention is that the general definition of "age" in the Code applies, and that any distinction between employees over age 18 of the basis of age is unlawful discrimination.

IV. DECISION

(a) *Res Judicata*, Issue Estoppel and Abuse of Process

31. I find it appropriate to deal with UHN's gateway assertions regarding *res judicata*, issue estoppel and abuse of process first.

32. *Res judicata*, issue estoppel and abuse of process are related doctrines which are used to preserve the integrity of the judicial process and the justice system. These doctrines can apply in any case, including cases which allege human rights or *Charter* violations. The Supreme Court of Canada's decisions in *Toronto (City) #2*, *Danyluk*, and *Doering* demonstrate that all three doctrines are applicable to grievance arbitration proceedings, and that a labour arbitrator should apply them when and as appropriate. It is both appropriate that arbitrators have these tools available, and consistent with the concept that, subject to the requirements of fairness, natural justice, and applicable legislation, an arbitrator is the master of his own procedure.

33. Issue estoppel is a branch of *res judicata* and in this case they are conveniently dealt with together. The twin principles underlying these doctrines are that except in special circumstances (and subject to the available appeal or judicial review processes) a final decision on the merits of substantially the same issue by an adjudicator of competent jurisdiction should put an end to the litigation; and a party should not be vexed more than once in the same cause. There are three preconditions which must be met for *res judicata* or issue estoppel to apply:

(1) substantially the same issue must have been determined in the prior decision raised as a bar;

(2) the prior decision must be a final decision by an adjudicator of competent jurisdiction; and,

(3) the prior decision must be binding the parties or their privies.

34. I agree with ONA that neither *res judicata* nor issue estoppel apply to this proceeding as a result of the *Participating Hospitals and O.N.A.* interest arbitration decision.

35. First, the fact that interest arbitration proceedings in the "hospital" sector as defined in the *Hospital Labour Disputes Arbitration Act*, are governed by that legislation. Grievance arbitrations are governed by the *Labour Relations Act, 1995*, begins the demonstration of the significant differences between the two processes. Interest arbitration is a substitute (albeit in my view a poor one in most sectors) for collective bargaining. When collective bargaining parties are unable to make their own collective agreement deal they can (or are required by statute to) take the matter to an arbitrator who settles the collective agreement issues the parties cannot and completes the collective agreement. The parties are obliged to live with the arbitrator's determination for the term stipulated. Grievance arbitration on the other hand is a mandatory alternative (to the Courts) quasi-judicial adjudication process which finally determines disputes between the parties concerning the interpretation or application of the collective agreement. The Courts have recognized that this difference between the two processes is significant. As the unanimous Divisional Court wrote in *Revera Retirement LP* (paragraph 8):

> 8. In this proceeding the arbitration was an interest arbitration rather than a rights of grievance arbitration. The Supreme Court has recognized that, while a rights or grievance arbitration is adjudicative, an interest arbitration is more or less legislative in nature: see *Canadian Union of Public Employees (CUPE) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 …

36. Second, the Board of Arbitration in *Participating Hospitals and O.N.A.* addressed Article 17 at pages 28-32 of Chair Albertyn's governing decision. The only reference to Article 17.01(g) is in paragraph 58 on page 29, which reads in its entirety as follows:

> 58. ONA proposes an addition to Article 17.01(g), guaranteeing no disentitlement to benefits by reason of passing age 65. We award what has been agreed between the Hospitals and OPSEU, with the necessary alterations:
>
> **Benefits Aged 65 and Older**
>
> Semi-private hospital insurance and extended health care benefits will be extended to active full-time nurses from the age of sixty-five (65), and up to the nurse's seventieth (70th) birthday, on the same cost share basis as applies to those nurses under the age of sixty-five (65).

37. As ONA points out, Chair Albertyn offered no reasons for awarding Article 17.01(g) as written. Although this is typical of interest arbitration awards (particularly when it is a 3-person Board comprised of a Nominee selected by each party and a neutral Chair), I do not subscribe to what I consider to be that unfortunate practice because I believe it is more likely to hinder than help future dealings between the parties, both generally and, in the application and administration of the collective agreement. In any event, the *Participating Hospitals and O.N.A.* decision does not indicate that anyone, including the Board of Arbitration considered or paid any attention to the application of the Code or ESA (or the *Charter*) to Article 17.01(g). There is certainly no indication that Chair Albertyn made any determination in that respect.

38. I am also not satisfied that it is an abuse of process in this case for ONA to pursue substantially the same objective in this proceeding that it failed to achieve at interest arbitration. There may be circumstances in which doing so will constitute an abuse of process. However, it not rare for a party to try to obtain a right or benefit in collective bargaining or at interest arbitration either to codify a right it believes it already has, or which it doesn't realize it already has. Further, it is not apparent what if any "trade off" benefits ONA obtained in return for the rejection of its Article 17.1(g) proposal.

39. UHN does not rely on the *Chatham-Kent (Municipality)* decision for its *res judicata*/issue estoppel argument. I take it from that, and from the fact that the collective agreement provisions in issue in that case were different from Article 17.01(g) in this case, that the employer in that case is not a privy of the "Participating Hospitals" employer party in the *Participating Hospitals and O.N.A.* interest arbitration.

40. However, UHN does rely on *Chatham-Kent (Municipality)* in support of its abuse of process argument.

41. *Toronto (City) #2* demonstrates that abuse of process is a closely related adjunct doctrine to *res judicata* and issue estoppel. The doctrine of abuse of process is used to prevent litigation which would be detrimental to the adjudication process and would bring the administration of justice into disrepute It is available in circumstances in which the preconditions of *res judicata* or issue estoppel are not met, but where allowing the litigation to proceed would violate the principles of judicial (or quasi-judicial) integrity, finality, and economy. As with *res judicata* and issue estoppel, the fact that a party wishes to advance additional facts or new arguments which could reasonably have been raised in the prior proceeding will not save the party from the application of the doctrine of abuse of process. A party is expected to bring its whole case forward the first time, and except in special circumstances a party will not be permitted to in effect re-

open litigation to raise a matter which could have been but wasn't brought forward the first time, regardless of the reason for the omissions in the previous proceeding.

42. At pages 6-7 of his decision in *Chatham-Kent (Municipality)* Arbitrator Etherington wrote that ONA asserted that the collective agreement in that case made:

> … distinctions in the provision of benefits on the basis of age and that these distinctions are disadvantageous and prejudicial on the basis of age. [ONA] notes that the Ontario government passed amendments to the *Human Rights Code*, effective December 12, 2006, which removed protection for mandatory retirement at age 65 or greater. The amendments changed the definition of age in the Code so that in general, discrimination against employees aged 65 or older is no longer permitted. However, at the same time the Code was amended to include sections 25(2.1) to (2.3) to create an exception to the new general prohibition on discrimination against those aged 65 or older. Those sections provide that the right to equal treatment without discrimination on the basis of age is not infringed by benefit, pension, superannuation or group insurance plans or funds that comply with the ESA and the regulations thereunder. Section 44(l) of the ESA states that "except as prescribed", no employer shall provide, offer or arrange for a benefit plan that treats employees differently because of age. However, the Regulation on Benefit Plans (O. Reg, 286/01) permits age-based discrimination over age 65 because age is defined as any age 18 years or more and less than 65 years. Sections 7 and 8 of the Regulation also permit age-based distinctions with respect to life insurance plans and short and long term disability plans. The combined effect of sections 25(2.1) to (2.3) of the *Human Rights Code*, the ESA provisions, and Regulation 286 on Benefit Plans is that employee life insurance plans and short and long term disability plans that provide differential and prejudicial treatment for workers aged 65 and over are deemed to not violate the *Human Rights Code*. **[**ONA**]** asserts that these provisions permit differential treatment of employees aged 65 and over in the provision of employee life insurance and disability plans and thus violate s. 15 of the *Charter of Rights and Freedoms* because they discriminate on the basis of age. **[**ONA**]** further contends that these alleged violations of s. 15 cannot be saved as reasonable limits that are justifiable under s. 1 of the *Charter*.
>
> As an alternative argument, **[**ONA**]** asserts that even if the challenged provisions of *Human Rights Code*, ESA and Benefit Plan Regulation are found to be constitutional, the post 65 benefit provisions of the collective agreement are contrary to s. 5(1) of the *Human Rights Code* because they discriminate on the basis of age. It contends that benefits are clearly part of an employee's overall compensation package, and because nurses aged 65 and over are entitled to less benefits than those who are under 65, they are receiving less overall compensation for their work than nurses who are less than 65. **[**ONA**]** argues that even if the law permits the Employer to restrict certain benefits based on age, in order to avoid discrimination on the basis of age that is contrary to s. 5(1) of the Code, it is required to provide nurses aged 65 and older with overall compensation that is equivalent to nurses who are under age 65. On this alternative argument, **[**ONA**]** also contends that if the Employer seeks to have such differential treatment in terms of overall compensation upheld it must satisfy the criteria for a bona fide occupational qualification (BFOQ) and satisfy its duty to accommodate to the point of undue hardship.

43. That is, ONA mounted substantially the same attack on the collective agreement provisions in *Chatham-Kent (Municipality)* that it advances against Article 17.01(g) in

this case. The major difference is that ONA's primary argument in *Chatham-Kent (Municipality)* focused on the Charter, with the same s. 5 Code argument made in the alternative. In this case ONA has launched a two-pronged attack. ONA does not concede as it apparently did in *Chatham-Kent (Municipality)* that the *prima facie* combined effect of of sections 25(2.1) to (2.3) of the *Human Rights Code*, the ESA provisions, and ESA Regulation 286/01 on Benefit Plans is that employee health benefit plans that provide differential and prejudicial treatment for workers aged 65 and over are deemed to not violate the *Human Rights Code*. Its first primary argument that that is not the case is constructed on an analysis of the interplay between s. 25 of the Code and Regulation 286/01. Substantially the same s. 5 of the Code argument in the alternative. Its second primary argument is the so far unarticulated Charter attack which has been bifurcated into Phase 2

44. For analytical purposes the issue in *Chatham-Kent (Municipality)* was the same. Analytically, it makes no difference that the grievance in that case concerned employees over age 65 and the grievance in this case concerns an employee over age 70. ONA's positions in this proceeding are the same as its positions in *Chatham-Kent (Municipality)*. The only real difference is that it seeks to litigate the issue that it conceded in in the prior case; namely, whether the combined effect of sections 25(2.1) to (2.3) of the Code, the ESA provisions, and ESA Regulation 286/01 is that employee health benefit plans that provide differential prejudicial treatment for workers aged 65 and over violate the Code. Clearly, that argument could have been advanced in *Chatham-Kent (Municipality)*.

45. I am satisfied that the fundamental issue that ONA raises in this case is substantially the same if not identical to the fundamental issue in *Chatham-Kent (Municipality)*; namely, whether discriminating against employees over the age of 65 with respect to benefits is contrary to the Code. I am also satisfied that all of the arguments that ONA makes in Phase 1 in this case were or could have been made in *Chatham-Kent (Municipality)*. ONA could have sought judicial review of the decision in *Chatham-Kent (Municipality)*, but it appears that it chose not to. I am satisfied that by pursuing fundamentally the same grievance against UHN, ONA is effectively mounting a collateral attack on *Chatham-Kent (Municipality)*. I am satisfied that granting ONA a determination of the Code issue in Phase 1 would effectively allow it to re-litigate the issue determined in *Chatham-Kent (Municipality)*, and that this would tend to debase rather than enhance the labour relations system of grievance arbitration. I am satisfied that it would constitute an abuse of process to allow ONA a "second kick at the can" by permitting it to re-litigate the same *Human Rights Code* issue that it raised and had determined in *Chatham-Kent (Municipality)*.

46. I am satisfied that ONA's *Human Rights Code*/ESA arguments in Phase 1 of this case must be dismissed as an abuse of process. I am not satisfied that there is any cogent reason to exercise my discretion to allow ONA a second determination notwithstanding that conclusion.

(b) In the Alternative – The Code Issue on the Merits

47. However, in the event that I am wrong to dismiss ONA's *Human Rights Code* as an abuse of process I will examine ONA's arguments on their merits.

48. In this jurisdiction there is no grievance arbitration doctrine of *Stare decisis* (which strictly speaking in the judicial sphere requires a court to follow the decisions of a superior court). That is, a grievance arbitration decision or line of decisions is not strictly speaking binding on another arbitrator. (This actually isn't inconsistent with the doctrine of *Stare decisis* because no arbitrator is "superior" to another within the meaning of the doctrine.) However, arbitrators do recognize the concept of *jurisprudence constante*; namely, that notwithstanding that every arbitrator is independent, as a group arbitrators should adjudicate in a predictable and non-chaotic manner. Certainty has a significant value in labour relations. Accordingly, lines of arbitral "authority" have developed, and an arbitrator will not readily depart from an applicable established line of such authority unless he is convinced that changes in the legislative framework or in society require an alteration in course. However, lines of authority tend to evolve to reflect changes in society or legislation, and the more established the line of authority the more difficult it is to persuade an arbitrator to depart from it. Of course there is a first case on every issue, but even here an arbitrator will generally follow even a first reasoned decision on an issue unless he is convinced it is wrong.

49. *Chatham-Kent (Municipality)* dealt with substantially the same issue that is presented in Phase 1. At pages 44-47 of that decision Arbitrator Etherington reviewed the legislative history of Bill 211:

> The *Ending Mandatory Retirement Statute Law Amendment Act*, S.O. 2005, c. 29 (2005 - Bill 211) came into effect on December 12, 2006. Prior to Bill 211, there was no legislation that prescribed mandatory retirement at age 65 for workers generally. But mandatory retirement policies - and the termination of workplace benefits - at age 65 were lawful because the *Human Rights Code*, R.S.O. 1990, c. H.19, only protected workers from age-based discrimination when workers were between the ages of 18 and 64. For employment purposes only, prior to December 12, 2006, the Code defined "age" as meaning "an age that is eighteen years or more and less than sixty-five years". Because age-based distinctions were permitted at age 65, prior to Bill 211 most benefit plans terminated benefits at age 65.

Bill 211 changed the definition of age in the *Human Rights Code* to remove the upper limit so that "age" is now defined as "an age that is l8 years or more". As a result, mandatory retirement at age 65 is no longer lawful for most employees and workplace rules, practices and policies that make distinctions based on age (18 or older) may be subject to complaints of age discrimination under the Code.

While Bill 211 extended the right to equality in employment to older workers, it carved out an exception in the area of benefit plans so that some distinctions based on age are still permissible. Bill 211 maintained the status quo under ESA Regulation 286/01 which permits an employee benefit, pension, superannuation or group insurance plan or fund to make distinctions based on age where those distinctions are made on an actuarial basis. Bill 211 amended s. 25 of the *Human Rights Code* to provide as follows:

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

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

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

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

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

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

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

When introducing Bill 211, the government stated its objective as being to end mandatory retirement and remove discrimination in the workplace against older workers "while not undermining existing pension, benefit and early retirement rights." In its documents released to explain Bill 211, the government stated that "[t]he status quo with respect to disability plans, life insurance plans, and health benefit plans will be maintained. The provision of benefits to workers aged 65 and older will continue to be at the employer's discretion." The government pointed out that under the ESA "employers are prohibited from discriminating on the basis of age in providing benefits to employees aged 18 to 64. This provision will remain in place." However the government also noted that "nothing in the legislation prevents employers from providing benefits to employees aged 65 and more." (Statement of the Minister of Labour to the Legislature introducing Bill 211 (7 June 2005), Tab 6 UBD vol. 3; and Ontario Ministry of Labour *FAQ: Mandatory Retirement* (12 December 2005 update), Tab 4 UBD vol.3).

50. Arbitrator Etherington then focused on ONA's primary *Charter* argument in that case. The *Charter* issue is not before me in Phase 1 of the proceeding. What is before me is ONA's alternative s. 5 Code argument. Arbitrator Etherington rejected that argument in *Chatham-Kent (Municipality)* (at page 78) because he was satisfied that:

> …by the plain meaning of the express terms of s. 25(2.1), workplace benefits that discriminate against workers aged 65 and older cannot be challenged as violations of section 5 of the *Human Rights Code*. The clear express statement in section 25 that such provisions will not constitute an infringement of section 5 does not allow any room for reliance on the principles of interpretation referred to by the Union. … To accept it would require me to find that sections 25(2.1) to (2.3) of the *Code* were of no force or

> effect, despite my findings above that they constitute a reasonable limit under section 1 of the *Charter*.

51. I reject ONA's submission that this is *obiter*. I accept and agree with Arbitrator Etherington's analysis and conclusions.

52. What Arbitrator Etherington did not have before him in *Chatham-Kent (Municipality)* was ONA's argument concerning the interplay between the Code, and the ESA and ESA Regulation 286/01.

53. The well-established fundamental rule of statutory interpretation is that the words of a statute or Regulation must be given their plain and ordinary meaning unless it is clear from the structure of the provision read in context that a different or special meaning is intended, or the plain and ordinary meaning result would be illegal or absurd. All words must be given meaning, different words are presumed to have different meanings, and specific provisions generally prevail over general provisions.

54. It is also well-established that human rights statutes are remedial legislation which is intended to prevent or correct discriminatory practices, including systemic discrimination, against identified protected groups. As such, human rights legislation has therefore been accorded near or quasi-constitutional status. In addition, a more flexible approach to interpretation has been adopted and strict grammatical construction does not necessarily rule. This does not mean that the fundamental rule of statutory interpretation has been tossed out of the adjudication window. But it does mean greater attention must be paid to the dominant purpose of (in this case) the *Human Right Code* and that specific limiting exceptions to the protections in the Code are strictly construed. The underlying premise is that the strict approach to statutory interpretation should not be used to minimize or enfeeble human rights protections. This tends to lessen the prevailing effect of specific over general provisions. The Supreme Court of Canada has not deviated from Lamer J.'s statement more than 30 years ago in *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 1545 (at page 158) that a human rights statute "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law".

55. Notwithstanding this, and the fact that it has been said by many (including me) that human rights are fundamental rights which all humans in an ordered and just society are entitled to, not all discrimination is prohibited. Whatever the merits of the rationale for the exceptions, the fact is that in our society discrimination is permitted against humans who are under age 18 and to a lesser but still significant extent against those who are over age 65.

56. In this case, the grievor has not been denied continued employment. Nor has her continued employment been made conditional upon enrolment in the health benefit plan. Indeed, ONA's complaint is that she is being denied benefits. In any case, I agree with UHN that s. 25(1) of the Code does not apply.

57. ONA argues that because s. 9 of ESA Regulation 286/01 does not permit discrimination in health benefit plans on the basis of age, the permissive s. 25(2.1) of the Code does not apply and general Code prohibition against discrimination of the basis age prohibits UHN from discontinuing heath plan benefits for employees over (in this case) age 70. I do not agree.

58. To repeat, s. 25(2.1) of the Code stipulates that the general "… right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit … plan … that complies with the *Employment Standards Act, 2000* and the Regulations thereunder." However, it is significant that in s. 1 of ESA Regulation 286/01 "age" is defined as "any age of 18 years or more and less than 65 years"; and s. 25(2.3) of the Code stipulates that "… subsections (2) and (2.1) apply whether or not "age", "sex" or "marital status" in the *Employment Standards Act, 2000* or the Regulations under it have the same meaning as those terms have in this Act." [Emphasis added.] When it amended the Code effective December 12, 2006 by eliminating the upper limit in the definition of "age" and adding s. 25 and then ss. 25 (2.1) and (2.3)) the Legislature knew that that it had not changed the definition of "age" in ESA Regulation 286/01 which mirrored the more restrictive definition in the Code prior to the amendments. On a fair purposive reading of this provision, the Legislature must have intended that the ESA definition govern. That is, s. 25(2.3) operates to incorporate the more restrictive definition of age in Regulation 286/01 into s. 25 (2) and (2.1) the Code for benefits purposes. Accordingly, so long as an employer complies with the more restrictive ESA it can discriminate against employees age 65 or over with respect to benefits.

59. Section 9 of ESA Regulation 286/01 provides that:

> **Health benefit plans, permitted differentiation re sex or marital status**
> **9.** The prohibition in subsection 44 (1) of the Act does not apply to,
>
> (a) a differentiation, made on an actuarial basis because of sex, in the rate of contributions of an employee to a voluntary employee-pay-all health benefit plan;
>
> (b) a differentiation, made on an actuarial basis because of an employee's sex and in order to provide equal benefits under the plan, in the rate of contributions of an employer to a health benefit plan;

> (c) a differentiation in an employee's benefits or contributions under a health benefit plan because of marital status, if the differentiation is made in order to provide benefits for the employee's spouse or dependent child; and
>
> (d) a differentiation in the rate of contributions of an employer to a health benefit plan, where there are specified premium rates and where that differentiation for employees having marital status and for employees without marital status is on the same proportional basis.

60. An adjudicator cannot ignore the clear meaning and intent of human rights legislation under the guise of broad and liberal or purposive construction. It is clear from the change in the definition of "age" and the wording of sections 25(2.1) – (2.3) that the Legislature intended to eliminate the right employers previously had to require employees to retire merely because they reached age 65 years by changing the Code definition of "age" and thereby making that age discrimination at and after age 65 contrary to the Code. However, when they are read together and in the context of s. 25 as a whole, it is equally clear from s. 25(2.1) which specifically states that the s. 5 right to equal treatment in employment is not infringed by an employee benefit plan which complies with the ESA and Regulations, and s. 25(2.3) which states that 25(2.1) applies whether or not "age" has the same meaning under the ESA as it does under the Code, that so long as they comply with the ESA employers are not also required by the Code to provide non-discriminatory benefits to employees who continue in employment after they reach age 65.

61. A benefit plan which does not differentiate between employees between ages 18 and less than 65 complies with the ESA, and therefore with the Code. On a plain but purposive meaning of s. 25 of the Code and Regulation 286/01 so does a benefit plan which discriminates against employees age 65 or older. The restrictive definition of "age" in the Regulation is the definition which applies to s. 9. That made it unnecessary to include age as a permitted basis of differentiation in s. 9.

62. Article 3.03 of the collective agreement adds nothing to ONA`s case or the analysis. All that this provision means is that the collective agreement is subject to the Code, which would be the case in any event. It does not have the effect suggested by ONA (see paragraph 29, above).

63. For the reasons given by Arbitrator Etherington in *Chatham-Kent (Municipality)* (see paragraph 50, above), ONA's Code s. 5 alternative argument must also fail. It is clear from the repeated statement in sections 25(1), (2), and (2.1) that those provisions were intended to prevail over the general s. 5 right to equal treatment with respect to employment.

64. Although I consider it unnecessary to delve into the statements made with respect to the over age 65 amendments to the Code which I was referred to (and which I am skeptical of given the difference between modern political words and concomitant actions), I observe that for what they are worth they are entirely consistent with my analysis in paragraphs 56-63, above.

65. There is no doubt that the grievor`s compensation package has been reduced by the value of the benefits she is no longer entitled to under the collective agreement merely because she is more than 70 years of age. However, this discriminatory treatment by operation of Article 17.01(g) of the collective agreement is permissible because it is not discrimination contrary to the Code.

66. ONA`s position in Phase 1 can therefore not be sustained.

67. If ONA wishes to proceed to Phase 2 to pursue its Charter arguments it must so advise in writing within 14 days of this Award so that appropriate hearing arrangements can be made.

68. If ONA does not advance the proceeding to Phase 2 the grievance will be dismissed.

DATED AT TORONTO THIS 24TH DAY OF JUNE 2013.

George T. Surdykowski .

George T. Surdykowski – Sole Arbitrator