

The Evolution of Employer-Sponsored Long-Term Disability Plans

Making the Case for Continued Age-Based Distinctions

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CIA Insight Statement





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1. Purpose and background

The primary audience for this report includes the legislatures that make laws in Canada and the courts, arbitrators, human rights commissions and other adjudicative bodies that interpret these laws. Other audiences are employers, unions and insurance companies that provide long-term disability (LTD) benefits to employees where an aging workforce is driving the need for changes in the design of these programs.

Discrimination on the basis of the age of an individual is not acceptable in modern society generally nor in the Canadian workplace specifically. However, in certain cases, such as the provision of insurance, age is a critical underwriting factor that cannot be ignored. Legislatures, courts, human rights tribunals and arbitrators have broadly accepted that, in the case of insurance benefits, differentiation based upon age of an individual remains appropriate to ensure that employer-sponsored group insurance plans are not unduly cost prohibitive and continue to be offered to employees as part of their compensation package.

In the case of LTD insurance, as with life insurance, premiums vary depending on the age of the insured. In addition, LTD insurance provides benefits for a limited period, generally expected to end before death and notionally tied to when an insured could reasonably be expected to cease working. Historically, the design of LTD insurance has used age 65 as the age at which an insured would be expected to cease work. For LTD insurance, using an age cut-off for the cessation of benefits also has the effect of defining the age after which coverage is no longer available.

This report will:

- 1. Discuss the changing needs of an aging workforce with respect to income protection through LTD insurance;**
- 2. Provide an overview of the current state of the law in Canada pertaining to distinctions on the basis of age in employer-sponsored LTD benefit plans;**
- 3. Demonstrate that it is good public policy to maintain the employment standards and human-rights-based legislative exceptions consistent with prevailing case law, which continue to permit differentiation on the basis of age when providing LTD benefits to employees; and**
- 4. Discuss alternate plan designs that can be considered by employers where a changing workforce drives the need for income protection after age 65.**



LTD insurance is often provided on a group basis through an employer, with the employer sometimes paying the premiums and sometimes passing those premiums onto employees directly through payroll deductions. LTD insurance underwriting, benefits claim processing, adjudication and payment are almost always provided by a third-party disability benefits insurer. Doing so allows an underwriter to rely on averages without the need to individually underwrite each insured employee, thus creating economies of scale in the provision of the insurance. However, when insurance is provided on a group basis, the ability to tailor the benefits to the circumstances of any individual is lost and many of the benefits provided under a group policy, by necessity, are uniform for all insureds.

Recently, the appropriateness of using age as a factor in determining when coverage for LTD insurance ceases and when benefits cease under a group insurance plan has been revisited by way of employees and unions filing a number of human rights tribunal complaints and grievances. These argue that, in part due to the increase in the number of older employees, such distinctions constitute unlawful discrimination under human rights and employment standards legislation as well as under the [*Canadian Charter of Rights and Freedoms*](#) (the *Charter*) and must be struck down.



2. Executive summary

Until the mid-to-late 2000s, mandatory retirement policies in Canadian workplaces were both common and lawful, with human rights and other legislation excluding employees aged 65 and older from protection against discrimination on the basis of age regarding the cessation of the employment relationship. However, in recognition of the growing demographic of older individuals seeking to work past age 65, significant legislative amendments were implemented to laws in Canada governing the workplace. These amendments eliminated mandatory retirement and recognized that age-based discrimination against older employees was no longer acceptable. However, there continued to be very specific legislative exemptions that allowed for differentiation based on age in certain benefit plans where those distinctions were made on an “actuarial basis.”



This paper focuses on LTD insurance, which is a very important form of insurance for employees, providing protection against a loss of employment income due to injury or illness. Employees are the direct beneficiaries of LTD insurance. However, it should be noted that employers and governments also derive a significant benefit from not having to support a disabled employee on a gratuitous basis, as that responsibility is placed on the LTD insurer.

A key principle of insurance is the principle of indemnity. That is, insurance is designed only

to provide a benefit to an insured in an amount no greater than an actual loss. When designing LTD insurance, the insurer must consider how much of an injured or ill employee’s income needs to be replaced and for how long. Since employees would not be expected to work their entire lifetime, a cut-off date after which benefits cease to be paid must be chosen. Historically, this cut-off date for benefits has commonly been age 65, and, in recent years, some LTD insurance programs have evolved in some cases to provide an option to continue benefits for a fixed period, such as two or five years after age 65.

In this paper, we consider the consequences of some recent legal decisions that raise or revisit the potential of a cut-off date regarding LTD benefits eligibility as no longer being permitted. We assert that, if benefits were paid for a fixed period of years in lieu of a cut-off date, the insurance would in many cases either over- or under-insure employees.



In contrast, if no cut-off date were used at all, then, absent recovery, benefits payable for the remaining lifetime of a disabled employee would be very expensive and may result in unwanted costs being borne by the vast majority of an employer's workforce to the potential benefit of only a few older employees. It is estimated that the cost of providing LTD insurance to a 60-year-old employee would more than double if benefits were paid for the employee's remaining lifetime rather than ceasing benefit payments at age 65 due to the longer expected benefit period.

With the expectation that legislation in Canada will continue to permit differentiation on the basis of age in the design of LTD insurance, but at the same time recognizing the increased desire of a growing number of older individuals to continue working, we advise that employers and insurers develop alternative program designs and involve and consider the income needs of their unionized and non-unionized employees in doing so, while ensuring that any new program design is one an insurance company is prepared to underwrite.

While alternative designs for LTD insurance programs may be better suited to meet the needs of an aging workforce, we make no recommendation as to the appropriate LTD insurance plan design for any employer, since the design will need to reflect the specifics of each workforce. Employers with many employees who continue to work past age 65 might want to modify LTD coverage to extend to age 67 or age 70, whereas such a change would not be needed for a workforce where virtually all employees retire at or before age 65. There is no one-size-fits-all solution, and any chosen plan design must also be one that an insurance company is able and willing to underwrite.



3. Relevant legislation and the *Talos* decision

In late 2006, Ontario's *Ending Mandatory Retirement Statute Law Amendment Act* (Bill 211) came into force. Prior to this legislation, there were no laws in Ontario that prohibited an employer from enforcing a mandatory retirement policy, since the Ontario *Human Rights Code* (the *Code*) only protected employees against age-based discrimination when they were between the ages of 18 and 64.

In bringing this legislation into force, Ontario recognized that certain employee benefit programs had costs that were strongly linked to the age of the employee. To ensure that these programs remained available to most workers, the legislation provided an exception for benefit plans when justified on an "actuarial basis." This was done by introducing new language under the *Code*, specifically section 25 (2.3).

In the years that followed the elimination of mandatory retirement in Ontario and the introduction of section 25 (2.3) of the *Code*, challenges to the age 65 cut-off level present in most employer-sponsored group health benefit plans (including LTD plans) were repeatedly dismissed by human rights tribunals, courts and arbitrators. A review of several of these cases is included in [Appendix A](#).

In the case *O.N.A. v. Chatham-Kent (Municipality)*, 2010, CarswellOnt 8919, OLAA No. 580, 104 CLAS 267, 202 LAC (4th) 1, 88 CCPB 95 (*Chatham-Kent*), the arbitrator provided a robust analysis of the statutes permitting the continued use of age for eligibility under benefit plans. Further analysis and excerpts from this decision can be found in [Appendix B](#).

Although we use Ontario human rights and employment standards legislation as examples of amendments made to legislation aimed at ending mandatory retirement while at the same time continuing to allow age-based distinctions with respect to certain employer-sponsored employee benefits, similar legislation was enacted in other provinces as well as for federally regulated employees.

Today, in some workplaces, an increasing number of employees are remaining at work past age 65, which is causing renewed questions about the appropriateness of the exception that allows an employer to exclude these employees from certain benefit plans.

The case law regarding the lawfulness and justification for age-based distinctions in the provision of LTD benefits was thought to be settled law until the decision by the Human Rights Tribunal of Ontario (HRTO) in *Talos v. Grand Erie District School Board*, 2018 HRTO 680 (*Talos*).



In that decision, which dealt with a provision of an employer's benefit plan that provided for termination of health, dental and life insurance benefits at age 65, the HRTO held that not only does section 25 (2.1) of the *Code* (which permits age-based distinctions in pension, benefit and insurance plans for employees aged 65 and over) violate the prohibition against age-based discrimination in section 15 (1) of the *Charter*, but the infringement could not be justified as a reasonable limit under the *Charter*.

Specifically, the HRTO held that the effect of disentitling employees aged 65 and older to group benefit insurance resulted in permitting lower compensation to older employees, thereby entrenching the stereotype that the labour of older employees is worth less.

The HRTO found that actuarial evidence available since the abolition of mandatory retirement demonstrated that the provision of health, dental and life insurance benefits to older employees under the employer's benefit plan in *Talos* was **not** financially prohibitive. It ruled that this infringement could not be justified as a reasonable limit under section 1 of the *Charter*, as the legislature could devise a less intrusive means to meet the objective of maintaining the financial viability of benefit plans.

Following issuance of the ruling in *Talos*, the Ontario Human Rights Commission issued a [news release](#) highlighting what the Commission viewed to be a significant decision, and the Chief Commissioner [further stated](#):

What this decision stands for is that it's not acceptable for employers to routinely and categorically take away benefits from older workers. The decision is important because it sends a message that older workers are equally valuable, that they're equal contributors in the workforce.

The decision sent shockwaves through the human rights and labour employment law bar, with many speculating that the implications of *Talos* would likely be far reaching. A similar statutory exemption for benefit plans exists in many jurisdictions across Canada, and *Talos* could provide an opportunity for applicants and unions to challenge other benefits and group insurance plan provisions such as LTD benefits, including that terminating LTD insurance coverage at age 65 was no longer reasonable or justifiable.

However, the HRTO decision in *Talos* has, to date, not been applied broadly by arbitrators and human rights tribunals to invalidate age-based distinctions in LTD benefit plans. Rather, adjudicators have distinguished the facts in *Talos* with those in a number of subsequent decisions where LTD benefit plan provisions have been challenged.



4. Justifying age-based distinctions

The main purpose of LTD insurance is to protect the insured from the loss of income that occurs when an injury prevents continued employment at the pre-injury rate of pay.

For LTD insurance, there are three levers affecting the price of insurance. First is the probability of a claim. Data shows that office employees have a lower risk of disability than those working in more dangerous occupations. The second lever is the income replacement benefit amount. The lower the income protection as a percentage of pre-disability income, the lower the premium will be as a percentage of income. Finally, the third lever is the benefit period – the number of months or years that the income replacement will be paid.

The first and second levers are not the focus of this report. Employers and employees can work together to minimize the probability of disability and decisions can be made on the appropriate level of coverage needed to provide proper care for disabled employees. This decision is subjective when designing a group insurance program.

It must be demonstrated that in the design of LTD insurance, differentiating coverage and benefits by age is necessary for such distinctions to be permitted. There does not seem to be any debate that insurance premiums should vary by age as a legitimate method to fairly allocate insurance costs among employees. However, what has been questioned in the wake of the decision in *Talos* is the fact that LTD insurance benefits paid to an insured who becomes disabled most often ends no later than at a specific age, which is most commonly age 65.

To examine this question of whether using age for the maximum period for benefit payments is appropriate, we consider two alternative approaches to providing LTD insurance as follows:

1. Ending the maximum benefit period to a fixed number of years, or
2. Ending the benefit period at either death or recovery with no intervening cut-off date.

To demonstrate the impact of different benefit period options for LTD insurance, we have built a model that provides a baseline benefit structure against which alternatives can be compared. The model is based on the following assumptions, which we believe are reasonable and are made for illustrative purposes and are not purported to represent the appropriate assumptions for any specific workforce:

- an assumed interest rate of 3% per annum
- the rates of incidence of disability for males as presented in the [Actuarial Report \(31st\) on the Canada Pension Plan](#) (CPP report)



- the rates of recovery and mortality for males from the Canadian Institute of Actuaries (CIA) 2019 *Group Long-term Disability Termination Study* (CIA study)
- benefits commence at disability and cease at recovery, death, or age 65
- any benefit reduction due to the Canada Pension Plan (CPP) / Quebec Pension Plan offset is ignored

This model ([Appendix C](#)) shows that the value of a benefit of \$100 per annum to an insured male who becomes disabled at age 40 is \$386.97 with a premium of \$0.59. The model also shows that the value of a benefit of \$100 per annum to an insured male who becomes disabled at age 60 is \$306.55 with a premium of \$2.83.

Termination of benefits after a fixed period

If age is not permitted to be used to determine the time at which disability payments cease, one alternative could be to pay benefits for a fixed number of years. For example, consider a disability program that pays benefits until recovery, death, **or a maximum of 20 years**.

In the absence of recovery or death, this would mean that someone becoming permanently disabled at the age of 20 would only have income protection until age 40, which would be well before the time at which income support would be expected from other sources such as pension savings and Old Age Security (OAS). The disability pension payable to a 20-year-old from the CPP would be quite modest given the small number of years as a contributor to the program.

In contrast, someone becoming disabled at age 60, in the absence of recovery or death, would receive benefits until age 80, which is well beyond the time almost all working Canadians continue to earn income from employment and well past age 70, which is the maximum age for postponing the receipt of benefits under the CPP and OAS.

As described, limiting the disability benefit period to a fixed period of years unrelated to the age at which someone becomes disabled can result in under-protection or over-protection relative to expected losses. Under-protection fails to meet the interests of society at large and over-protection fails to





meet the insurance principle of indemnity. This approach is therefore ineffective as an alternative to using age to determine the maximum period for which benefits will be paid under LTD insurance.

Termination of benefits only at recovery or death

If age is not permitted to be used to determine the time at which disability benefits cease, a second alternative could be to not have any arbitrary cut-off date and require the continuation of benefits until recovery or death.

To consider the impact on the cost of LTD insurance in this alternative, we have recalculated the premiums calculated under our base model presented above. In addition to the assumptions presented above, we have made “extending assumptions” to develop this alternative calculation as follows:

Recovery – the rates of recovery provided by the [CIA study](#) cease at age 65 since that is the age at which benefits normally cease.

- The rate of recovery for an employee disabled at age 40 is just over 0.5% by the time they attain age 64. We have assumed a constant rate of recovery of 0.5% for ages beyond age 64.
- The rate of recovery for an employee disabled at age 60 is just over 1.0% by the time they attain age 64. We have assumed a constant rate of recovery of 1.0% for ages beyond age 64.
- If an assumption of no recovery beyond age 64 were used, then the cost impact of requiring benefits to be paid without a cut-off date would increase.

Mortality – mortality rates for disabled employees are greater on average than those of the population in general.

- As with rates of recovery, the [CIA study](#) does not provide mortality rates for disabled lives after age 64. To arrive at mortality rates for disabled lives after age 64, we have taken the age 64 mortality rates and prorated them at future ages upon Statistics Canada’s [Life tables, Canada, provinces and territories, 2017-2019](#).
- If standard mortality rates were used instead of using these higher prorated mortality rates, then the cost impact of requiring benefits to be paid without a cut-off date would increase.



Based upon the assumptions used in the base model, modified above, the following table presents the expected change in LTD insurance premiums for a 40-year-old and 60-year-old resulting from the elimination of a maximum benefit period ending at age 65. The calculation of premiums assuming a cut-off of age 65 is shown in [Appendix C](#) and assuming no cut-off is shown in [Appendix D](#), summarized below.

Age	LTD insurance premium		
	Cut-off at 65	No cut-off	% change
40	\$0.59	\$0.65	10%
60	\$2.83	\$6.16	118%

The above results show that for a 40-year-old, there is an expected increase in premium of 10%. More significantly, the increase in premium for a 60-year-old would be an increase of 118% to more than double the premium if the age 65 cut-off were permitted.



5. Negotiating the design of LTD insurance

For unionized workplaces, recent arbitration and human rights cases have confirmed the importance of employers and unions being able to rely on negotiated contractual arrangements regarding the terms and conditions of benefit plans, and they have shown the chilling effect of invalidating a costly component of a unionized employee's compensation package after the parties had specifically bargained over them.

In [*Bentley v. Air Canada and Air Canada Pilots Association, 2019 CHRT 37 \(Bentley\)*](#), the Canadian Human Rights Tribunal (CHRT) dealt directly with the effect of cutting off LTD coverage for pilots when they became eligible for an unreduced pension.

The CHRT in *Bentley* also noted that a significant factor that the HRTO in *Talos* did not address was that the terms of LTD coverage is the result of collective bargaining between the employer and the union. The dollar amount of the monthly LTD benefit itself was the result of the union's success at achieving increased monthly payments for its members. The terms of the LTD provision are regularly addressed by the parties and incorporated into their collective agreements, where they agree upon the quantum of income replacement payable along with the coverage cut-off date.

In [*Rayonier v Unifor, Locals 256 and 89, 2022 CanLII 75226 \(Rayonier\)*](#) the arbitrator highlighted the negative potential impact of an LTD plan being extended to a few older employees without an age restriction on the overall cost of the benefit plan to the detriment of younger employees:

[137] Assuming that the Employer could afford some form of extended LTD coverage for workers who are aged 65-70 and assuming that the Union is serious about wanting to negotiate for such coverage, it was tempting to grant the Union's request to send the Parties back to the bargaining table. However, that would undermine the Collective Agreement already reached by the Parties. Their benefit package is a significant aspect of the employees' compensation and the Employer's cost. Each element within that package impacted the complex deal that the Parties reached. It has to be presumed that their Collective Agreement was arrived at by carefully balancing the interests of the entire workforce. Rather than allowing for the "flexibility" to bargain what the *Code's* carve out for pensions and LTD was designed to protect, invalidating the current provision would effectively undercut the collective bargaining process and have a chilling effect. Parties must be confident that the deal they reached fully resolved their issues.



The hallmarks of the *Code* and the *Charter* are their protection and balancing of the interests of those affected and ensuring that their dignity is maintained. This does not require that everyone has to be treated the same. It requires that any differences are reasonably justified and that no one will be prejudiced by the result.

[138] Therefore, for purposes of the contextual analysis, a significant factor is that the LTD coverage is the result of collective bargaining. The dollar amount of the monthly LTD benefit itself was the result of the Union's success at achieving increased monthly payments for its members. The terms of the LTD provision are regularly addressed by the Parties and incorporated into their Collective Agreements. The Parties have agreed upon the quantum of income replacement payable along with the coverage cut off at age 65. Like the circumstances in *Bentley*, these Parties have adopted an LTD Plan that provides for income protection in the event of a disability and allows for the transition for replacing disability benefits with retirement benefits when employees become eligible for an unreduced pension. This creates a tangible benefit that is consistent with the goal of the *Code* and the goals of the *Charter* by ensuring dignified treatment of all employees and respects the Parties ability to determine the conditions of the workplace for themselves. While a potentially affordable, albeit limited, LTD plan could be obtained for employees over the age of 65, that fact does not make the current LTD provision unreasonable. Just because the benefit might be affordable does not make it a requirement or a right. As pointed out above, and accepted by the Union, a line has to be drawn somewhere for LTD coverage. The age of 65 represents a demarcation that these Parties have agreed upon in free collective bargaining. While the *Talos* decision dismissed that factor as an important consideration, the long line of cases before and since *Talos* from the Supreme Court affirm that free collective bargaining is a necessary precondition to the meaningful exercise of the *Charter's* constitutional guarantee of freedom of association. Therefore, the right to free collective bargaining is one that should not be destabilized lightly. Allowing the terms of these Parties' LTD plan to remain in place as a matter of their collective choice preserves their decision to structure a compensation package that balances the need to recruit younger workers with the desire to retain an experienced workforce. It also allows them to negotiate changes in future negotiations, if they choose to do so.



See [Appendix E](#) for further summary provided by the arbitrator in *Rayonier* with respect to the reasonableness of the choice of age 65 as a limit on LTD coverage.

Using the human rights tribunal or grievance arbitration process to invalidate the terms and conditions of freely negotiated LTD benefit plans via *Charter* arguments as means to extend LTD benefit benefits to employees excluded from coverage after a certain age is not appropriate. It undermines the freedom of employee and employer in the non-unionized employment context to negotiate, agree to and rely on terms of conditions of employment and risks destabilizing the ability of the parties in the unionized workplace to engage in free collective bargaining.

However, employers in both unionized and non-unionized workplaces, particularly ones with a larger older workforce (or where the number of older workers is expected to increase in the coming years), are advised to consider proactively tackling the issue of age restrictions on LTD benefit plans, including working with their insurers to determine what alternate design choices for LTD insurance may be available.



6. Exploring alternate design choices for LTD insurance

This report demonstrates that the design of an effective LTD insurance program necessitates the use of age in differentiating eligibility and the benefit period. However, it is not necessary that the same age be used for both the age at which eligibility for insurance coverage ceases and the age at which benefits payments cease. Further, neither of these ages must necessarily be age 65.

Given the conclusion that using age to determine the cut-off for the benefit period remains appropriate, the question arises whether age 65 continues to be the most appropriate age. To some, age 65 may seem arbitrary to cease income protection. However, this choice is supported by the fact that age 65 is generally considered the “normal retirement age” under pension legislation and is also the age at which full benefits become payable under both the CPP and OAS.



Age 65 was considered a reasonable target age for retirement in the 1960s. Increases in longevity and changing societal norms over the past fifty years has shown a divide among workers with some retiring well before age 65 and others retiring later than that age. The [CPP report](#) expects approximately 90% of workers to elect to receive benefits at age 65 or earlier with only approximately 10% deferring receipt past age 65. This expectation reinforces that it is reasonable to expect workers to “target” retirement by age 65.

At the same time, some observers expect a trend towards later retirement ages for reasons including continued good health, meaningful work and insufficient retirements savings. Should such a trend occur for a significant number of workers, as time passes, the age 65 cut-off for benefits might fall short of the expected working lifetime of greater numbers of workers. Today, workers over age 65 generally do not have disability insurance coverage, which creates a gap in the income protection regime. This gap can be filled through the purchase of an individual insurance policy, but it is likely that most employees over age 65 self-insure this risk – that is, they assume that they won’t become disabled, or if they do become disabled, that they will choose retirement at that time.



To better address the future needs of workers choosing to work past age 65, consideration could be given to modifying how LTD insurance programs are designed. We present three alternatives for consideration.

Continuation of coverage and benefits to age 67

While still using age to define the cut-off date, the age could be extended from age 65 to age 67. Doing so will have a very modest impact on the expected cost of LTD insurance for a 40-year-old, which we have estimated as an increase of approximately 2%. However, a more material increase in premium of 25% would be expected for a 60-year-old. Under this design, eligibility for coverage would also be extended to workers ages 65 through 67.

Reduced benefits at older ages

Because the incidence of disability rises with age, the cost of providing income protection for one year of benefits post-disability rises with age. A solution to mitigate the increasing cost of LTD insurance for older workers is to provide a declining level of income protection such that the expected cost does not rise as quickly or at all compared to the protection provided to a worker aged 64.

Continuation of benefits for a minimum of 24 months

Rather than extending the cut-off date for all employees, an LTD insurance program could specify that the benefit cut-off date is the later of age 65 or twenty-four months of benefit payments. This design has no impact on the cost of insurance for workers under age 63. For workers over age 63 there would be material increases in premiums given the expectation that benefits could be extended beyond age 65. Under this design, in theory there would be no cut-off date for eligibility, however, in practice insurers might still limit the age at which coverage could be purchased given the increasing prevalence of disability as individuals age. This is the design adopted by Ontario's Workers' Safety and Insurance Board and other jurisdictions in Canada have made similar adjustments to provide workers over age 65 with some level of income protection for workplace injuries.

These three possible design options are a selection among a wide range of options that might best fit the needs of a particular workforce. As noted in the previous section, the key message of this report is that employers and employees need to understand the risk of disability and the cost trade-offs in the design and pricing of income protection and reach a program design that best meets the needs of the entire group of workers.

We wish to thank the CIA for publishing this report and to the many actuaries that submitted comments on the subject.



Appendix A – Decisions of courts, tribunals and arbitrators

In [*Repaye v. Flex-N-Gate Canada*, 2012 HRTO 1258](#) (*Repaye*), the applicant, who was 65 years of age, alleged that the short-term and LTD benefits provided by the applicant's employer, which are not payable to employees aged 65 and older, was discriminatory and contrary to the *Code*. The HRTO dismissed the complaint on the basis that there was no reasonable prospect that the application could succeed. In doing so, the HRTO confirmed at paragraph 21 that "it is clear that workplace short-term and long-term disability plans that differentiate because a person is over 65 cannot be challenged under the *Code*."

In [*Sobhi v. Bombardier Inc.*, 2012 HRTO 2302](#), the applicant, who was 65 years of age, alleged discrimination on the basis of age in that the terms of the insurance plan disentitled employees over 65 years old to dental and short- and long-term disability coverage, contrary to the *Code*. The HRTO confirmed the results in the *Repaye* decision and dismissed the complaint on the basis that there was no reasonable prospect that the application could succeed. In doing so, the HRTO confirmed that while employers may "choose" to extend benefits to employees who are 65 and over, a failure to do so cannot be challenged under the *Code*.

In [*Kartna v. Toronto \(City\)*, 2014 HRTO 395](#), the applicant, who was 65 years of age, alleged that the employer's plan which provided for LTD benefits until the age of 65, at which point LTD benefits terminated, was discriminatory, contrary to the *Code*. The HRTO again confirmed the *Repaye* decision and dismissed the complaint on the basis that there was no reasonable prospect that the application could succeed.

Human rights case law in other provinces provided for a similar result. In [*Barker v. Molson Coors Breweries and another \(No. 3\)*, 2019 BCHRT 192](#), the British Columbia Human Rights Tribunal (BCHRT) concluded, albeit according to section 13 (1) of the British Columbia [*Human Rights Code*](#), that the age-based reduction in the applicant's benefits were lawful as they derived from the operation of a *bona fide* group or employee insurance plan. In reaching this conclusion, the BCHRT found that it is only required to evaluate the plan as an "entire package" and not engage in "piecemeal examination of particular terms." Along this reasoning, the BCHRT concluded that the employer's benefits package was the result of bargaining trade-offs and compromises, and that there was no correspondence between the benefits in issue and age.

In [*Epcor Utilities Inc v. International Brotherhood of Electrical Workers, Local No. 1007*, 2015 CanLII 62763 \(AB GAA\)](#), a case from Alberta, a grievance was dismissed on the basis of the fact that while the employer's LTD plan eligibility cut off at age 65 was *prima facie* discrimination on the basis of age, it was a *bona fide* insurance plan, and the terms and conditions of that plan that may otherwise be viewed as discriminatory were protected by



section 7 (2) of the Alberta [Human Rights Act](#), a provision similar to section 25 (2.1) of the Ontario *Code*.

That decision was confirmed by the Alberta Court of Appeal in [International Brotherhood of Electrical Workers, Local No. 1007 v. Epcor Utilities Inc., 2017 ABCA 314](#) where the bench provided some helpful commentary on the *bona fide* nature of age limitation in insurance plans – their comments applying both to LTD plans and life insurance plans. Namely, the Alberta Court of Appeal held that in the circumstances where the source of – in that case – long-term insurance benefits is the collective agreement, it is a good indication that the insurance plan is *bona fide* and was not adopted for the purpose of defeating rights. The bench reached the conclusion that if the benefit plans operated in violation of the law, the union would not have agreed to the terms in the first place or would have negotiated with the employer to replace the offending terms.



Appendix B – Analysis and excerpts from *Chatham-Kent*

In arbitral jurisprudence, unions challenging age-based distinctions in employer-sponsored group health benefit plans include the age 65 cut-off for LTD benefits were also unsuccessful. In the leading decision in *Chatham-Kent*, the arbitrator dealt with a policy and two individual grievances that alleged that the employer violated the collective bargaining agreement, the [Ontario Employment Standards Act, 2000](#) (ESA), the *Code* and the *Charter* by discriminating against employees who were over the age of 65, in particular a cap on LTD benefits at age 65.

Rather than simply arguing that the age-based distinctions under the LTD plan violated the *Code*, the union in that case argued that the section of the *Code*, section 25 (2.3) that allowed for differentiation on the basis of age in employer group health plans, itself violated the prohibition on age-based discrimination in section 15 (1) of the *Charter* and should be held to be unconstitutional.

The *Chatham-Kent* arbitrator acknowledged that while age 65 may be a “somewhat arbitrary and historical” choice, it was based on the age at which certain government benefits become payable in unreduced amounts.

The arbitrator provided a review of the legislative history that resulted in the amendments to the ESA and the *Code*, including section 25 (2.3) which had the effect of allowing for differentiation on the basis of age in employer group health plans.

As excerpted from *Chatham-Kent*:

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



[83] 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. ...

[87] 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 “[the 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).

The result was that Ontario employers were not prohibited from providing lesser benefits to employees once they reached age 65 and employer-sponsored benefit plans that discriminated against these employees could not be challenged under the *Code*.

The arbitrator went on to find that a collective agreement that excluded LTD insurance coverage for employees over the age of 65 violated the right to equal protection and equal benefits under section 15 of the *Charter*, however, such differentiation on the basis of age was “demonstrably justifiable” and constituted a reasonable limit under section 1 of the *Charter*.

Although the age of 65 may have been based on an arbitrary and/or historical cut-off when mandatory retirement was abolished, the arbitrator noted that the legislature had to draw a line that balanced the interests of the individuals with the collective interests. The “carve out” at age 65 for pension and benefits in the *Code* and the ESA was the “line” that was drawn to match the point where unreduced government pensions become available. Similarly, the parties to the collective agreement at issue adopted the age of 65, the point that coincides with the parties’ pension and government unreduced pension availability.



In assessing whether the elimination of LTD coverage at age 65 was “reasonable or justifiable” under section 1 of the *Charter*, the arbitrator noted that “age is different” from other prohibited grounds of discrimination because aging is a shared experience by everyone. Quoting from [McKinney v. University of Guelph, 1990 CanLII 60 \(SCC\), \[1990\] 3 SCR 229](#), the *Chatham-Kent* decision noted that the issue of age raises important social and economic values that impact the question of “reasonable limits” with respect to age discrimination and section 1 of the *Charter*:

The present situation allows the parties concerned, the employers and the employees, the freedom to agree about an issue of central importance to their lives and activities. The freedom of employers and employees to determine conditions of the workplace for themselves through a process of bargaining is a very desirable goal in a free society.

The arbitrator held that while it will always be important to protect against age-based discrimination, the *Charter* also protects the freedom of association, which brings with it the protection of collective bargaining. In that context, parties must balance the interests of newly hired employees who are beginning their careers with those at the end of their careers. Freely negotiated provisions are the result of parties’ mutual agreements about how to address and balance the interests of the bargaining unit members and operational considerations.

Parties have the right to determine their own bargaining objectives. The importance of collective bargaining as an aspect of the *Charter*’s freedom of association and as a core aspect of employment in our society is considered by the Supreme Court to be a significant factor in the proportionality analysis.

In dismissing the union’s grievances, the arbitrator concluded that allowing workers to remain actively employed while providing different treatment with respect to participation in benefit and group insurance plans can be a reasonable limit on equality rights.



Appendix C – Calculation of disability benefit payable to age 65

Premium at age 40 for benefits payable to age 65

Age	Benefit	Recovery	Mortality	Term	Survival	Interest	Value
40	100	0.46064	0.03306	0.00000	1.000000	1.000000	100.00
41	100	0.41621	0.04169	0.49370	0.506300	0.970874	49.16
42	100	0.20599	0.02888	0.45790	0.274465	0.942596	25.87
43	100	0.10237	0.02170	0.23487	0.210002	0.915142	19.22
44	100	0.04819	0.01788	0.12407	0.183947	0.888487	16.34
45	100	0.02481	0.01747	0.06607	0.171793	0.862609	14.82
46	100	0.02047	0.01667	0.04228	0.164530	0.837484	13.78
47	100	0.01699	0.01644	0.03714	0.158419	0.813092	12.88
48	100	0.01331	0.01678	0.03343	0.153123	0.789409	12.09
49	100	0.00941	0.01767	0.03009	0.148516	0.766417	11.38
50	100	0.00566	0.01821	0.02708	0.144494	0.744094	10.75
51	100	0.00563	0.01895	0.02387	0.141045	0.722421	10.19
52	100	0.00559	0.01974	0.02458	0.137578	0.701380	9.65
53	100	0.00558	0.02054	0.02533	0.134093	0.680951	9.13
54	100	0.00554	0.02142	0.02612	0.130591	0.661118	8.63
55	100	0.00550	0.02235	0.02696	0.127070	0.641862	8.16
56	100	0.00548	0.02331	0.02785	0.123531	0.623167	7.70
57	100	0.00546	0.02432	0.02879	0.119975	0.605016	7.26
58	100	0.00540	0.02544	0.02978	0.116402	0.587395	6.84
59	100	0.00538	0.02660	0.03084	0.112812	0.570286	6.43
60	100	0.00534	0.02781	0.03198	0.109204	0.553676	6.05
61	100	0.00531	0.02911	0.03315	0.105584	0.537549	5.68
62	100	0.00528	0.02982	0.03442	0.101950	0.521893	5.32
63	100	0.00527	0.03048	0.03510	0.098371	0.506692	4.98
64	100	0.00523	0.03124	0.03575	0.094855	0.491934	4.67

(1) Value of benefit	\$386.97
(2) Incidence of disability	0.152%
(3) Premium = (1) x (2)	\$0.59



Premium at age 60 for benefits payable to age 65

Age	Benefit	Recovery	Mortality	Term	Survival	Interest	Value
60	100	0.255910	0.057410	0.000000	1.000000	1.000000	100.00
61	100	0.130900	0.072430	0.313320	0.686680	0.970874	66.67
62	100	0.031310	0.050260	0.203330	0.547057	0.942596	51.57
63	100	0.013920	0.037710	0.081570	0.502434	0.915142	45.98
64	100	0.011830	0.031160	0.051630	0.476493	0.888487	42.34

(1) Value of benefit	\$306.55
(2) Incidence of disability	0.923%
(3) Premium = (1) x (2)	\$2.83



Appendix D – Calculation of disability benefit payable to death

Premium at age 40 for benefits payable for life

Age	Benefit	Recovery	Mortality	Term	Survival	Interest	Value
40	100	0.46064	0.03306	0.00000	1.000000	1.000000	100.00
41	100	0.41621	0.04169	0.49370	0.506300	0.970874	49.16
42	100	0.20599	0.02888	0.45790	0.274465	0.942596	25.87
43	100	0.10237	0.02170	0.23487	0.210002	0.915142	19.22
44	100	0.04819	0.01788	0.12407	0.183947	0.888487	16.34
45	100	0.02481	0.01747	0.06607	0.171793	0.862609	14.82
46	100	0.02047	0.01667	0.04228	0.164530	0.837484	13.78
47	100	0.01699	0.01644	0.03714	0.158419	0.813092	12.88
48	100	0.01331	0.01678	0.03343	0.153123	0.789409	12.09
49	100	0.00941	0.01767	0.03009	0.148516	0.766417	11.38
50	100	0.00566	0.01821	0.02708	0.144494	0.744094	10.75
51	100	0.00563	0.01895	0.02387	0.141045	0.722421	10.19
52	100	0.00559	0.01974	0.02458	0.137578	0.701380	9.65
53	100	0.00558	0.02054	0.02533	0.134093	0.680951	9.13
54	100	0.00554	0.02142	0.02612	0.130591	0.661118	8.63
55	100	0.00550	0.02235	0.02696	0.127070	0.641862	8.16
56	100	0.00548	0.02331	0.02785	0.123531	0.623167	7.70
57	100	0.00546	0.02432	0.02879	0.119975	0.605016	7.26
58	100	0.00540	0.02544	0.02978	0.116402	0.587395	6.84
59	100	0.00538	0.02660	0.03084	0.112812	0.570286	6.43
60	100	0.00534	0.02781	0.03198	0.109204	0.553676	6.05
61	100	0.00531	0.02911	0.03315	0.105584	0.537549	5.68
62	100	0.00528	0.02982	0.03442	0.101950	0.521893	5.32
63	100	0.00527	0.03048	0.03510	0.098371	0.506692	4.98
64	100	0.00523	0.03124	0.03575	0.094855	0.491934	4.67
65	100	0.00500	0.03432	0.03647	0.091395	0.477606	4.37
66	100	0.00500	0.03771	0.03932	0.087802	0.463695	4.07
67	100	0.00500	0.04148	0.04271	0.084051	0.450189	3.78
68	100	0.00500	0.04565	0.04648	0.080145	0.437077	3.50
69	100	0.00500	0.05025	0.05065	0.076086	0.424346	3.23
70	100	0.00500	0.05539	0.05525	0.071882	0.411987	2.96
71	100	0.00500	0.06108	0.06039	0.067541	0.399987	2.70



72	100	0.00500	0.06740	0.06608	0.063078	0.388337	2.45
73	100	0.00500	0.07443	0.07240	0.058512	0.377026	2.21
74	100	0.00500	0.08224	0.07943	0.053864	0.366045	1.97
75	100	0.00500	0.09092	0.08724	0.049165	0.355383	1.75
76	100	0.00500	0.10060	0.09592	0.044449	0.345032	1.53
77	100	0.00500	0.11136	0.10560	0.039756	0.334983	1.33
78	100	0.00500	0.12340	0.11636	0.035129	0.325226	1.14
79	100	0.00500	0.13682	0.12840	0.030619	0.315754	0.97
80	100	0.00500	0.15178	0.14182	0.026277	0.306557	0.81
81	100	0.00500	0.16849	0.15678	0.022157	0.297628	0.66
82	100	0.00500	0.18716	0.17349	0.018313	0.288959	0.53
83	100	0.00500	0.20807	0.19216	0.014794	0.280543	0.42
84	100	0.00500	0.23147	0.21307	0.011642	0.272372	0.32
85	100	0.00500	0.25764	0.23647	0.008889	0.264439	0.24
86	100	0.00500	0.28698	0.26264	0.006554	0.256737	0.17
87	100	0.00500	0.31990	0.29198	0.004641	0.249259	0.12
88	100	0.00500	0.35680	0.32490	0.003133	0.241999	0.08
89	100	0.00500	0.39825	0.36180	0.001999	0.234950	0.05
90	100	0.00500	0.44480	0.40325	0.001193	0.228107	0.03
91	100	0.00500	0.49583	0.44980	0.000656	0.221463	0.01
92	100	0.00500	0.55018	0.50083	0.000328	0.215013	0.01
93	100	0.00500	0.60775	0.55518	0.000146	0.208750	0.00
94	100	0.00500	0.66830	0.61275	0.000056	0.202670	0.00
95	100	0.00500	0.73489	0.67330	0.000018	0.196767	0.00
96	100	0.00500	0.79939	0.73989	0.000005	0.191036	0.00
97	100	0.00500	0.86595	0.80439	0.000001	0.185472	0.00
98	100	0.00500	0.93393	0.87095	0.000000	0.180070	0.00
99	100	0.00500	1.00000	0.93893	0.000000	0.174825	0.00

(1) Value of benefit	\$428.36
(2) Incidence of disability	0.152%
(3) Premium = (1) x (2)	\$0.65



Premium at age 60 for benefits payable for life

Age	Benefit	Recovery	Mortality	Term	Survival	Interest	Value
60	100	0.25591	0.057410	0.00000	1.000000	1.000000	100.00
61	100	0.13090	0.072430	0.31332	0.686680	0.970874	66.67
62	100	0.03131	0.050260	0.20333	0.547057	0.942596	51.57
63	100	0.01392	0.037710	0.08157	0.502434	0.915142	45.98
64	100	0.01183	0.031160	0.05163	0.476493	0.888487	42.34
65	100	0.01000	0.034233	0.04299	0.456009	0.862609	39.34
66	100	0.01000	0.037615	0.04423	0.435838	0.837484	36.50
67	100	0.01000	0.041371	0.04762	0.415086	0.813092	33.75
68	100	0.01000	0.045530	0.05137	0.393762	0.789409	31.08
69	100	0.01000	0.050123	0.05553	0.371897	0.766417	28.50
70	100	0.01000	0.055244	0.06012	0.349537	0.744094	26.01
71	100	0.01000	0.060923	0.06524	0.326732	0.722421	23.60
72	100	0.01000	0.067224	0.07092	0.303559	0.701380	21.29
73	100	0.01000	0.074238	0.07722	0.280117	0.680951	19.07
74	100	0.01000	0.082028	0.08424	0.256521	0.661118	16.96
75	100	0.01000	0.090687	0.09203	0.232914	0.641862	14.95
76	100	0.01000	0.100339	0.10069	0.209462	0.623167	13.05
77	100	0.01000	0.111077	0.11034	0.186351	0.605016	11.27
78	100	0.01000	0.123088	0.12108	0.163788	0.587395	9.62
79	100	0.01000	0.136465	0.13309	0.141990	0.570286	8.10
80	100	0.01000	0.151393	0.14646	0.121193	0.553676	6.71
81	100	0.01000	0.168059	0.16139	0.101633	0.537549	5.46
82	100	0.01000	0.186681	0.17806	0.083537	0.521893	4.36
83	100	0.01000	0.207537	0.19668	0.067107	0.506692	3.40
84	100	0.01000	0.230876	0.21754	0.052508	0.491934	2.58
85	100	0.01000	0.256977	0.24088	0.039860	0.477606	1.90
86	100	0.01000	0.286244	0.26698	0.029219	0.463695	1.35
87	100	0.01000	0.319080	0.29624	0.020563	0.450189	0.93
88	100	0.01000	0.355888	0.32908	0.013796	0.437077	0.60
89	100	0.01000	0.397228	0.36589	0.008748	0.424346	0.37
90	100	0.01000	0.443658	0.40723	0.005186	0.411987	0.21
91	100	0.01000	0.494556	0.45366	0.002833	0.399987	0.11
92	100	0.01000	0.548776	0.50456	0.001404	0.388337	0.05
93	100	0.01000	0.606192	0.55878	0.000619	0.377026	0.02



94	100	0.01000	0.666588	0.61619	0.000238	0.366045	0.01
95	100	0.01000	0.733005	0.67659	0.000077	0.355383	0.00
96	100	0.01000	0.797342	0.74300	0.000020	0.345032	0.00
97	100	0.01000	0.863728	0.80734	0.000004	0.334983	0.00
98	100	0.01000	0.931541	0.87373	0.000000	0.325226	0.00
99	100	0.01000	1.000000	0.94154	0.000000	0.315754	0.00

(1) Value of benefit	\$667.75
(2) Incidence of disability	0.923%
(3) Premium = (1) x (2)	\$6.16



Appendix E – Arbitration analysis from *Rayonier*

Excerpt from *Rayonier v Unifor, Locals 256 and 89, 2022 CanLII 75226*:

[126] To summarize the analysis that follows, I have concluded that the Parties' choice of age 65 as the limit on LTD coverage has been demonstrated to be reasonably justified because it is rationally connected to and consistent with the age at which government pensions are unreduced and it coincides with the age at which this Collective Agreement provides an unreduced pension. The age cut-off impacts as little as possible on individuals, given the host of other benefits available to workers aged 65 and older and the demographics of this workforce. Finally, the limit on LTD coverage meets the "proportionality test" by virtue of the fact that age is a lesser concern in the context of this Collective Agreement's package of benefits and the importance of giving deference to the economic and social value of allowing employers and employees to determine the conditions of their workplaces for themselves. This is more fully explained below.

[127] The reality of this workplace is the relevant context. The vast majority of bargaining unit members in this workforce retire from this demanding work at the average age of 60. There are only four active employees aged 65+ in a workforce of close to 300. The cost increases for LTD coverage for them would impact the compensation package available to the bargaining unit as a whole. That cost could increase exponentially if the Union's expert's predictions of people working longer comes into fruition. Further, the loss of LTD coverage is offset by the potentially greater benefit available to employees from the pension plan. Declaring the LTD cut-off to be unenforceable would upset the calculations of cost that led to the Parties' joint determination of the overall compensation package, thereby undermining the *Charter's* other goal of protecting the collective bargaining process.

[128] These conclusions do not ignore the Union's very valid submissions with regard to society's attitude towards age and aging workers. The evidence of [the Union's expert] Dr. Pianosi is accepted wherein she listed the ways that older workers are too often assumed to be more prone to illness and accidents, less productive and less adaptable to change. Further, people are often upset by the very prospect of retirement because work gives them purpose, dignity and a sense of wellbeing. Therefore, a workplace that discourages employees from remaining on the job after their 65th birthday by denying them a host of benefits available to younger employees may well be perpetuating stereotypes. However, that cannot be said to be true of this workplace. The very fact that employees between the ages of 60-65 have the lowest incidence of disability claims illustrates that these workers remain productive and valued. While the pension



provisions give employees the option to retire as early as age 58, the operation of the Collective Agreement does not encourage employees to leave at age 65 because it supports workers who are 65+ with a host of health related benefits that have no age limit attached. For example, Extended Health Insurance is continued and STD payments are available for 52 weeks. Therefore, it cannot be said that this workplace, the termination of LTD at age 65 or the Collective Agreement perpetuate negative stereotypes about aging. Instead, it offers alternative protections to employees.

[129] The Union pointed out that the loss of LTD coverage at age 65 may result in employees feeling compelled to retire if they are suffering from a long term illness or disability. While there is no evidence that this has ever happened, such evidence was not necessary. Given that this was a hearing into policy grievances, the conclusion can be inferred. Nevertheless, the situation of such employees must be viewed together with the actual purpose of an LTD plan. LTD insurance exists to provide income replacement. However, unlike pensions, LTD is not designed as a lifetime income stream. It is designed to replace income until a person recovers or reaches pensionable age. There is no evidence of any LTD plan with no age cap. The benefits of LTD coverage have to be viewed in the context of these employees also having access to an unreduced pension as early as age 58 or by the time they are 65, unless they have short service. The suite of health and welfare benefits to workers beyond age 65 provides them with the opportunity to transition from LTD to a secure pension income that may even be greater than what would be available under a theoretical extended LTD plan. Therefore, they are not significantly disadvantaged by being cut off from LTD coverage. It is true that this may result in some employees deciding to retire sooner than they may have anticipated. That is not a trifling consideration. However, their dignity is protected by their having access to their pension income. The combination of STD, LTD and pension benefits creates a package that meets the needs of workers for income security as they age... .

[130] The *Talos* decision did not consider the claimant's ability to draw on OAS and CPP or personal savings as being relevant to Mr. Talos' *Charter* claim, [see para. 229]. That made sense given that he was seeking continuation of health care benefits for his family. It was the suite of those particular benefits that mattered to Mr. Talos, not whether he had an income from a different source. In contrast, the availability of CPP and OAS at 65 is a relevant factor in considering the general reasonableness or justification of having an LTD plan's coverage cease at 65 in this case when other benefits remain in place for those who are working and there is an alternate source of pension income for people as early as 58 to transition into for income security. That is another reason why this case is different from *Talos*. ...



[134] Similar to the facts in *Bentley*, the Parties in the case at hand have a pension plan that operates on the basis of a pensionable age that corresponds with the age definition in the applicable statutes. It is true that workers who are 65 and older do not have access to the LTD coverage available to younger employees, so it follows that they are treated differently than their younger colleagues. However, even though they may not have the same benefits, the Supreme Court has said time and time again that not all distinctions or difference on an enumerated ground amount to discrimination. It is the disadvantage or the loss of dignity that matters. In the case at hand, employees over the age of 65 can continue working with many health and welfare protections. It cannot be said that older workers in this workplace are significantly disadvantaged when they can continue employment with a suite of benefits. If they encounter significant health challenges, they have access to 52 weeks of Short Term Disability coverage and then the alternative of transitioning to retirement with a full pension which saves them from income insecurity and the stigma of loss of dignity.

[135] The financial implications of removing an age cut-off for LTD on the employer's costs is also an important factor to address as part of the contextual analysis as was done in the decisions involving *Chatham-Kent*, *Talos* and *Bentley*. The Union has successfully illustrated that the financial implications of securing two years of LTD coverage for its members who are 65-70 may not be as financially unfeasible as the situation faced by the employers in the earlier caselaw. In *Chatham-Kent*, the actuarial evidence showed that the cost of disability benefits for employees 65-70 would increase the employer's cost by 20-25% and increase steeply when workers entered their 60's. In *Bentley*, the cost of continuing LTD past 65 was estimated to be 18 times the cost for an average aged employee (40-45). In those cases, the financial burden of that level of coverage was taken into consideration in the conclusions that age was a justification for the termination of LTD coverage. In contrast, in *Talos*, the HRTO received different evidence that enabled it to conclude that there was no correspondingly "steep" increase in the cost of providing health and dental benefits that would justify a protection necessary to maintain the financial viability of those plans.

[136] In the case at hand, the uncontradicted evidence was that no insurers offer LTD coverage without any age restriction. Further, 99% of the available plans have a cut-off at age 65. That explains why this Union did not ultimately ask for the removal of any age cap on coverage. This Employer's insurance broker explained that the LTD costs would rise by 10% if LTD coverage was provided for employees between the ages of 65-70 for a maximum of two years. This is significantly less than was shown in the *Bentley* and *Chatham-Kent* cases. Further, nothing in the evidence was sufficient to support a finding that limited LTD coverage for two years between 65-70 would



jeopardize the financial viability of this Employer's vast operations at this time. However, the evidence of the Employer's expert was that the cost of insuring employees who are 60 or older is exponentially higher than insuring younger employees. That is based on the uncontradicted evidence of the insurance industry's experience with claims incidence and duration. Therefore, if the Union's expert's predictions of an increasingly aging workforce come to fruition, the cost implications of extending LTD coverage could become much more significant. Therefore, future costs will have implications on the compensation package available to bargaining unit members, placing the burden of coverage for the older workers falling on the younger ones.

...

[142] ...just as the government policy that created the *Code* and the *Charter* had to draw a line that balanced the interests of individuals and the collective, so too do the parties to a collective agreement have to balance interests in crafting their collective agreements. Choosing the age of 65 as a cut-off for LTD coverage has been shown to be reasonable and demonstrably justifiable because, for this workplace, the age of 65 is greater than, or coincides with, the point when these employees can access their unreduced pensions, 65 is older than the average age of retirement in this physically demanding workplace, and it connects with the point that unreduced government benefits become available. Further, given the other benefits available to employees without age restrictions, this Collective Agreement allows them to continue working beyond their 65th birthday with some significant benefits and protections if they so choose. The cut-off of LTD at age 65 creates no significant disadvantage to these employees and is the result of free collective bargaining, not the result of any stereotyping or prejudicial treatment of employees in this workplace. Even though there may be LTD plans that may be affordable for a limited period for employees between the ages of 65-70, the cost could impact the balance of interests achieved by the Parties in their complex collective bargaining process. That is a constitutionally protected process that should not be intruded upon lightly. Given the small number of bargaining unit members who work past their 65th birthday, it was reasonable to allocate resources in the ways chosen by the Parties. Therefore, it must be concluded that it is a reasonable limit on equity rights to make provisions that allow for continued employment of employees who are 65+ but treat them differently with respect to LTD coverage in this Collective Agreement. Accordingly, while the LTD coverage provided under this Collective Agreement may not be equal to that available to younger employees, it is saved by s. 1 of the *Charter*.



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