

IN THE MATTER OF AN ARBITRATION

between

**YORK UNIVERSITY
(the "University")**

and

**YORK UNIVERSITY FACULTY ASSOCIATION
(the "Association" or "YUFA")**

**2006 RETIREMENT COHORT GRIEVANCE
INTERIM DECISION
Regarding
SECTION 54 of the Labour Relations Act of Ontario**

SOLE ARBITRATOR: PAMELA COOPER PICHER

APPEARANCES FOR THE UNIVERSITY:

**Christopher Riggs, Q.C. - Counsel
Bushia Rehman - Counsel
Nadine Zacks - Student
Carey Barker - Associate Director Non-Academic
Employee Relations**

APPEARANCES FOR THE ASSOCIATION:

**Steven Barrett - Counsel
Tim Gleason - Counsel
Emma Phillips - Counsel
Suzie Young - Chief Steward
Monica Mulvihill - Staff Representative**

A hearing in this matter was held in Toronto, Ontario on October 24, 2008.

INTERIM DECISION

The York University Faculty Association, YUFA, has filed grievances dated June 20 and 29, 2006 on behalf of faculty members who were forced to retire as of July 1, 2006. Among the grievors are Barbara Evans, Nick Larry, Edelgard Mahant and Sam Mallin. YUFA refers to this group as the “2006 cohort”. YUFA asserts that the University has acted in violation of articles 3.01, 14 and 17.03 of the collective agreement, among others, by failing to exercise its managerial discretion in a fair and reasonable manner. YUFA further claims that by forcing the retirement of the 2006 cohort, the University has applied the collective in breach of section 54 of the Ontario *Labour Relations Act*, 1995, S.O., c. 1, Schedule A, as amended (the “OLRA”), which prohibits discrimination contrary to the *Canadian Charter of Rights and Freedoms*, as amended (“the Charter”).

By way of remedy, YUFA seeks a declaration of violation of the collective agreement. In addition, YUFA requests that the University offer all faculty in the 2006 cohort the option of working in a full-time capacity, with all entitlements, including full compensation, with interest.

On December 12, 2005, the Ontario Legislature passed Bill 211, c. 29 S.O., 2005, an Act to amend the Human Rights Code and certain other Acts to end mandatory retirement (“Bill 211”), in order to end mandatory retirement

effective December 12, 2006, some 5 ½ months after the 2006 cohort was forced to retire. Section 8 of Bill 211 stipulated that the *Act* would come into force one year after it received Royal Assent, i.e. on December 12, 2006.

Through section 1(1) of Bill 211, the relevant definition of “age” in the *Human Rights Code* of Ontario, R.S.O. 1990, c.H.19 (the “*Code*”) was changed from “18 years or more and less than sixty-five years” to “18 years or more”. The effect of the new definition was to invalidate mandatory retirement because under the new definition of “age”, mandatory retirement at age 65 would lose its protected status of falling outside the definition of “age” for the purposes of defining discrimination. It would thereafter fall within the scope of the definition of “age” and constitute discrimination in breach of the *Human Rights Code*.

The instant grievance focuses on the transition period for the ending of mandatory retirement, i.e. on those faculty members who were forced to retire at age 65 between December 12, 2005, when Bill 211 received Royal Assent, and December 12, 2006, when the new definition of “age” under the *Human Rights Code* came into effect to invalidate mandatory retirement.

The collective agreement provides for mandatory retirement at age 65 in article 14, as follows:

Article 14
RETIREMENT

Preamble

The Clauses of Article 14, which govern the Retirement of full-time faculty and professional librarian employees, are premised on the principle that the timing of an individual's retirement from full-time responsibilities at the University, and the assumption of any part-time responsibilities following retirement from full-time duties, shall in the normal case be influenced primarily by the wishes of the individual.

General Conditions and Definitions

- 14.01 (a) "Retirement" means the termination of an individual's full-time status at York University at any time after that individual would, if a member of the York Pension Plan, be eligible to receive a pension from the York Pension Plan (i.e., anytime after attainment of age 55). Continuation in a part-time capacity, or as "professor emeritus" or "librarian emeritus" or "senior scholar" is not inconsistent with the use of the term "retirement".
- (b) Normal retirement date shall be 1 July coincident with or next following an employee's 65th birthday.

...

The substantive issue before the Arbitrator is whether, notwithstanding article 14 of the collective agreement, the mandatory retirement of faculty members between December 12, 2005 and December 12, 2006 constituted a breach of section 54 of the *OLRA* which prohibits discrimination under collective agreements if that discrimination is contrary to the *Canadian Charter of Rights*

and Freedoms. An additional issue is whether, even if the mandatory retirement did not constitute a breach of section 54 of the *OLRA*, it amounted to a breach of the collective agreement by virtue of an alleged failure of the University to properly exercise its discretion in the course of carrying out its management rights under the collective agreement. YUFA maintains that by forcing the mandatory retirement of the grievors, the University gave no consideration to the effect of the pending legislation in Bill 211, which, as of December 12, 2006, would be removing the University's right to insist on retirement at age 65.

Prior to turning to the substance of the grievance, the parties have asked the Arbitrator to determine a threshold or preliminary issue involving the interpretation of section 54 of the *OLRA*, which provides as follows:

- 54. Discrimination Prohibited** - A collective agreement must not discriminate against any person if the discrimination is contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms.

YUFA does not argue that the University's retirement of the 2006 cohort effective July 1, 2006 breached the *Human Rights Code* because at that time, i.e. until December 12, 2006, the *Code* had an age cap which permitted mandatory retirement. As noted, because the definition of "age" under the *Code* until December 12, 2006 was "18 years or more and less than sixty-five years", the University's mandatory retirement of the 2006 cohort under article 14 of its collective agreement did not violate the prohibition in section 54 of the *OLRA* in respect of the *Code*.

YUFA's assertion, however, is that the mandatory retirement of the 2006 cohort was still a breach of section 54 of the *OLRA* because it constituted discrimination contrary to the *Charter*, which listed "age", without limitation, as a ground of prohibited discrimination. The *Charter's* prohibition against discrimination is set out through sections 1 and 15, as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Counsel for the University disputes that the mandatory retirement of the 2006 cohort through section 14 of the collective agreement could have been a violation of section 54 of the *OLRA* on the basis of alleged discrimination contrary to the *Charter*. More specifically, the University maintains that it is not open to YUFA to rely on an alleged breach of the *Charter* in asserting that the University's forced retirement of the 2006 cohort was a breach of section 54 of

the OLRA because it is common ground that the University is not itself an employer that is subject to the *Charter*.

In December of 1990, the Supreme Court of Canada in **Re McKinney v. Board of Governors of the University of Guelph et al** (1990), 76 D.L.R. (4th) 545 (S.C.C.), (hereinafter referred to as “**Re McKinney**”), held that the *Charter* was not applicable to universities, including York University, because the universities were not exercising government functions. At p. 633, the Supreme Court stated through La Forest J., speaking for the majority, the following:

THE APPLICATION OF THE CHARTER

The application of the Charter is set forth in s. 32(1), which reads:

32(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

These words give a strong message that the Charter is confined to government action. This court has repeatedly drawn attention to the fact that the Charter is essentially an instrument for checking the powers of government over the individual. ...

At pp. 638 and 639, La Forest J. continued:

It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the Charter...

The Charter apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a Charter attack cannot be sustained on that ground. There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative. Unless, then, it can be established that they form part of government, the universities' action here cannot fall within the ambit of the Charter. That cannot be answered by the mere fact that they are incorporated and perform an important public service.

At pp. 643-644, La Forest J concluded:

...My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of the Charter, but rather that the appellant universities are not part of the government given the manner in which they are presently organized and governed.

The University argues in the instant matter that the section 54 *OLRA* prohibition against collective agreements discriminating against any person contrary to the *Charter* is limited to only those collective agreements involving employers that are themselves subject to the *Charter*, which, as found in **Re McKinney**, is not the case for the University.

In direct contrast to the position of the University, YUFA maintains that notwithstanding that the University is not an employer that is itself subject to the *Charter*, section 54 of the *OLRA* has adopted the definition of discrimination under the *Charter* and prohibited all collective agreements in Ontario (be they involving employers subject to the *Charter* or not) from discriminating in violation of the definition of discrimination in the *Charter*.

Accordingly, before proceeding further, in light of the agreed fact that the University is not an employer that is itself subject to the *Charter*, the parties have asked the Arbitrator to determine the preliminary question of whether YUFA may even advance its position that the University's forced retirement of the 2006 cohort was in breach of section 54 of the *OLRA* by reason of it allegedly constituting discrimination under the *Charter*.

Because of its importance to both the threshold issue and the substantive issues of the grievance, it is helpful to look first to the decision of the Supreme Court of Canada in **Re McKinney**, *supra*. While the majority in **Re McKinney** held that universities, including York University, were not subject to the *Charter*, it went on to determine that even if the *Charter* did apply to universities, mandatory retirement would be permitted for the universities by application of section 1 of the *Charter*. The Supreme Court held that while mandatory retirement constituted discrimination on the basis of age contrary to section 15(1) of the *Charter*, the discrimination was a "reasonable [limit] prescribed by law" within the

meaning of section 1 of the *Charter*. As set out in the summary of LaForest J.'s majority decision at p. 546, paragraphs b through f, the Supreme Court drew this conclusion, in part, for the following reasons:

...the policies [of mandatory retirement] are a reasonable limit within s. 1 of the Charter. The universities' objectives are to enhance and maintain their capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal, and to preserve academic freedom and a collegial form of association by minimizing distinctive modes of performance evaluation. These are objectives of pressing and substantial importance.

The policies of mandatory retirement are rationally connected to the objectives sought. Mandatory retirement is intimately tied to the tenure system. Its elimination would adversely affect the desire to maximize academic freedom by minimizing interference and performance evaluation, because there could well be an increase in evaluation and attempts to dismiss for cause. Mandatory retirement also ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence.

In determining whether there is minimal impairment of the right, the court must determine whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given its pressing and substantial objectives. The policies meet that standard. Mandatory retirement is not wholly detrimental to the group affected; it contributes significantly to an enriched working life for its members by ensuring a large measure of academic freedom with a minimum of supervision and performance review. While it is a source of anguish to those who do not wish to retire, the detriment to those affected must be weighed against the benefit of the universities' policies to society generally and to the individuals who compose it. Mandatory retirement provides work opportunities for the young, and staff renewal is vital to the university and society. There is evidence accepted by

the courts below that on average there is a decline in intellectual ability from age 60. Therefore, the court will not second-guess the policies' use of age 65 for retirement. The effects of the policies on mandatory retirement are not so severe as to outweigh the government's pressing and substantial objectives.

On the basis of the reasoning set out above, the Supreme Court held that mandatory retirement for the universities was permissible because it amounted to a "reasonable [limit]" under section 1 of the *Charter*.

Counsel for YUFA asserts that the factors deemed relevant by the Supreme Court to the assessment of mandatory retirement under section 1 of the *Charter* have shifted and developed in the years since **Re McKinney** was decided in 1990. Accordingly, YUFA maintains that considerations that moved the Supreme Court in **Re McKinney** to find, pursuant to section 1 of the *Charter*, that mandatory retirement was a "reasonable [limit]" have substantially changed and, in its view, would not point to the same result today. More specifically, counsel for YUFA asserts that since the University was well aware that mandatory retirement would be ended as of December 12, 2006, it could no longer reasonably assert, respecting the transition period between December 12, 2005 and December 12, 2006, that the mandatory retirement of the 2006 cohort could be justified under section 1 of the *Charter* as having a particularly beneficial impact on tenure and faculty renewal.

The application of section 1 of the *Charter* to the forced retirement of the 2006 cohort, however, is an issue that will only become relevant if the Arbitrator first determines the preliminary issue in YUFA's favour.

We turn then to the determination of the threshold issue of whether section 54 of the *OLRA* prohibits the University, in application of the its collective agreement with YUFA, from discriminating against its faculty contrary to the *Charter*, notwithstanding that the University is not an employer that is subject to the *Charter*. Does the prohibition in section 54 of the *OLRA* prohibit discrimination that is contrary to the *Charter* under all collective agreements in Ontario, i.e. including those involving employers that are not subject to the *Charter*, as argued by YUFA, or, as maintained by the University, is the prohibition against discrimination contrary to the *Charter* limited in its application to only those collective agreements that involve employers that are themselves subject to the *Charter*, i.e. those who carry out government action within the meaning of section 32 of the *Charter*?

YUFA'S SUBMISSIONS:

Counsel for YUFA contends that the grammatical and ordinary meaning of the words used by the Legislature in section 54 of the *OLRA* reveal that the prohibition against discrimination is intended to exclude from all collective agreements, be they involving employers subject to the *Charter* or not, acts of discrimination as discrimination is defined in either the *Charter* or the *Human*

Rights Code. Counsel argues that the breadth and encompassing nature of the words of section 54 clearly reveal that the Legislature chose to prohibit the widest possible description of discrimination by adopting, for application to all collective agreements, the definition of discrimination found in both the *Human Rights Code* and the *Charter*. Counsel contends that there is nothing in the wording of section 54 to suggest that the prohibition against discrimination contrary to the *Charter* is intended to be restricted to the limited group of employers in Ontario that are subject to the *Charter*.

Counsel for YUFA asserts that if section 54 is limited to precluding discrimination under the *Charter* for only those employers that are subject to the *Charter*, then the reference to a prohibition of discrimination under the *Charter* in section 54 would be redundant because, he argues, in that circumstance the reference would simply be confirming what the law already provides, i.e. that employers subject to the *Charter* are prohibited from discriminating contrary to the *Charter*.

Counsel further argues, without dispute, that the legislative history of section 54 is relevant to the interpretation of section 54. In this regard counsel relies on the Supreme Court of Canada decision in **Rizzo v. Rizzo Shoes Ltd.** (1998), 154 D.L.R. (4th) 193 (S.C.C.) at paragraphs 31 and 34:

31 ... Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court ...

...

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA...

Counsel for YUFA submits that the legislative history of section 54 illustrates that section 54 is intended to prohibit discrimination in all forms contemplated by either the *Code* or the *Charter*, and to apply the same standard of protection against discrimination to all collective agreements governed by the *OLRA*.

More broadly, counsel for YUFA asserts that the interpretation of section 54 of the *OLRA* should be guided by the scheme and object of the *OLRA*, which he submits includes to "...facilitate and protect collective bargaining, to provide for the administration and enforcement of collective agreements, to ensure that rights under the Act can be exercised effectively and to recognize the importance of workplace parties adapting to change...including changes in Canadian values regarding what may constitute discrimination in employment..."

YUFA relies particularly on an arbitration decision between York University and YUSA, the York University Staff Association, which addressed the same threshold issue placed before this Arbitrator. In **Re York University and YUSA**, a decision of Arbitrator Stephen Raymond dated February 20, 2008, Arbitrator Raymond concluded, as urged by YUFA in the instant matter, that section 54 of the *OLRA* prohibits discrimination under all collective agreements where the

discrimination is contrary to either the *Code* or the *Charter* whether or not the employer is subject to the *Charter*.

YORK UNIVERSITY'S SUBMISSIONS:

Counsel for the University maintains that the arbitration decision in **Re York University and YUSA**, *supra*, was wrongly decided and urges the Arbitrator to conclude so as well. Counsel contends that the reference to the *Charter* in section 54 is intended to apply to only those collective agreements involving employers that are governed by the *Charter*. He asserts that the wording in section 54 is clear and unambiguous and provides precisely for the interpretation endorsed by the University.

Counsel comments that if YUFA's interpretation of section 54 is accepted, the conclusion would have to be drawn that the Ontario Legislature had placed a provision in the *OLRA* that is inconsistent with the Supreme Court of Canada's decision in **Re McKinney** because, counsel argues, YUFA's interpretation, effectively, would result in the application of the *Charter* to universities. Counsel argues that the Ontario Legislature has no authority to extend the scope of the *Charter* beyond its scope of application as set out in section 32 of the *Charter*, as interpreted by **Re McKinney**.

Regarding legislative history respecting section 54 of the *OLRA*, counsel for the University argues that the statements made by government officials in

2005 when Bill 211 (an Act to amend the Human Rights Code and certain other Acts to end mandatory retirement) was introduced for first and second reading clearly indicate that mandatory retirement was the prevailing norm at that time and that Bill 211 was intended to abolish it. Counsel contends that these comments would make little sense if mandatory retirement under all collective agreements in Ontario was already illegal through the application of the *Charter* pursuant to section 54 of the *OLRA*.

Counsel for the University further argues that if YUFA's interpretation of section 54 of the *OLRA* is correct then various arbitration decisions issued following the *Charter* would be wrong, including **Re OISE and Ontario Confederation of University Faculty Associations** (1987), 28 L.A.C. (3d) 161 (Burkett) where at paragraph 17, Arbitrator Burkett said the following:

17 It is clear that, absent express language to the contrary, management has the right to implement retirement policies that require mandatory retirement at age 65 notwithstanding the provisions of the collective agreement establishing seniority rights and protection from unjust discharges: see also *Re Canadian Porcelain Co. Ltd. and United Glass & Ceramic Workers, Local 249* (1981), 30 L.A.C. (2d) 40 (Brunner).

Other decisions that counsel maintains would be deemed incorrect under YUFA's interpretation include **Re Miracle Food Mart Canada and United Food & Commercial Workers' International Union, Locals 175 & 633** (1995), 48 L.A.C. (4th) 377 (Petryshen); **Re Metropolitan Separate School Board and O.P.S.E.U.** (1995), 50 L.A.C. (4th) 378 (P. Picher); **Re Superior Electrics Ltd.**

and **USW, Local 6946**, [2006] O.L.A.A. No. 92 (Roach), and **Re Imperial Tobacco v. Baker, Confectionery, Tobacco Workers and Grain Millers International Union, Local 364T**, [2002] O.L.A.A. No. 753 (W. Kaplan).

Counsel for the University further argues that if section 54 of the *OLRA* incorporates some of the *Charter* provisions, as argued by YUFA, specifically sections 15 and 1, then it should incorporate all of the *Charter* provisions, including section 32, which indicates, as found in **Re McKinney**, that the *Charter* would not apply to the University. Counsel contends that it is not appropriate for YUFA to pick those sections of the *Charter* that it deems helpful and to ignore the rest.

Counsel maintains, as well, that YUFA's interpretation would lead to an anomalous, inappropriate and illogical result because, he submits, under YUFA's reading of section 54, employees in Ontario who are unionized would have the benefit of protection against discrimination under both the *Code* and the *Charter*, while those who are unorganized and employed by employers that are not subject to the *Charter* would be subject to only the protection against discrimination as found in the *Human Rights Code*.

Counsel argues that the lack of merit to YUFA's interpretation of section 54 is further underscored by the fact, as counsel asserts, that no board, court or tribunal has been called upon to address this argument respecting section 54

since the *Charter* was brought into effect and section 48 (now 54) of the *OLRA* was amended in 1986 by Bill 7 to include a reference to it. Counsel further argues that YUFA's position is untenable because it necessitates a conclusion that the Legislature placed two inconsistent definitions of discrimination in section 54, since under the *Code* mandatory retirement would be legal (up until December 12, 2006), while under the *Charter* such mandatory retirement would not be permitted pursuant to its section 15, unless it could be justified by section 1 of the *Charter*, as occurred in **Re McKinney**.

Finally, counsel for the University disputes that his interpretation leads to redundancy, as argued by YUFA. Counsel maintains that through the passage of Bill 7 to amend the *OLRA* in 1986, the Legislature was simply ensuring that the *OLRA* would clearly indicate that not only would the prohibition against discrimination under collective agreements incorporate discrimination under the *Code* but also that it would extend to discrimination contrary to the *Charter* for those limited employers in Ontario that are subject to the *Charter*.

DECISION

Accepting the uncontested fact that the University is not itself subject to the *Canadian Charter of Rights and Freedoms* because it does not carry out government action within the meaning of section 32(1) of the *Charter*, the preliminary question to be determined is whether section 54 of the *OLRA* prohibits the collective agreement between York University and YUFA from

discriminating against any person if the discrimination is contrary to the *Charter*. As set out above, YUFA maintains that the section 54 prohibition encompasses discrimination contrary to either the *Human Rights Code* or the *Charter*, while the University asserts that the prohibition for the instant parties includes only discrimination contrary to the *Code* and does not extend to discrimination contrary to the *Charter* since the University is not itself subject to the *Charter*.

For ease of reference, section 54 of the *OLRA*, is again set out, as follows:

54. Discrimination Prohibited - A collective agreement must not discriminate against any person if the discrimination is contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms.

Section 54 describes the prohibited discrimination as that which is contrary to the *Code* or the *Charter*. The focus of section 54 is the prohibition of discrimination against “any person”. Section 54 makes no mention of the status of the “person” or the status of the employer of the person being discriminated against. It does not define the prohibited discrimination under a collective agreement according to the identity of the employer. It does not limit the prohibited discrimination that is identified by reference to the *Charter* to only those persons who are employed by the limited number of employers in Ontario that are subject to the *Charter*. The prohibition is extended to “any person” and, the Arbitrator finds, in its plain meaning “any” includes “all” persons. In the **Oxford English Dictionary**, Oxford University Press, 2nd edition, 1991, “any” is defined, in part, as follows:

...no matter which, of what kind, or how many ... it asserts concerning a being or thing of the sort named, without limitation as to which, and thus constructively of every one of them, since every one may in turn be taken as a representative. ...

What the Legislature has done through section 54 of the *OLRA*, in the Arbitrator's view, is to incorporate by reference, as the discrimination that is prohibited for any person under a collective agreement, the definition of discrimination as spelled out in both the *Code* and the *Charter*. What the Legislature has done through section 54, the Arbitrator finds, is to prohibit under any collective agreement in Ontario discrimination against any person as defined in either the *Charter* or the *Code*. To find that the protection against discrimination contrary to the *Charter* is limited to collective agreements involving employers that are subject to the *Charter* would require clear language to that effect, which is not found in section 54. Without such clear language, to find the limitation on the *Charter* protection sought by the University would fly in the face of the plain import of the words used by the Legislature and would alter their meaning, which is something an arbitrator is without jurisdiction to do.

The legislative history to section 54 of the *OLRA* that accompanied the introduction of Bill 7, which, in 1986, amended the *OLRA* to insert the disputed reference to the *Charter* in what was then section 48 of the *OLRA* (the predecessor to section 54) provides additional support for the Arbitrator's conclusion.

In 1985, the Ontario government carried out a review of its legislation and amended Ontario statutes to conform to the *Charter*, which had been brought into being in 1982. In June of 1985, an omnibus Bill, known as “Bill 7”, was introduced. Its full title was *An Act to Amend Certain Ontario Statutes to Conform to Section 15 of the Charter of Rights and Freedoms*.

Prior to the *Charter*'s enactment, section 48 of the *OLRA* prohibited collective agreements that discriminated against people on certain enumerated grounds, which included “age”, as follows:

48. An agreement between an employer or an employer's organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

...

(b) if it discriminates against any person because of his race, creed, colour, nationality, age, sex or place of origin.

Labour Relations Act, RSO 1980, c. 228, s. 48

It is noted that prior to the amendment ultimately brought about through Bill 7 in 1986, section 48 of the *OLRA* did not expressly mention either the *Code* or the *Charter* in defining the prohibited discrimination. Rather it listed its own grounds of discrimination.

Through the passage of Bill 7, section 48 was amended to eliminate its enumerated grounds of discrimination and, in its place, described discrimination as “any ground” prohibited by the *Code* or the *Charter*. Instead of defining

discrimination itself, the revision to section 48 incorporated the definitions of discrimination under the *Code* and the *Charter*, as follows:

48. An agreement between an employer or an employer's organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

...

(b) if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code, 1981* or the *Canadian Charter of Rights and Freedoms*.

Equality Rights Statute Law Amendment Act, 1986, S.O. 1986, C. 64, s. 23.

The new section 48 was subsequently renumbered as section 49.

The pertinent question in this arbitration is whether the amendment to section 48(b) brought through the passage of Bill 7 restricted the relevance of "discrimination prohibited by ... the Canadian Charter of Rights and Freedoms" to only those collective agreements involving employers that are themselves covered by the *Charter* through its section 32.

Section 22 of Bill 7, as well as statements made by government officials as Bill 7 passed through its various stages before receiving Royal Assent, reveal that the intention of the Legislature was to apply the definition of discrimination under the *Charter* to all collective agreements and not to restrict its application to only those involving employers that are themselves subject to the *Charter*.

Section 22 of Bill 7 contained an explanatory note which summarized the changes envisaged by the Bill, as follows:

SECTION 22 – Subsections 1, 3 and 4. *Labour Relations Act*. Several provisions of this Act which prohibit discrimination on the basis of a number of named grounds are expanded to prohibit discrimination on the basis of any ground not allowed by the *Human Rights Code, 1981* or by section 15 of the *Canadian Charter of Rights and Freedoms*.

[emphasis added]

The intention of the amendments to the *OLRA*, brought into being by Bill 7, was expressly stated in section 22 of the *Act* to be an “[expansion]” of the provisions of the *OLRA* which had prohibited discrimination on enumerated grounds such that they would now prohibit discrimination “on the basis of *any* [emphasis added] ground not allowed by the *Human Rights Code, 1981* or by section 15 of the ... *Charter* ...”. Section 22 contains no direct or implied suggestion that the prohibition against discrimination under the *Charter* is limited to the narrow group of employers in Ontario that are subject to the *Charter*. The language used could hardly be broader or more inclusive. As with the wording of section 54 of the *OLRA*, as discussed above, the focus of the amendments in Bill 7, as expressed in section 22, is the prohibition of discrimination. It stipulates that the prohibited discrimination is “any ground” precluded by the *Code* or section 15 of the *Charter*. As noted above, the definition of “any” includes, “... no matter which, of what kind, or how many ...”. The explanatory note does not

suggest that, in respect of the *Charter*, the “[expansion]” to section 48 through the amendment in Bill 7 is only for those employers that are subject to the *Charter* as defined in section 32 of the *Charter*. To draw such a conclusion from the words used in the explanatory note would be to distort the plain meaning of the language chosen by the government.

This same legislative intention was echoed when the government introduced Bill 7 for both first and second reading on June 11, 1985 and October 22, 1985, respectively. When Bill 7 was introduced at first reading, the then Minister of Labour made the following comments respecting the government's intention behind the proposed amendments contained in Bill 7:

This means that in Ontario no technical interpretive barriers will be placed in front of those who want to use the charter to address hidden or unintentional discrimination.

...

... Where conflicts have been found, we have been guided by cabinet's determination that Ontario's laws should reflect the spirit as well as the letter of the charter. We have not taken a narrow or technical approach.

In a similar vein, when the then Attorney General Ian Scott introduced Bill 7 for second reading some 4 months later, he stated the following:

... The function of this bill is to bring Ontario statutes – there are a number of them – into some measure of conformity with the equality rights contained in section 15 of the Canadian Charter of Rights and Freedoms and into conformity with the Human Rights Code of Ontario.

Most of the amendments in the bill deal with statutes which discriminate on the basis of age, sex, religion and marital status. This government has committed itself to eliminating all forms of discrimination and to working towards a more just and equal society. We are proceeding with the statutory amendments in Bill 7 as a necessary part of the commitment, but we realize the bill is only one step, the first step, in the process of ensuring that our laws and practices conform.

Ontario, Legislative Assembly, Official Report of Debates (Hansard), Session 33:1 (1985/10/22).

[emphasis added]

Bill 7 received Royal Assent on December 18, 1986 as the *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1985, c. 64.

The intention of Bill 7, as expressed by the Attorney General, was to encompass the government's commitment "to eliminating all forms of discrimination and to working towards a more just and equal society." It is apparent to the Arbitrator that "all" forms of discrimination were intended to be defined by reference to both the *Code* and the *Charter*. To restrict the *Charter* protection to only those collective agreements involving employers subject to the *Charter* does not fit comfortably within the expressed intention of "eliminating all forms of discrimination and ... working towards a more just and equal society". Equality is not achieved when only those employees in Ontario who fall under collective agreements with employers that are themselves subject to the *Charter* are provided with *Charter* protection against discrimination, leaving the clear

majority of employees without protection against those “forms of discrimination” found in the *Charter*.

The plain meaning of the words chosen by the Legislature in Bill 7 clearly reflected this expansive intention expressed by government officials when introducing the legislation. Through Bill 7, section 48 was amended to void a collective agreement “ ... if it discriminate[d] against any person because of any ground of discrimination prohibited by the ... *Code* ... or ...the ... *Charter*...” (emphasis added). To extract from these words in Bill 7 a limitation on the prohibition against *Charter* grounds of discrimination to only those collective agreements involving employers subject to the *Charter*, i.e. government actors, would be to turn a blind eye to the plain meaning of the words, as framed by the Legislature.

Section 48, which had been renumbered to section 49, was further revised in 1992, through the introduction of Bill 40, *Labour Relations and Employment Statute Amendment Act*, 1992, S.O. 1992, c. 21, section 26. Until 1992, section 48/49 of the *OLRA* stipulated that a collective agreement would be deemed not to be a collective agreement if there was either interference by the employer in the formation or funding of the union or if it discriminated against any person as further set out therein. Through section 26 of Bill 40, section 49 was revised to separate the no-discrimination provision from the collective agreement invalidation provision. Through this amendment in 1992, the invalidation of

collective agreements was limited to circumstances of employer interference in the formation or funding of a union. Instead of invalidating collective agreements that discriminated, section 49.2, through the amendment, simply prohibited the defined discrimination. By creating section 49.2, the Legislature allowed tribunals, boards or courts to award appropriate remedies for discriminatory provisions or actions without quashing an entire collective agreement. The new section 49.2 provided as follows:

49.2 A collective agreement must not discriminate against any person if the discrimination is contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms.

The Arbitrator was not made aware of any legislative history respecting the 1992 amendment to section 49 through Bill 40 that would suggest any intention on the part of the Legislature to constrict the grounds of prohibited discrimination as set out in the predecessor section 48 that took effect with Bill 7 in 1986. Section 49.2 has since been renumbered to the current section 54 of the *OLRA*.

Accordingly, for the reasons detailed above, the Arbitrator is satisfied that the legislative history is fully supportive of and consistent with the Arbitrator's conclusion that the plain meaning of the words of section 54 stipulate that the section 54 prohibition against discrimination under the *Charter* is applicable to all

collective agreements in Ontario and is not restricted to only those of employers that are themselves subject to the *Charter*.

The Arbitrator further finds that YUFA's interpretation is more closely aligned to the spirit of section 64(1) of the *Legislation Act*, 2006, S.O. 2006, c. 21, Schedule F which provides as follows:

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

It may be noted that this rule of interpretation was endorsed by the Supreme Court of Canada in *Re Rizzo*, *supra*, at paragraph 22, as follows:

22. I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, [now section 64 (1) of *The Legislation Act*] which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

In the Arbitrator's assessment, the interpretation of section 54 advanced by YUFA provides the "fair, large and liberal interpretation that best ensures the attainment of ... [the] object [of the *OLRA*]". Under YUFA's interpretation, all collective agreements in Ontario are subject to the same prohibition against discrimination. The uniformity of the discrimination prohibition that follows with YUFA's interpretation is more consistent with the object and scheme of the

OLRA which is, in part, to facilitate fair and effective collective bargaining across Ontario.

The Arbitrator does not accept the suggestion of the University that adopting YUFA's interpretation of section 54 of the *OLRA* leads to the implausible result of creating two inconsistent concepts of discrimination within the section. Firstly, as we have seen through **Re McKinney**, the express allowance for mandatory retirement under the *Code*, as it stood until December 12, 2006, with its definition of age discrimination expressly capped at 65 years, was reconciled with the *Charter*, notwithstanding an unrestricted definition of age in section 15 of the *Charter*. Through an application of section 1 of the *Charter*, the Supreme Court concluded that the age discrimination that existed with mandatory retirement in conflict with section 15 was permissible through the application of section 1 of the *Charter* as a "reasonable [limit] prescribed by law". Accordingly, as seen through **Re McKinney**, direct differences in descriptions of discrimination between the *Charter* and the *Code* do not necessarily create inconsistent results.

Moreover, grounds of discrimination have evolved over the years. There may well have been points in time when some enumerated grounds of discrimination have been included in either the *Charter* or the *Code* but not in both. In the Arbitrator's assessment, and as supported by the legislative history, set out above, the very reason why the Legislature, through Bill 7, defined the

prohibited discrimination in section 48 of the *OLRA* with reference to the prohibitions contained in both statutes was to make the protection against discrimination fully inclusive. Establishing protection against discrimination that was as broad as possible is precisely what was stated by the government to be the intention when Bill 7 was introduced and processed through its various stages to Royal Assent. Accordingly, the Arbitrator is satisfied that the fact that age discrimination may be defined differently in the *Human Rights Code* and the *Charter* and that a collective agreement might be measured against both definitions does not create an implausible result. Instead, it functions to provide all employees under collective agreements with equal, all-inclusive protection against discrimination.

The Arbitrator is unable to share the University's concern that YUFA's interpretation is flawed because it would provide organized employees with more protection than unorganized employees. Such a dichotomy is the norm for multiple aspects of employment life in those areas where the very ability to organize and engage in collective bargaining brings benefits not shared by unorganized employees.

The Arbitrator is further unable to agree with the suggestion of the University that if any sections of the *Charter* are invoked through section 54 of the *OLRA* for parties that are not themselves subject to the *Charter* then all sections must apply, including section 32, which stipulates that the *Charter's*

application is restricted to government actors. Section 54 of the *OLRA* does not incorporate the *Charter* itself. Instead, it incorporates by reference the description of discrimination under the *Charter*. Section 54 defines the prohibited grounds of discrimination by adopting, and adopting only, the prohibition against discrimination that is set out in the *Charter*. The reference to the *Charter* in section 54 is an abbreviated way of further defining the scope of the prohibition against discrimination in collective agreements beyond that as defined in the *Human Rights Code*. The Ontario Legislature did not extend the limits of the *Charter* itself beyond its scope of application as defined in section 32 of the *Charter*. As stated, it simply used a shorthand way of adopting within section 54 of the *OLRA* the standard of prohibited discrimination that is contained in the *Charter*.

The Arbitrator is unable to adopt the University's suggestion that YUFA's interpretation of section 54 of the *OLRA* is in conflict with the Supreme Court of Canada's decision in **Re McKinney**. **Re McKinney** determined that the universities were not subject to the *Charter*. YUFA's interpretation of section 54 adopts that finding. It then moves the question beyond that considered by **Re McKinney** by asserting that even though the University is not subject to the *Charter*, the Ontario Legislature, through the introduction of Bill 7 and what is now section 54 of the *OLRA*, has extended the protection against discrimination in the *Charter* to collective agreements in Ontario involving employers that are not subject to the *Charter*.

After the Supreme Court in **Re McKinney** answered the first question it considered by concluding that the universities were not subject to the *Charter*, it then addressed a second question by finding that even if the universities were subject to the *Charter*, mandatory retirement would be permissible through the application of section 1 of the *Charter*. What YUFA is asking the Arbitrator to find in the instant matter accepts the answer to the first question, i.e. that the University is not subject to the *Charter*, and it precedes the second question answered by **Re McKinney**. It is not inconsistent with **Re McKinney's** conclusion respecting either question. What YUFA is asserting is that even though the University is not itself an employer subject to the *Charter*, (the finding made in respect of the first question in **Re McKinney**), its collective agreement is nevertheless subject to the prohibition against discrimination as defined in the *Charter* through the dictates of section 54 of the *OLRA*. This issue was not addressed by **Re McKinney**. Only if the answer to that issue is in the affirmative will this Arbitrator be asked to consider the question that is similar to the second question that was addressed in **Re McKinney**, i.e. whether the mandatory retirement is permitted under the *Charter*, albeit in a different context.

Moreover, the Arbitrator is not persuaded by the University's concern that article 14 of the collective agreement, which expressly provides for mandatory retirement, would make little sense if the *Charter* was applicable to the interpretation of age discrimination. Once again, in **Re McKinney**, the Supreme

Court found mandatory retirement to be permissible through the application of section 1 of the *Charter*.

The University asserts that Bill 211 introduced in 2005 to prohibit mandatory retirement would not have been necessary if the definition of discrimination under the *Charter* (which did not directly permit mandatory retirement) already applied to all employers in Ontario. Again, this assertion declines to take account of the impact of section 1 of the *Charter* which the Supreme Court relied on in **Re McKinney** to conclude that mandatory retirement was in fact permissible for universities by virtue of section 1 because it fell within the scope of “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The University asserted that if YUFA's interpretation of article 54 of the *OLRA* is correct, then numerous arbitration decisions following the introduction of the *Charter* and the subsequent amendment to section 48 (now 54) of the *OLRA* must be seen to be wrong, presumably, in part at least, because the cases recognized the express endorsement of mandatory retirement in the *Human Rights Code* and did not give weight to the *Charter's* lack of such express endorsement or to the possible impact of section 54 of the *OLRA*. The cases cited by the University to this end included, as set out above, **Re OISE and Ontario Confederation of University Faculty Associations** (1987), 28 L.A.C. (3d) 161 (Burkett); **Re Miracle Food Mart Canada and United Food &**

Commercial Workers' International Union, Locals 175 & 633 (1995), 48 L.A.C. (4th) 377 (Petryshen); **Re Metropolitan Separate School Board and O.P.S.E.U.** (1995), 50 L.A.C. (4th) 378 (P. Picher); **Re Superior Electrics Ltd. and USW, Local 6946**, [2006] O.L.A.A. No. 92 (Roach), and **Re Imperial Tobacco v. Baker, Confectionery, Tobacco Workers and Grain Millers International Union, Local 364T**, [2002] O.L.A.A. No. 753 (W. Kaplan).

In **Re OISE**, however, the contested mandatory retirement occurred on July 1, 1985. Bill 7, which amended the *OLRA* to include the contested reference to the *Charter* in what is now section 54, only received Royal Assent on December 18, 1986. It is not surprising, therefore, that a reference to the *Charter* under section 48, now section 54, of the *OLRA* was not argued in **Re OISE** since it had not yet been placed into that section at the point of the mandatory retirement in issue in that case.

The prohibition against discrimination under the Charter was in place in section 54 in 1995 when **Re Miracle Mart** concluded that mandatory retirement at age 65 was not a breach of the collective agreement. An argument against the appropriateness of the application of mandatory retirement under the collective agreement based on section 54 of the *OLRA* was not argued. If it had been, and if YUFA's interpretation of section 54 had been accepted, the decision in **Re Miracle Mart** might still have been the same by utilizing logic similar to that of the Supreme Court of Canada in **Re McKinney**, which endorsed mandatory

retirement under the *Charter* by application of section 1 as a “reasonable [limit] prescribed by law”, notwithstanding that the mandatory retirement policy amounted to discrimination on the basis of age under section 15 of the *Charter*. Similarly, the issue of section 54 of the *OLRA* was not argued in either **Re Metropolitan Separate School Board** or **Re Superior Electrics**, but, again, the conclusions reached may have been the same based on a **Re McKinney** analysis.

In **Re Imperial Tobacco**, the issue of whether the mandatory retirement policy was “unconstitutional ... as an infringement of the Charter” notwithstanding its apparent permissibility under the *Code*, was raised but, on the agreement of the parties, was not addressed in that arbitration proceeding which, on agreement, was limited to determining whether there was a “properly promulgated and administered policy requiring mandatory retirement” in effect between the parties. It was expressly stipulated, though, that the union could bring the issue of “constitutionality” back on at a later time. Accordingly, the decision in **Re Imperial Tobacco** would not have been “wrong” if YUFA’s interpretation of section 54 finds acceptance because it was focused on the determination of a point preliminary to a consideration of the *Charter*.

Accordingly, on the basis of the foregoing, the Arbitrator is unable to adopt the assertion of the University that YUFA’s interpretation of section 54 of the *OLRA* is flawed because it would render “wrong” the post-*Charter*/post-section

48 amendment arbitration decisions cited by the University. In **Re OISE**, the mandatory retirement in issue occurred before section 48 (now 54) was amended to include the *Charter* reference; in **Re Miracle Mart** and **Re Superior Electrics**, section 54 was not argued but, even if it had been, the result might not have been different given the **Re McKinney** analysis, and in **Re Imperial Tobacco**, the parties expressly agreed not to address the *Charter* issue within the scope of that arbitration.

Finally, and of particular significance, the Arbitrator's conclusion in this case is directly supported by the recent arbitration decision in **Re York University and York University Staff Association (YUSA)**, a decision of Arbitrator Stephen Raymond, dated February 20, 2008 where the section 54 issue was placed squarely before the arbitrator. As in the instant matter, the parties agreed that the University was not a "government actor" and therefore, by virtue of section 32 of the *Charter*, was not subject to the *Charter*. Even so, the arbitrator concluded that section 54 of the *OLRA* applies to all collective agreements in Ontario and that any provision in a collective agreement which discriminates contrary to the *Charter* is prohibited by section 54 of the *OLRA*, even though the *Charter* does not apply directly to the employer involved. At pp. 6-7, the arbitrator reasoned as follows:

III DECISION

I am dealing with a preliminary question. That is, whether section 54 of the *OLRA* means that (a) any collective agreement may not discriminate contrary to the *Charter* or (b) only collective agreements that

otherwise have as a party an employer to which the *Charter* applies may not discriminate contrary to the *Charter*.

I am mindful that the Supreme Court of Canada has clearly indicated that the *Charter* only applies to certain workplaces and, in particular, that this workplace is not one to which the *Charter* applies. To me, however, this is not the question. In my complete review of the jurisprudence provided it is clear that the Courts, including the Supreme Court of Canada, have not considered the question before me. As well, I did not find any of the arbitral jurisprudence to be persuasive in relation to the question before me.

I am being asked to interpret the *OLRA* not the *Charter*. I do not think it is beyond the authority of the Ontario Legislature to enact a law, such as the *OLRA*, that uses discrimination as it is set out in the *Charter* as part of the framework against which to decide whether there is an unlawful provision in a collective agreement. This is exactly what the Ontario legislature has done. It has provided that collective agreements, all collective agreements, may not discriminate. In defining what it means by discrimination, it has made reference to the *Code* and the *Charter*. I find, therefore, that section 54 means, as it states, that no collective agreement may contain a provision that discriminates as that is understood by either the *Code* or the *Charter*. The fact that the *Charter* does not apply to the University is irrelevant. The *OLRA* does and its anti-discrimination section applies to all collective agreements in the province of Ontario including the one between the University and YUSA. The provision of the *OLRA*, as enacted, is not in my view *ultra vires* the Ontario legislature. The practical implications of what that means and the impact of section 1 of the *Charter* are not before me at this time.

I remit the matter back to the parties and remain seized.

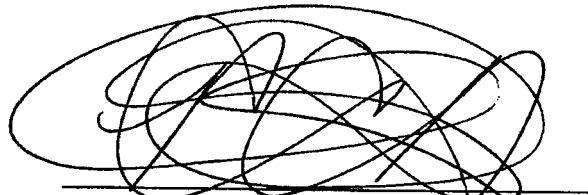
This decision was taken on judicial review by the University. By a decision delivered orally on October 15, 2008, the Divisional Court dismissed the application for review as being pre-mature. At paragraph 3, the Court stated the following:

The arbitrator has yet to decide the ultimate question between the parties, that is, whether mandatory retirement prior to the amendments to the *Human Rights Code* was unlawful. ... The arbitrator ruled, as a preliminary question, that s. 54 of the *Ontario Labour Relations Act* applies. It is best to have the arbitrator rule on all issues before any application for judicial review is entertained by this Court.

Accordingly, in the result, in respect of the preliminary issue, the Arbitrator concludes that on the basis of the plain meaning of the words used by the Legislature in section 54, as reinforced by both the legislative history of section 54 and the recent decision of Arbitrator Raymond in **Re York University and YUSA**, as set out above, that section 54 of the *OLRA* prohibits all collective agreements in Ontario from discriminating against any person if the discrimination is contrary to either the *Canadian Charter of Rights and Freedoms* or the *Human Rights Code*, whether or not the employer is itself subject to the *Charter*.

Accordingly, this matter may now proceed to its hearing on the merits.

Dated this 23rd day of January, 2009.



Pamela C. Picher
Arbitrator