IN THE MATTER OF: A Union grievance dated September 25, 2013 alleging failure to provide benefits to members over age 65, and an arbitration under the *Labour Relations Code*.

BETWEEN:

OKANAGAN COLLEGE,

Employer,

- and -

OKANAGAN COLLEGE FACULTY ASSOCIATION,

Union,

-and-

THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
Pursuant to the *Constitutional Question Act,*

Respondent.

AWARD

Appearances:

Lindsie Thomson, for the Employer.
Leo McGrady, Q.C., for the Union.
Alex Dutton, for the Attorney General.

Hearing dates and location:
April 30-May 1, 2018; Kelowna, B.C.

Introduction

Okanagan College ("OC" or "the College") is a post-secondary institution which has operated since 1963. It has campuses and centres throughout the Okanagan-Shuswap-Revelstoke region, with a main campus in Kelowna. The College presently has about 8,000 students and just over 1,000 employees, including approximately 260 faculty members represented by The Okanagan College Faculty Association ("OCFA" or "the Association").

On September 25, 2013, the Union grieved (Ex. 11) that Group Life Insurance, Long Term Disability (LTD) and Accidental Death and Dismemberment (AD&D) benefits provided to OC faculty under policies purchased by the College ("the Plans") terminate at age 65. In its grievance, the Union cited provisions of the collective agreement (Ex. 1) and the *Human Rights Code*, R.S.B.C. 1996, c. 210 ("the Code"). A few years earlier, the Code had been amended to eliminate mandatory retirement and certain consequential revisions had been made to the collective agreement. The grievance in full stated as follows:

> This is to advise you of a Step 2 policy grievance pursuant to Article 36 of the Okanagan College – Okanagan Faculty Association Collective Agreement. It is the Union's position that the Employer's actions are a violation, misinterpretation, or misapplication of, but not limited to the Preamble, Article 39, the BC Human Rights Code and any other relevant provisions of the Collective Agreement and related legislation.
>
> The facts of this grievance are as follows. Long term disability coverage currently ends at 3 months prior to a member turning 65; Life Insurance and Accidental Death and Dismemberment coverage ends at age 65. It is the position of the OCFA that this is a violation of Article 39 as well as the Human Rights Code provisions against age discrimination.

> The remedy requested is that the Employer comply with the aforementioned Articles of the Collective Agreement and BC Human Rights Code and any other relevant provisions of the Collective Agreement and related statute(s).

In denying the grievance on October 22, 2013, the College President stated as follows (Ex. 2, Tab 20):

> … When the provincial government implemented Bill 31 in 2007 amending the definition of "age" in the Human Rights Code thereby eliminating mandatory retirement, the College advised all of its employees and bargaining agents, including the OCFA, of the effect on employee benefits for those employees who chose to work beyond age 65. The College and the OCFA discussed the elimination of mandatory retirement as a regular agenda item at JCAA [Joint Committee on the Administration of the Agreement] commencing on June 4, 2007 through to February 15, 2008. At the request of the Faculty Association, a Frequently Asked Questions document relating to the elimination of mandatory retirement was published and was advertised in the June 19, 2009 issue of "Inside Okanagan College". That document, which is still available online, addressed the issue of benefits for employees age 65 and older. The Faculty Association was aware that the benefits programs were not being amended to extend Long Term Disability (LTD), Life Insurance and Accidental Death and Dismemberment (AD&D) benefits beyond age 65. Since that time, the Faculty Association has had two opportunities in collective bargaining to negotiate amended benefit provisions.
>
> …
>
> The Human Rights Code allows for the College's group insurance plan that ends coverage at age 65.

The grievance was advanced to Step 3 in November 2013. No resolution was reached and the dispute was referred to arbitration.

The Union now asserts that the Employer has violated (i) articles 9 and 39 of the collective agreement, (ii) the prohibition against age discrimination set forth in section 13(1) of the Code, and (iii) section 15 of the *Canadian Charter of Rights and Freedoms* ("the Charter").

Section 13(3)(b) of the Code creates an exception for *bona fide* group or employee insurance plans and the Employer relies on the exception. The Union denies that the Plans in this case qualify under section 13(3)(b). The Union further states that if the Code authorizes age discrimination under the Plans, then the Code itself violates the Charter.

Notice of constitutional question was served pursuant to section 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 (Ex. 5) and the Attorney General of B.C. intervened.

The Employer objected to the arbitrability of the grievance. According to the Employer, the issue of post-65 benefits is not a matter that arises under the collective agreement because coverage is determined by the Plans, which are contracts between the insurer and the Employer. In the well-known *Brown & Beatty* taxonomy, this is a Category 3 case, or at most a hybrid of Category 2 and 3. In either event, the Employer's only obligation under the collective agreement is to arrange for the Plans and pay the premiums. The age discrimination issue must be pursued by a human rights complaint under the Code or by a civil action in the courts. Therefore, the grievance should be summarily dismissed, said the Employer. In response, the Union relied on express terms of the collective agreement that, in its view, entitle faculty members to benefits without discrimination based on age. Arbitral jurisdiction flows directly from these provisions, said the Union.

By agreement of the parties, the arbitrability question was scheduled to be heard and decided first. The parties filed a Partial Agreed Statement of Facts ("Facts", Ex. 2, 3, 4) and the Employer filed its own Book of Documents (Ex. 17). The Employer also called oral evidence in support of its preliminary objection. It was agreed that

if the case proceeds on the merits, the Union will be entitled to further cross examination of these witnesses. There were no material facts in dispute for present purposes.

The Attorney General took no position at this stage but appeared on a watching brief.

Background to the proceedings

The termination of benefits at age 65 has been in place since 1975 when the Plans were first purchased. Since at least 1975, faculty at the College have been able to work past age 65 under the retirement provisions of the collective agreement. From 1975 until 2010, the agreement stipulated a normal retirement date effective the June 30th after the member's 65th birthday (Facts, Tab 15, Article 26). However, upon the President's approval, a member could be allowed to continue past age 65 and annual extensions could be granted. Over the years, some faculty did work past age 65 and were advised prior to their 65th birthday that their Life, LTD and AD&D insurance coverage would terminate at age 65. LTD benefit eligibility ends three months prior to age 65 because of the qualifying-period provision but active LTD claims are payable until age 65.

In 2008, the Code was amended to preclude mandatory retirement at age 65. The Union and the Employer had discussions at that time concerning the implications for the collective agreement and for certain benefits. The parties amended the retirement provision of the collective agreement to eliminate the reference to "normal retirement" at age 65 unless approval to work longer was provided (Facts, Tab 42). During those discussions, the Employer advised the Union that the Code included a provision allowing benefit plans to differentiate on the basis of age and therefore the LTD, Life and AD&D Insurance Plans were not discriminatory, in the Employer's

opinion. In January 2008, the Union responded that access should be available to all benefits past the age of 65.

There were no complaints or objections to the cessation of benefits at age 65 until the filing of the present grievance in September 2013.

An arbitrator was appointed on April 4, 2014 to adjudicate the grievance. The collective agreement under which the arbitrator was appointed expired on March 31, 2014 (Facts, Tab 18). It was subsequently replaced by the current collective agreement which expires in 2019. The language on benefits remains the same.

The procedural history of this matter is complex. The grievance was first scheduled to be heard in late January of 2015. The parties mutually agreed to adjourn those dates to accommodate common table collective bargaining. The matter was then scheduled to be heard in March 2016.

Before the hearing, the Union objected to three documents disclosed by the Employer, asserting that they amounted to expert evidence but were not presented as part of an expert report. The hearing was adjourned to August 16-18, 2016 to provide time for the Employer to retain an expert in relation to that evidence and disclose an expert report.

On July 15, 2016, the Union raised an allegation that the Employer had acted contrary to s. 15 of the Charter. On July 18, 2016, the Union served a Notice of Constitutional Question and, on July 29, 2016, an Amended Notice of Constitutional Question. Pursuant to section 8(6) of the *Constitutional Question Act*, the Attorney General became a party to the proceeding and sought an adjournment of the August 2016 dates, to which the Employer and the Union consented. The hearing was adjourned and rescheduled to April 3-7, 2017.

In advance of the April 2017 hearing dates, the Attorney General moved to strike the Union's *Charter* claim on the basis that the Union lacks standing to bring a claim under s. 15 of the *Charter*. The Attorney General also objected to expert reports disclosed by the Union to the parties. At this point, the Employer gave notice of its arbitrability objection. The Union reacted to the standing motion by seeking to add two individual grievors to the policy grievance.

The hearing convened on April 3, 2017 and dealt only with the Attorney-General's motion to strike the Union's *Charter* claim for lack of standing and the Union's attempt to add individual grievors to the policy grievance. After a day of argument, the parties came to an agreement on how to proceed. There would be four new individual grievances and those individual grievances would be consolidated with the policy grievance and referred to the arbitrator, subject to the Employer's preliminary objection on arbitrability. Due to illness, the original arbitrator was unable to continue and I was appointed by the parties as a replacement.

The parties set hearing dates from April 30 to May 4, 2018 to address the Employer's arbitrability objection. Further dates in August and September 2018 were set to deal with expert reports and the merits of the grievances, subject to arbitrability.

Provisions of the collective agreement

1.3 Future Legislation

In the event that any current or future legislation renders null and void or materially alters any provision of this Agreement, the parties hereto shall negotiate a mutually agreeable provision to be substituted for the provision so rendered null and void or materially altered. All other provisions of this Agreement shall remain in full force and effect.

ARTICLE 9 – NO DISCRIMINATION

9.1 There shall be no discrimination based on the grounds set out in the *Human Rights Code* of British Columbia.

9.2 Further, OC and its agents agree that there shall be no discrimination, interference, restriction or coercion exercised or practiced with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, termination, discipline, dismissal or otherwise by reason of age, race, creed, colour, nationality, political or religious affiliations, physical or mental disability, sexual orientation, sex or marital status, nor by reason of membership in a labour union, and employees shall at all times and in like manner act in good faith toward OC.

ARTICLE 39 – HEALTH AND WELFARE PLANS

39.1 Benefits Eligibility

This clause applies only to employees on a full-time continuing appointment, 50% part-time continuing employees who hold six-month appointments and, with the exception of section 39.1.3, to employees on full-time term appointments which are greater than five calendar months in length. OC shall pay the full premiums for the health and welfare plans while the employee is in receipt of a salary from OC.

39.1.1 Group Life Insurance Plan

Life Insurance: Three (3) times annual salary (Principal Sum) to a maximum of $300,000.

39.1.2 Accidental Death and Dismemberment

Life (in addition to any life insurance)	The Principal Sum
Both hands.	The Principal Sum
Both feet	The Principal Sum
Entire sight of both eyes	The Principal Sum
One hand and one foot	The Principal Sum
One hand and entire sight of one eye.	The Principal Sum
One foot and entire sight of one eye.	The Principal Sum
Speech and hearing.	The Principal Sum
One arm	Three-Quarters of The Principal Sum
One hand.	Three-Quarters of The Principal Sum
One foot.	Two-Thirds of The Principal Sum
Entire sight of one eye	Two-Thirds of The Principal Sum
Speech or hearing	One-Half of The Principal Sum
Thumb and index finger (either hand)	One-Third of The Principal Sum

39.1.3 Long Term Disability

Payable after 90 days of disability at a level of 70% of monthly salary, to a maximum of $4,000 per month.

39.1.3.1
An Employee receiving long term disability benefits shall be considered an employee for purposes of the College Pension Plan only and shall continue to be covered by the medical, extended health, dental, and group life and AD&D insurance for the first 24 months from the date on which the employee received compensation under the long term disability plan. Participation in these plans may be continued past the 24 months provided OC is reimbursed for 100% of the applicable premiums.

39.1.4 Dental Care Plan

…

39.1.5 Medical Care Plan

…

39.1.6 Extended Health Benefits

…

39.1.7 Employee Assistance Program

…

39.2

Clause 39.1 is provided solely for the purpose of explaining the principal features of the plans. All rights with respect to the benefits of the plans will be governed by the policies issued by the carriers. There will be no change to the level of health and welfare benefits without prior consultation between the parties.

39.3 Benefits for Part-Time Continuing and Term Employees

39.3.1

Employees on part-time continuing appointments shall, upon request, be eligible for health and welfare benefits in accordance with clause 39.1. OC shall pay a portion of the health and welfare plan premiums consistent with the employee's appointment percentage as specified in his or her offer of appointment, and employee shall pay the remainder of the premium.

39.3.2

Employees on part-time continuing appointments who do not request health and welfare coverage shall receive 4% of their salaries in lieu of health and welfare benefits. This payment shall be made biweekly. …

39.3.3

Employees identified in section 39.3.1 who exercise their option for health and welfare benefit coverage at the start of their appointment must continue coverage for the term of their appointment for that college year.

39.3.4

Employees on 50% part-time appointment who hold six-month appointments (see clause 13.6) may continue their health and welfare benefits during the time they are not receiving a salary from OC provided they reimburse OC for the full cost of the health and welfare benefits during this period.

39.3.5

Full-time term of employees who are appointed for a period of five calendar months or less shall receive, in addition to their agreed salaries, 4% of their salaries in lieu of health and welfare benefits. This payment shall be made biweekly. …

39.3.6

Part-time term employees shall receive 4% of their salaries in lieu of health and welfare benefits. This payment shall be made biweekly. ….

39.3.7

Part-time continuing employees who accrue additional work pursuant to 15.6 shall receive 4% of the additional salary for the term contract in lieu of health and welfare benefits. This payment shall be made biweekly. ….

39.3.8

Full-time employees not on leave without pay who receive a part-time term appointment are not eligible for this payment.

Evidence

The Employer called three witnesses. Margo Kendal ("Kendal") has been employed by OC since 1997 and at the time of the hearing was Manager of Personnel Services and Systems. As part of her duties, she dealt with employee eligibility and enrolment in benefit plans, as determined by the provisions of the collective agreement. Article

39.1 lists the categories of eligible employees – those with full time continuing appointments and certain part-time and term employees. Phyllis Van Steinberg ("Van Steinberg") worked for the College in human resources and benefit administration from 1978 until she retired in 2009. She provided notification to employees and met with them to review their benefit entitlements. Finally, Chris Rawson ("Rawson") joined OC as Manager of Labour Relations in 2006 after a lengthy and diverse career. In that capacity, she was personally involved in discussions relating to the elimination of mandatory retirement and the implications for collective agreement rights and benefits. From 2012 to 2014, she held a position with the Post-Secondary Employers' Association (PSEA) and conducted collective bargaining on behalf of various colleges. She returned to OC in 2014 and retired in October 2016.

Kendal testified that benefits for Life Insurance, LTD and AD&D have always terminated at age 65 and this fact was made clear in the plan booklets sent out to employees along with their enrolment forms. She noted that about 8% of faculty are over the age of 65 (Faculty Staffing Complement, October 2015, Ex. 17-1). As faculty members approached their 65th birthdays, they were notified of the termination date for their benefits (Ex. 17, Tab 14). Certain conversion privileges are available for life insurance and these were explained. If employees disagreed, they were referred to the carrier's appeal process.

Reviewing the historical record, Kendal said that originally, OC faculty were covered by a University of British Columbia life and disability plan. The College committed in the 1975-76 collective agreement to establish an alternative, Employer-paid plan, to be effective by June 1, 1975 (Facts, Tab 1, p.13), as follows:

ARTICLE 14 HEALTH AND WELFARE PLANS

(1) It is agreed that health, welfare and dental plans shall be established by applying to all components of the College. The College shall present a proposal outlining the involvement of all bargaining units for the development of such plans. These health, welfare and dental plans shall be in effect by June 1, 1975.

(2) The College shall pay on hundred percent (100%) of the premiums of each employee for the Medical and Extended Medical Services plans provided under C.U. &C.

The College shall pay one hundred percent (100%) of the premiums of each employee covered under the University of British Columbia Group Life and Total Disability plan as long as the plan remains in effect for employees.

The College agrees to establish, in consultation with the Association, an alternative Total Disability and Group Life Insurance plan, to be put into effect not later than June 1, 1975. The College shall pay one hundred percent (100%) of the premiums of all employees covered by this plan, and the College agrees that this plan will provide coverage at least equivalent to the following coverages:

(a) Payment of two (2) times annual salary as Group Life Insurance benefits.

(b) Payment of four (4) times annual salary as Group Life Insurance benefits in the event of accidental death.

(c) Income replacement of not less than sixty percent (60%) of salary in the event of disability of an employee.

(3) Should no agreement be reached between components of the College in accordance with the procedure outlined in clause (1) of this article, it is agreed that a health, welfare and dental plan for employees covered by this Agreement shall be negotiated by the Bargaining Committee.

In the next collective agreement, reference was made to the particulars of Canada Life Group Life, AD&D and LTD plans, with the notation that "the above is provided solely for the purpose of explaining the principal features of the plans. All rights with respect to the benefits of the plans will be governed by the policies issued by the carriers" (Facts, Tab. 2, Art. 14, p. 21).

Based on steps she took to inform herself from file materials, Kendal stated that there was an age 65 cut-off for the Life and LTD benefits, a provision that has remained

in place over the years. The carrier changed to Crown Life Insurance in 1993, Maritime Life Assurance in 1997 and Manufacturers Life Insurance (Manulife) in 2010, with various benefit level changes over time (Facts, Tabs 22-27). AD&D coverage was assumed by UNUM Life Insurance in or about 1993, and later by North West Life and Industrial Alliance Pacific (Facts, Tabs 28-31), but the benefit under these policies always terminated at age 65, she said. However, from my review of the evidence, I note that as of March 2014, after the grievance filing, the Principal Sum payable for death and major injuries was changed so that it declined in value after age 64 and terminated at age 70 (Facts, Tab 31, Endorsement No. 7).

Under cross examination, Kendal confirmed that effective April 1, 2012, the age limit for Extended Health and Dental coverage was changed from 70 to "termination or retirement", as a result of an amendment to the Manulife policy (Facts, Tab 27). Thus, these benefits continue throughout the faculty member's employment without regard to age. Kendal stressed that the change resulted from collective bargaining for the 2010-2012 agreement. During her tenure, there was no other bargaining related to age limits for benefits.

Kendal testified that employees were provided with a copy of the benefit booklet listing coverages and conditions (Ex. 17, Tab 21). When paper copies were discontinued by the carrier, OC staff referred faculty members to online links (Ex. 17, Tabs 22-24), but also printed off additional copies. Individuals could log in using their identifiers and access personal information on their files.

Van Steinberg testified she was personally involved in distributing the benefit booklet to employees. She also handled notifications to employees turning 65 (Ex. 17-14). About three months prior to an employee's 65th birthday, she would send a memo covering benefit status upon retirement. This included cases where the

faculty member was requesting an extension beyond the mandatory retirement age and intended to continue working. At the time, an approval from the College President was required and the extension was available for one year at a time. Van Steinberg often received phone calls from the member and would explain more about the status of benefits after 65 during these conversations. She sent these notifications every year, she said, in varying numbers.

Rawson was Manager of Labour Relations during the transition away from mandatory retirement in 2008 and she was personally involved in negotiations with the Union on that subject. When the Code amendment was enacted, the 2005-2010 collective agreement was in place (Facts, Tab 16). The Plans were described in Article 35 and there was language expressing that all rights with respect to benefits "will be governed by the policies issued by the carriers", the same as today. Mandatory retirement was discussed at a series of regular meetings held by the Joint Committee on the Administration of the Agreement ("the Joint Committee"). This was a body comprised of both Employer and Faculty Association representatives.

The first Joint Committee session dealing with mandatory retirement and benefits was held on June 4, 2007 (Facts, Tab 32). The Union suggested the collective agreement may need to be updated. The parties agreed that more discussion was required. On September 28, 2007, Rawson advised the Committee that she was receiving information from PSEA and would report back (Facts, Tab 34). In the minutes, the issue was identified as follows: "What impact will there be to health and welfare benefits and collective agreement provisions as a result of the change in mandatory retirement? Is the employer intending to send letter to Union (*sic*) and employees as to what provisions are voided and what health and welfare benefits will apply past age 65?" At the November 16, 2007 meeting, the issue was adjourned so the Employer could obtain legal advice and confirm its position.

There was a substantive discussion at the January 8, 2008 meeting (Facts, Tab 36) and Rawson was in attendance. During the meeting, she explained that the terms of the Plans are determined by the carriers. OC was following the sector and any change in benefits would require approval from PSEA as there was a mandate in place for financial commitments. She told the Union that age-based distinctions were still allowed under the amended Code. For its part, the Union stated that all benefits should be available to employees past the age of 65. While this was expressed during the meeting as keeping benefits "unchanged", Rawson testified that the Union position actually entailed an expansion of benefits, given the past practice. At the meeting, the Union asserted that under Article 35.1, "all employees are eligible for benefits." Further, the Union stated, "If an employee is hired after age 65, OCFA will reserve the right to demand benefits coverage through the grievance procedure." (Facts, Tab 36, 37).

On February 15, 2008, the Employer advised the Committee that it was reviewing information and the Association reported that it was starting to receive questions from faculty members about benefits (Facts, Tab 38). The subject of mandatory retirement did not arise again until the November 14, 2008 meeting (Facts, Tab 40). It was stated that members were unclear about benefits and purchase options, and the College agreed to submit more information. On December 12, 2008, after further discussion, the parties agreed "to do a fix" by drafting amendments to the collective agreement removing the retirement age clause. This was in keeping with Article 1.3 of the agreement (Future Legislation) which required negotiation to replace a provision rendered void by new legislation. As well, it was agreed that HR would distribute a Frequently Asked Questions (FAQ) document for employees.

At the next session on January 19, 2009, Rawson presented a Letter of Understanding (LOU) containing revisions to Article 26 on retirement. It was

reviewed and signed, amending the collective agreement by deleting reference to the mandatory retirement age (Facts, Tab 42). No other aspect of mandatory retirement was bargained. At this meeting, Union President Peter Murray raised a concern on behalf of a member who was working past 65 and still being deducted for life insurance even though that benefit had terminated. The College undertook to look into the matter. Rawson recalled that she made inquiries and learned that while the member's pay stub showed the insurance premium payment, the amount was not in fact being deducted. It was a pay stub error and it was corrected. She found the same problem on another faculty member's pay stub. However, no grievance was lodged over the fact that benefits were still terminating at age 65, even after the elimination of mandatory retirement.

At the March 16, 2009 Joint Committee meeting (Facts, Tab 44), Rawson presented the FAQ and there was discussion, with the Union to review further and provide feedback. On April 17, 2009 (Facts, Tab 45), it was noted that an Association representative had reviewed the FAQ and made suggestions to improve the clarity of the document. There was no comment with respect to the following text in the FAQ addressing why benefits terminate at age 65: "These provisions existed in the contract with the insurance carrier prior to the implementation of the legislation eliminating mandatory retirement. The provisions form the basis upon which our premiums are established. The Human Rights Code continues to make provision for age-based distinctions under a *bona fide* group benefit insurance plan" (Ex. 17-3).

At the May 22, 2009 Joint Committee, work continued towards finalizing the FAQ (Facts, Tab 46). It was decided to post a link to the FAQ on the College intra-net and the Inside Okanagan College newsletter (Facts, Tab 47). The final version of the FAQ, as distributed, included a chart depicting age-65 expiry of Group Life,

AD&D and LTD coverage (Facts, Tab 48). The draft text explaining why benefits terminate at 65 was unchanged. Rawson observed in her testimony that the Union gave no indication it considered this a violation of the collective agreement. On a related matter, Rawson issued an estoppel notice dated May 17, 2010 to discontinue a practice whereby the College paid for Medical Services Plan, Extended Health and Dental benefits for an additional month past an employee's retirement date (Ex. 17-4). Again, there was no opposition from the Union.

Rawson testified that the parties agreed to join Common Table bargaining for the 2010-2012 collective agreement. The Union did not table any proposals on post-65 benefits, either at the Common Table or in local bargaining (Ex. 17, Tabs 5-6), although it did request that Medical Care Plan terms be incorporated in the agreement and that benefits be paid during the month of an employee's retirement. Neither proposal was accepted.

An overall settlement was reached on December 15-16, 2011 (Ex. 17-7). As the next step, it was necessary to analyze the interaction between local and Common Table provisions. Rawson found that the Common Agreement contained "better than" provisions on certain benefits, so the College changed the termination dates on Dental and Extended Health (Ex. 17-8, 17-9). This was the Manulife policy amendment referred to by Kendal in her evidence. Rawson testified, "We asked the insurer and they did it." Also, the Association had an option to join the common disability plan but declined. The Association reviewed the harmonization analysis done by Rawson and made some comments (Ex. 17-10) but throughout the process, no issue was raised concerning post-65 Life, AD&D or LTD benefits.

In summary, said Rawson, the Union "had a keen interest in benefit issues" during this round of bargaining. "Lots of attention was paid to these issues." However, post-65 benefits did not come up.

In the next bargaining round, leading to the 2012-2014 collective agreement, there was a Protocol Agreement governing joint bargaining by ten colleges and their faculty associations (Ex. 17-11), including OC and the OCFA. The issue of post-65 benefits under the Plans was not raised, although OCFA did address other benefit matters (Ex. 17-12). It proposed eligibility for all employees on full-time appointments, regardless of length of appointment (then-Article 40.1); removal of the $4,000 monthly cap on LTD payment (then-Article 40.1.3); and a new clause providing reimbursement for proactive health activities and programs, such as gym memberships. None of the proposals were accepted. An overall settlement was reached on February 2, 2013 (Ex. 17-13).

Rawson testified she heard nothing more about post-65 benefits until the present grievance was filed on September 25, 2013. Historically, there have never been any grievances regarding denial of benefits to individual employees although there have been appeals taken through the carrier's appeal process.

Under cross examination, Rawson was pressed about her position at the January 8, 2008 Joint Committee meeting where the parties discussed post-65 benefits. She confirmed that she, on behalf of OC, stated that the Plans are determined by the carriers. In fact, there is some negotiation between OC and the carrier with respect to the policy details. She added that "how the Plans work is subject to the carrier." Yes, she agreed, in some circumstances the rights of employees under the policy, such as the age when coverage terminates, can be negotiated between the policy holder (OC) and the carrier. As one example (referenced in Kendal's testimony),

the College asked for changes in Extended Health and Dental coverage, and the insurance carrier agreed. Effective April 2012, there was no age limit. Previously coverage had ended at age 70 (Facts, Tab 27).

Rawson acknowledged that at the January 2008 meeting, the Union's position was that benefits are available post-65. But "that's not how it works," she testified. During the meeting, the Employer responded that any such change would have to be negotiated. Taken to the Union's bargaining proposals tabled in June 2010, she confirmed that the Association requested a new clause allowing it to appoint an agent of record to represent Union interests in Plan design and the purchase of all employee benefits (Ex. 17-6). Until this point in time, these matters were the exclusive domain of OC and the carrier. Rawson reiterated the Employer position that rights are "as agreed by the carrier." The agent of record proposal was not accepted.

When the FAQ was under discussion in early 2009, the Union's pension advisory officer submitted comments on the draft but Rawson was unaware whether these were individual comments or a formal, voted position of the Union. She agreed that during this period of discussion, the OC message was that the post-65 age issue is governed by the agreement between OC and the carrier. Moreover, the College was saying at the time, the Code allows for termination of benefits in this manner.

There were no witnesses called by the Union at this stage.

Employer argument

On behalf of the Employer, Ms Thomson filed a comprehensive written brief, in addition to delivering oral argument. The Employer submitted that the collective agreement imposes an obligation upon it to purchase the Plans and pay the required premiums. Having done so, the Employer's obligation is discharged and disputes

about eligibility or entitlement to benefits are disputes between the employee and the insurer arising out of, and "governed by", the Plans. They are not disputes between the Union and the Employer arising out of the collective agreement.

Conclusive effect of the *Elkview Coal* decision

The Employer pointed to the reasoning and result in *Elkview Coal Corp. v. United Steelworkers of America, Local Union No. 9346 et al*, [2001] B.C.J. No. 1696 (C.A.) (hereafter *Elkview Coal*) as being directly on point in the present case. The Court of Appeal concluded that even though an arbitrator has the power to interpret and apply the Code, the arbitrator in that case had no jurisdiction over an allegedly discriminatory plan (failure to recognize same sex spouses) where the collective agreement made it clear that: (i) the company is to pay premiums for the insurance coverage; (ii) the coverage provided is subject to the terms of the policies; and (iii) benefits provided are payable by the insurer and not the company (at para. 24).

While the present grievance cannot proceed, said the Employer, this does not mean there is no way for the Union to seek a remedy. A challenge can be taken before the Human Rights Tribunal on whether or not the Plans are *bona fide* group insurance plans entitled to the exception under section 13(3)(b) of the Code. The Employer expressed confidence in its position on that score but the Union has ready recourse to a remedial process. Further, the Union's proposed Charter challenge to section 13(3)(b) can be brought in court, with the advantage that a ruling would be applicable across the province and not confined to the current parties. Dealing with the proposed issues under a grievance arbitration process raises the prospect of conflicting awards on the constitutionality of section 13(3)(b) of the Code.

Turning to a detailed review of *Elkview Coal*, the Employer referred to Article 16.01 of the collective agreement in that case, which stated as follows:

> 16.01 The Company agrees to pay the premiums to the insurance companies for providing the benefits set out below for any employee who has elected or in the future may elect to be covered by the Plans provided that such employee meets the eligibility requirements for enrolment. Coverage provided is subject to the terms of the respective insurance policies. All the benefits provided in this agreement are payable by the insurer and not by the Company.

While the arbitrator held this was a Category 3 case, he found he did have jurisdiction to decide whether benefits the company was obligated to provide under Article 16.01 were discriminatory (at para. 24-25):

> In this case, the issue is whether the Company had complied with its obligation under Article 16 to provide benefits, if entitlement to those benefits is defined by the policy of insurance in a manner that is contrary to the *Human Rights Code*. Put in those terms, the issue arises out of the collective agreement although the validity of the action of the Company depends on the proper interpretation and application of a statute which is precisely the mandate of an arbitration board under section 89(g) of the *Labour Relations Code*. Nor does that conclusion give rise to a conflict in jurisdiction with the Human Rights Tribunal because although the carrier may have an interest in the proceedings, what is really being sought by the Union is an order to require the Company to secure a policy that is not discriminatory. No order may be sought or maintained against the carrier because it is not a party to the collective agreement but one outcome of the proceedings could be to require the Company to cancel the existing policy if the insurer were to refuse to amend the offending definition, or obtain another policy, from whatever insurer, that complies with the *Human Rights Code*. …
>
> Whatever may turn out to be the result, I find that I have jurisdiction to decide the substantive issue. Properly understood, it is not a dispute between the carrier and the Union, which can only be decided by a Human Rights Tribunal or the courts, but it is a dispute that arises under the collective agreement whether the health care, dental care and vision care benefits required to be provided by the Employer under Art. 16 and, which are affected by the definition of common law spouse, are void as being discriminatory. I now intend to proceed to hear that issue on its merits subject to the condition that the current carrier, the Great West Life Assurance Company shall be forthwith notified in writing by the Company that its interests may be affected by the outcome of the proceedings and that it may seek to intervene and be separately represented in the proceedings.

The Labour Relations Board denied review, [1998] B.C.L.R.B.D. No. 423, and then denied reconsideration, [1999] B.C.L.R.B.D. No. 202. Next, judicial review of the Board decisions was denied: [2000] B.C.J. No. 542. However, the Court of Appeal held the grievance was inarbitrable. The Employer submitted that the *Elkview Coal* decision is fatal to the present grievance.

In its reasons, the court cited *Weber v. Ontario Hydro* [1995] 2 SCR 929 ("*Weber")* and framed the issue as whether the dispute in its essential character arises from the interpretation of the collective agreement. On the facts, the *Elkview* dispute was about the definition of a common law spouse under the insurance plan. The union was seeking an order that the employer compel the insurer to amend the definition in the policy, in conformity with the Code (para. 21). The court held that the union's real dispute was with the insurer, not the employer, and that the dispute "does not relate to nor arise from the Collective Agreement" (para. 23). The court stated as follows in determining that the grievance was beyond the arbitrator's jurisdiction (para. 24-33):

> The employer's obligations in this case arise under s.16.01 of the Collective Agreement. It obliges the employer to pay premiums for the insurance coverage in issue. It makes clear that the coverage provided is subject to the terms of the policies, and that the benefits provided for in the Collective Agreement are payable by the insurer and not the company. Whether an employee's same-sex partner is entitled to coverage under the policy, and what, if any, benefits are payable, are therefore matters to be resolved by looking to the language of the insurance policy, and not the Collective Agreement.
>
> It is of note that the employer in this case had nothing to do with drafting, or settling, the language of the insurance policy. The Union had the language of the policy in its possession before the last Collective Agreement was signed. There is no suggestion of any dispute between the Union and the employer over the terms of the policy in general, or the definition of common law spouse in particular. Beyond the bare allegation that the employer is in breach of the Collective Agreement, there is nothing in the nature of this dispute, or in the terms of the Collective Agreement, that would give substance to that allegation.

This is a very different case from *Weber*. There, benefits payable under the Ontario Hydro Sick Leave Plan were expressly said to be "considered as part of this [collective] agreement." Administration of the plan was vested solely in the employer, Ontario Hydro. The employer had the right to decide what benefits an employee would receive, subject to the employee's right to grieve.

This case, on its facts, is much closer to *Dubreuil Bros.*, where the employer's obligation was simply to maintain the insurance coverage and to pay for the premiums.

In my respectful opinion the arbitrator in this case fell into error in describing the dispute as "whether the ... benefits required to be provided by the employer under Article 16, and which are affected by the definition of common law spouse, are void as being discriminatory." Benefits cannot be said to be "void." They are either payable or not payable, depending on the true interpretation of the document under which they are provided for. What may, or may not, be "void" is the language of the insurance policy, if it can be shown to offend the provisions of the Human Rights Code. In posing the question as he did, the arbitrator confused the employer's obligation under the Collective Agreement, with the insurer's obligation under the policy. As I have said, the Union's real dispute is not with the employer, but with the insurer.

In my view, this fundamental error is determinative of this appeal. In posing the question as he did, the arbitrator misinterpreted the Collective Agreement. That is a question of law going to the arbitrator's jurisdiction to hear and decide the matter in issue.

Counsel for the Labour Relations Board submitted that there may be an implied obligation on the employer, arising under Article 16.01 of the Collective Agreement, to provide a benefit plan that complies with the general law. Counsel for the Board argues that whether there is an implied obligation under the Collective Agreement to provide a plan that conforms to the *Human Rights Code* is a question that only the arbitrator can decide. Since the arbitrator must decide whether there is an obligation to provide a lawful plan, the issue is arbitrable and therefore within the arbitrator's jurisdiction.

This argument assumes that the employer may be held solely responsible for the content of the plan and in particular its lawfulness. There is nothing in Article 16.01 to support that position. As the arbitrator noted, the employer's only obligation was to pay the premiums necessary to provide the benefits. The nature or extent of those benefits were subject to the Union's agreement. The employer's obligation was to pay for a benefit plan that was acceptable to the Union. The Union had in its possession the terms of the plan before the Collective Agreement was signed, and took no issue with the plan, or the language used by the insurer to describe the benefit. To find that there was an implied unilateral obligation on the employer to ensure the lawfulness of the plan would in these circumstances be wholly unreasonable. It would, therefore, not be open to the arbitrator to reach such a conclusion, if that issue was raised.

> I would therefore not give effect to this argument of the Labour Relations Board.
>
> The question on review by both the Labour Relations Board and the Court is to be decided on the standard of correctness. As the arbitrator was wrong in law, the decision on jurisdiction should have been set aside. I would so order, and grant a declaration that the issue raised by the Union is not arbitrable, as being beyond the jurisdiction of the arbitrator.

The Employer cited *Bennett v. British Columbia*, [2007] B.C.J. No. 4 (C.A.), where it was held that a claim by retired employees to continue receiving premium-free MSP and extended health benefits was not within an arbitrator's jurisdiction. The benefits in question had never been the subject of collective bargaining. The claim was "a matter lying outside the ambit of any collective agreement" (para. 47) and was properly launched as a court action. *Elkview Coal* was mentioned with approval (para. 30) as one of several authorities applying the *Weber* approach to jurisdiction. The Supreme Court of Canada denied leave to appeal in *Bennett*: 2007 CanLII 67864. *Elkview* was also applied in *Telus Communications Inc. v. Telecommunications Workers Union*, [2010] B.C.J. No. 999 (S.C.) at para. 71-73.

The *Weber* test for jurisdiction

The Employer quoted the classic formulation of an arbitrator's jurisdiction as set out in *Weber v. Ontario Hydro* [1995] 2 SCR 929 at para. 67:

> I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal.

Thus, the question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective

agreement (at para. 52). The Employer added that it is not enough for a Union to assert that the College is subject to the *Charter* and *ipso facto* the arbitrator has jurisdiction. The essential character of the dispute must still arise expressly or inferentially from the interpretation, application, administration or violation of the collective agreement. If this were not so, then jurisdiction in *Weber* would have flowed from the fact that Ontario Hydro itself was subject to the *Charter*. This was not the court's reasoning. The Supreme Court of Canada has not departed from *Weber* in subsequent decisions.

Jurisdiction in disputes over insurance plans

The Employer noted that the *Brown & Beatty* taxonomy has been found to be consistent with the principles enunciated in *Weber*: *Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 1518*, [1998] B.C.L.R.B.D. No. 263, at para. 60, affirmed [1998] B.C.L.R.B.D. No. 350. The ultimate question is whether the language reveals an intention that the rights at issue should be enforced through the arbitration process: *Coca-Cola Bottling Ltd. v United Food and Commercial Workers International Union*, [1994] O.L.A.A. No 31 (Swan), at para. 9.

To make that assessment, arbitrators commonly refer to the "four categories", which provide a framework for analysing the relationship between a collective agreement and an ancillary document. These categories, and their effect on jurisdiction, were described as follows in *Northwest Community College v. British Columbia Government and Service Employees' Union, Local 712,* [2006] B.C.C.A.A.A. No 179 (Steeves) (para. 16):

> (1) The Plan or policy is not mentioned in the collective agreement. In this case a dispute about the plan is not arbitrable.

(2) The collective agreement specifically provides for certain benefits. A dispute will be arbitrable.

(3) The agreement only provides for the payment of premiums by the employer. A dispute is not arbitrable.

(4) Specific plans or policies are incorporated by reference into the agreement. A dispute is arbitrable.

In some cases, in addition to a collective agreement providing for the payment of premiums, it will provide basic levels of coverage that must be purchased. In these so-called hybrid cases, the employee's recourse is still limited to a claim against the insurer, as held in *Nechako Northcoast Construction v. British Columbia Government and Service Employees' Union,* [2010] B.C.C.A.A.A. No 188 (Hall), as follows (para. 20-21):

> The relationship between category 2, category 3, and hybrid provisions was examined by Arbitrator Richard Brown in *Re Abbott Laboratories Ltd. and Retail, Wholesale Canada, Div. U.S.W.A., Loc. 440* (1998), 74 L.A.C. (4th) 331, and cited by the same arbitrator in an award advanced here by the Employer, *Re Parmalat Food Inc. and Retail, Wholesale Canada, Local 440* (1999), 84 L.A.C. (4th) 417:
>
> > ... In a pure category-two case, the collective agreement describes the LTD benefits to which employees are entitled and makes no mention of insurance coverage. The employer was obliged to pay the benefits specified. While the employer was not prohibited from arranging insurance coverage, claims not paid by the insurer remained the responsibility of the employer.
> >
> > In a pure category-three case, the contract requires the employer to provide an insured LTD plan, but does not specify the details of the resulting benefits. Arbitrators read into agreements of this sort an implied term requiring the employer to arrange a "standard" plan, so as to ensure employees enjoy the sort of benefits normally provided and, therefore, reasonably expected. So long as the employer met this obligation, an employee denied benefits could sue the insurer but could not obtain relief against the employer in arbitration. Failing to obtain such a plan rendered the employer liable in arbitration to an employee prejudiced by this failure. For example, see *Re Andres Wines (B.C.) Ltd. and United Brewery Workers, Loc. 300* (1981), 30 L.A.C. (2d) 259 (Christie).
> >
> > Collective agreements falling in the area where the two spheres overlap have been described as hybrids of category two and three. Contracts of this sort both describe the benefits to which employees are entitled and contemplate the

> employer arranging insurance coverage. In this scenario, the employer's obligation was to obtain a plan providing the benefits specified in the collective agreement. (*Parmalat*, at pp. 424-45)
>
> As made plain by later awards such as *Re Atlantic Packaging Products Ltd. and Communications, Energy and Paperworkers Union of Canada, Local 333* (2003), 115 L.A.C. (4th) 97 (MacDowell), an employer's only obligation under a hybrid provision is to purchase the appropriate insurance coverage for the benefits under consideration; an employee's recourse with respect to a claim for individual entitlement is against the insurance carrier...

The fact that the benefits are identified in the collective agreement "does not give rise inferentially to a right in employees to hold the employer accountable under the grievance and arbitration provisions of the agreement for the payment of benefits as opposed to the payment of premiums…". *Northwest Community College, supra*, para. 26.

In summary, said the Employer, where a collective agreement includes an obligation that falls within Category 3 of the *Brown & Beatty* taxonomy, the arbitral jurisprudence establishes that the mutual intention of the parties is assumed to be that the employer must obtain and pay the premiums of a "standard plan": *Andres Wines (B.C.) Ltd. v. United Brewery Workers, Local 300* [1981] B.C.C.A.A.A. No. 2 (Christie), at paras. 14-15. This was the first case to accept that the employer's obligation under Category 3 is to purchase such a plan. There, the employer counsel conceded that in a Category 3 situation, the union would expect the employer to purchase a standard plan. As a result, this became a proxy for the employer's obligation to purchase a plan the union would reasonably expect it to purchase. However, once a plan has been purchased, whether "standard" or as specified, the employer obligation has been met: *Nechako Northcoast, supra*, para. 20. In the present case, the Employer stated it was not relying on the "standard plan" line of argument. Here, the Union knew exactly what benefit terms were being purchased and agreed over the years.

Ultimately, the question is whether the language of the collective agreement evinces an intention that the Employer has agreed to self-insure and thus bear the risk in the event of a dispute regarding benefit eligibility, or whether the parties intended the Employer would purchase an insurance plan. Given the magnitude of risk in self-insuring, there is a presumption in the arbitral jurisprudence that employers intend to pass that risk on to a third party. In *Coca-Cola, supra* (at para. 15), the arbitrator described this presumption as follows:

> Such provisions must be understood in context, because insurance programs are a standard way for parties to a collective agreement to provide benefit coverage for employees covered by that agreement. For the Employer, they offer a mechanism for commuting the risk of providing these benefits to a certain regular premium payment, and it is unlikely that an employer would willingly place itself in a position of both paying premiums to an insurer to have these benefits provided, while taking on primary liability for the payment of the benefits in any case.

Accordingly, it takes clear language to displace this presumption because, as the arbitrator in *Coca-Cola* noted (at para. 16):

> …parties must be assumed to have negotiated their collective agreements "conscious of the various mechanisms by which a long-term disability plan can be related to the collective agreement".

The collective agreement language is a Category 3 formulation

The Employer submitted that Articles 39.1 and 39.2 of the present collective agreement clearly establish that this is a Category 3 case. Article 39.1 provides:

> … OC shall pay the full premiums for the health and welfare plans while the employee is in receipt of a salary from OC.

These "buzz-words, placed at the beginning of the benefits article, betoken the simple obligation to arrange insurance for employees": *University of Guelph v. University of Guelph Faculty Association*, [1995] O.L.A.A. No. 97 (Kaplan) at para. 29 (in dissent, but not on this point) and para. 17.

Article 39.2 expressly provides:

> All rights with respect to the benefits of the plans will be governed by the policies issued by the carriers.

The Employer argued this is strong language that cannot be ignored. The meaning of "govern" is to "prevail" or "control". The phrase "All rights" must include eligibility and termination questions. Finally, Article 39.2 also states:

> Clause 39.1 is provided solely for the purpose of explaining the principal features of the plans.

The Employer emphasized the choice of the word "solely" and said it must be given its plain meaning. The benefit descriptions contained in 39.1.1, 39.1.2 and 39.1.3 are not meant to set out the terms and conditions of each plan. They merely summarize the main features; they are informational. It is the Plans themselves that govern.

The Employer cited *Champion Road Machinery Ltd. v. International Association of Machinists and Aerospace Workers, Local 1863 (Cornish Grievance)*, [2001] O.L.A.A. No. 97 (Verity) where similar language was held to preclude arbitral jurisdiction to resolve an eligibility dispute (para. 12-14), even in the face of more detailed particulars of benefit eligibility contained in that collective agreement. The arbitrator held that "the essential character of a dispute of this nature does not arise expressly or inferentially from the collective agreement under the four categories test as set out in Brown and Beatty" (para. 14).

In *Northwest Community College, supra*, the agreement referenced the findings of a joint committee and listed the required elements of the agreed disability benefit plan. Nevertheless, the arbitrator found this was a Category 3 case (para. 24, 36): "… I cannot find that this language goes as far as the statement in the grievance that the Employer has a contractual obligation to pay benefits. … Put another way, the

essential character of this dispute is one between the carrier, who administers the plan, rather than between the Employer and the Grievor and I am unable to find that the dispute is one that expressly or inherently arises from the collective agreement."

The Employer also cited *Waterloo Furniture Components Ltd. v. United Steelworkers of America, Local 7155 (Vaisochr Grievance)*, [2005] O.L.A.A. No. 441 (Verity) where the employer agreed to "provide the Insurance Benefits as set out in Schedule "B" attached hereto …". However, the collective agreement also stated that insurance benefits were "subject to the terms and conditions of the master policy". This was found to be a Category 3 case and the grievance was not arbitrable (at para. 15-16).

The Employer submitted that even if the present collective agreement language is taken as a hybrid of Categories 2 and 3, based on the illustrative listing of specific benefits in Articles 39.1.1 to 39.1.3, the result is the same. The Employer's obligation is to purchase plans with the enumerated principal features and pay the necessary premiums. This was initially done prior to the 1976-1977 collective agreement and continuously thereafter. The Union did not say otherwise. According to the evidence, the Plans have continued in roughly the same form, with an age 65 termination, for 40 years. There have been faculty members working past age 65 for much of this time (since around 1984). This is compelling evidence that the College did in fact purchase the Plans which the parties agreed and expected as per the collective agreement. Otherwise, a grievance would have surfaced long ago. In this context, said the Employer, there is no arbitral jurisdiction with respect to the eligibility of any particular employees. The entitlement of post-65 employees and the alleged human rights violations are matters between the affected employees and the insurer.

The Union's "all employees" argument

The Employer responded to the Union's position, expressed at Joint Committee in January 2008 and repeated in the present hearing, that the language of Article 39.1 requires that the Plans cover "all employees" in receipt of salary who fall under the categories listed in the article. The categories are *full time continuing* appointment, 50% *part-time continuing* appointment holding six-month appointments, and (except for LTD benefits under 39.13) *full-time term* appointment greater than five calendar months in length. The Union maintains that by saying "employees" in these categories are eligible, the parties must have meant "all employees", without regard to age. Therefore, the College has failed to purchase the agreed plans and the grievance is arbitrable. The Employer submitted that a full, contextual analysis of the provision shows that the Union's interpretation ("all employees") is plainly wrong.

First, Article 39.2 is clear that Clause 39.1 (the preamble to the Health and Welfare article) is provided for explanatory purposes only, and that all rights are governed by the carrier's policy. Second, a review of related clauses in the article indicates that the purpose of the preamble is to separate the class of employees who are entitled to receive benefits under the Plans from the class of employees who receive 4% of salary in lieu of benefits.

The preamble sets out the categories of employee to whom benefits can apply. As stated, the first category is full time continuing employees. Benefits also apply to 50% part time continuing employees who hold a six month contract. This second category of employee is explained in Article 13.6 and refers to the situation where a 50% part time continuing employee takes their 50% part time assignment in the form of a six month full time workload. Pursuant to Article 37.1.3, these employees may

elect to receive full time pay for 50% of the year rather than part time pay for the entire year. Article 39.3.4 states that if a 50% part time continuing employee opts to have their health and welfare coverage continue while they are not receiving salary, they must reimburse the Employer for the full cost of the benefits during that period. This explains why the parties modified the preamble to state that the Employer will only pay full premiums for the health and welfare plans when the employee is in receipt of a salary from OC.

The third category of employee listed in the preamble is full time term employees who have appointments of greater than 5 months in duration. Article 39.3.5 notes that full time term employees whose appointments are *less than* 5 months in duration will receive 4% in lieu of benefits. Thus, the preamble is stating that once a full time term employee has an appointment longer than 5 months, then they are eligible for benefits and no longer receive 4% of salary in lieu of benefits.

The Employer therefore submitted as follows. When the preamble is reviewed in the context of Article 39 as a whole, it is clear that the purpose of the provision is to separate those employees who are eligible to participate in health and welfare benefits from those who receive 4% of salary in lieu of benefits.

The Employer further observed that if the Union's "all employees" interpretation applied, it would prohibit the Plans from using basic and necessary insurance coverage conditions, such as residence in Canada, maintaining active work status, participation in vocational programs and supplying appropriate medical information in support of claims. It would be unreasonable to construe Article 39.1 as dictating the eligibility of "all employees" in the three categories at all times.

The Employer also referred to the historical evolution of the benefits article in support of its position. From the inception of the Plans in the 1976-1977 collective agreement, it was agreed that all rights with respect to benefits would be governed by the policies. Coverage was never provided to employees past the age of 65. Without question, the Employer was meeting its obligations under the agreement. In the 1987-1990 contract, the preamble first appeared, in conjunction with the clauses allowing for some employees to receive 4% of pay in lieu of benefits. However, coverage under the policies continued to terminate at age 65 and there was never any objection by the Union. In the Employer's submission, this fortifies its interpretation that the purpose of the preamble was to identify different categories of employees for benefit purposes

The history of the retirement clause was also cited in support the Employer's position. Beginning in 1976, employees were required to retire on June 30 following their 65th birthday, unless waived or altered by mutual consent in writing. In 1984, language was added allowing employees to continue employment on a yearly basis by applying for an extension. These employees worked significant periods of time without receiving benefit coverage. The language allowing an employee to continue in his or her employment past the normal retirement date (with approval) existed until January 2009, when the parties determined it was no longer needed due to the change to the definition of "age" in the Code. In fact, that was the only clause the parties changed as a result of the amendments to the Code. The evidence showed that the Employer notified individual employees that their Life Insurance, LTD and AD&D benefits under the Plans would terminate at age 65, while their Dental and Extended Health would continue. These provisions were known to the Union, according to the evidence, and were described in the FAQ document which was prepared with input from the Union.

The Employer referred to *Kwantlen University College v. Kwantlen College Faculty Association, Local 5,* [2001] B.C.C.A.A.A. No. 12 (Germaine), where the parties negotiated an increase in insurance coverage but the policies contained an "actively at work" requirement that excluded employees on LTD from the enhanced benefit. The collective agreement clause stated that "benefits shall be set at three times the employee's annual salary". As in the present case, the union argued that this meant the benefit applied to "all employees". The agreement also said that benefits would be provided by means of an insurance policy and would be subject to the terms of the plan. The grievance was denied and the arbitrator held as follows (para. 44-45):

> … Notwithstanding the Union's subjective intention to ensure all improvements were available to all employees, the better interpretation of that language is that it is intended merely to increase the amount of coverage. Neither the presence of the term "employee" in the clause nor the reference to the amount of the insurance benefit is sufficient to change the group life and accidental death insurance benefits into Brown & Beatty category two benefits.
>
> As I have just indicated, the use of the term "employee" does not alter the apparent intention of the parties. Like "faculty members", it is an encompassing term. But its co-existence with the stipulation that the benefits are subject to policy limitations manifests the intention that standard insurance policy limitations may modify the entitlement of employees, or faculty members, to the benefits.

The Union's conduct strongly supports the Employer interpretation

The Employer submitted that the Union's long acquiescence and failure to grieve the termination of benefits at age 65 is evidence that supports the Employer's interpretation. For years, faculty were permitted to work past 65 in some circumstances but the Union never claimed benefits on their behalf. Even when the parties met in 2008-2009 to discuss the implications of mandatory retirement being eliminated under the Code, the Union was equivocal. In the collective bargaining rounds that followed the Code amendment, a number of benefit improvements were proposed by the Union but post-65 Group Life Insurance, LTD and AD&D were not

raised. No grievance was taken until the present matter began in 2013 as a policy grievance. The Employer argued that the Union's long course of conduct shows that the Plans as purchased have always been consistent with the mutual intent of the parties.

This reasoning was applied in *Brewers' Distributor Ltd. v. Brewery, Winery & Distillery Workers Union, Local 300*, [2003] B.C.C.A.A.A. No. 217 (Taylor). The collective agreement provided as follows: "Each eligible employee shall be insured in the Medical Services Plan of BC and the Extended Health Benefits Plan." The benefit plan purchased by the employer had a lifetime maximum of $7,500 for extended health benefits per person, at which point the coverage terminated. The union argued that the employer had failed to provide the agreed benefit, which it construed as extended health benefits free of any cap. The employer argued that the collective agreement did not disclose a mutual intention to provide unlimited extended health benefits. In the alternative, it said the $7,500 limit was clearly understood and agreed to by the union. The arbitrator noted the long history of coverage under the plan and the use of benefit handbooks that described the cap, similar to the present case. On that basis, the arbitrator dismissed the grievance, as follows (at para. 66-67, 70, 72-73):

> If the Union believed that it had negotiated an unlimited extended health benefit for 35 years, would it not have said so? Wouldn't the Union, in 35 years, have said to the Employer, "this $7,500 lifetime maximum is not the deal"?
>
> Article 9.06 provides for an extended health benefit plan. Did the Union negotiate that language without knowing the "plan" to which they agreed for at least 35 years? These are sophisticated parties with a longstanding collective bargaining relationship. It must be presumed that they looked carefully at the words they chose to express their bargain with a full understanding of their meaning. Article 9.06 refers to a "plan". That plan, for at least 35 years, has included a $7,500 lifetime maximum.
>
> …

> Here, the Union has proven that the Employer intended to provide an extended health benefit plan but is unable to prove that an unlimited plan was mutually agreed. The Union bears the obligation to prove the benefit.
>
> …
>
> In this case, the terms of the extended health benefit plan, specifically the $7,500 lifetime limit, must be presumed to have been known to the Union. It has been in existence for at least 35 years and is expressed clearly in the employee benefit handbooks.
>
> The test is mutual intention. I find that the parties mutually intended an extended health benefit plan with a $7,500 lifetime maximum limit.

Brewers' Distributor was subsequently applied to the issue of post-65 benefits coverage in *Peace River South School District No. 59 v. British Columbia Government and Service Employees' Union (Karpinski Grievance)*, [2009] B.C.C.A.A.A. No. 162 (Hall). The employer had a policy of mandatory retirement at age 65 until the definition of "age" in the Code was amended as of January 1, 2008. As a result, the grievor continued working after she turned 65 during the 2007-2008 school year. However, various benefits she had been receiving were not continued. The union relied on a clause in the agreement stating that "[t]he Employer shall provide the health care benefits listed below for all employees working a minimum schedule of fifteen (15) hours per week". The arbitrator dismissed the grievance, although the present Employer conceded the facts were different, in that the *Peace River* parties had actually negotiated the insurance plan terms, including termination of benefits at age 65. Still, the "all employees" argument did not prevail (at para. 13):

> … Here, the terms of coverage are found in two documents (i.e. the Collective Agreement and the insurance plan contemplated by the Collective Agreement which is now administered by the PEBT). It would be a proverbial triumph of form over substance to ignore what is found in the negotiated plan when determining the extent of benefit coverage mutually intended by the parties.

In summary, the Employer submitted that in light of the language of the collective agreement, the Union's conduct and the applicable case law, it was only required to purchase a Plan for Group Life, AD&D and LTD having the principal features outlined in Article 39.1. Since the Employer has clearly fulfilled its obligation in this regard, the grievances are inarbitrable.

Conclusion

In conclusion, the Employer reiterated that the present case is on all fours with the facts in *Elkview Coal*. As in *Elkview Coal,* whether an employee is entitled to coverage under the Plans after age 65 is a matter to be resolved by looking to the language of the Plans, not the collective agreement. Moreover, as in *Elkview Coal,* here the Union has known for decades that the Plans terminate at age 65. The fact that the Union has not grieved since 1975 indicates that it knows the Plans do not contravene the agreement. What the Union is presently seeking is to have the Employer subject to a ruling which requires it to either self-insure or compel the Insurer to cover employees over age 65, contrary to the terms of the Plans. Both options would be costly.

As stated by the Court of Appeal in *Elkview Coal,* the Union's dispute is actually with the insurer, not the Employer.

Union argument

On behalf of the Union, Mr. McGrady began by pointing to the existence of an express no-discrimination clause in the present collective agreement – Article 9.2. In the Union's submission, this clause amply supports arbitral jurisdiction and distinguishes *Elkview Coal*, which was heavily relied upon by the Employer. The collective agreement in *Elkview* did not contain such a provision. The analysis in

Elkview Coal turned solely on Article 16.01 of that agreement, which required the employer to pay premiums for a plan and specified that coverage was subject to the terms of the insurance policy.

The Supreme Court of Canada in *Weber* directed an arbitrator to ask whether the dispute, in its essential character, arises from the interpretation, application, administration or alleged violation of the collective agreement (at para. 52). If so, the arbitrator has jurisdiction to hear the grievance. The Union argued that the Employer's failure to secure non-discriminatory Plans in the course of fulfilling its obligations under Article 39.1 constitutes a breach of Article 9.2 of the collective agreement.

The Union noted that while Article 9.1 reiterates protection already provided by the Code, Article 9.2 is broader and must be given effect under prevailing principles of interpretation. All words in the agreement must be given meaning.

The parties used the word "Further" as a preamble in Article 9.2, indicating a clear intention to go beyond the basic human rights guarantees available under the Code. Also, the clause includes both OC and its agents in the commitment. The Union submitted that in this context, a benefits carrier may reasonably be interpreted as falling within the ambit of an agent, although it is unnecessary to decide the point at this stage of the proceedings. The significance of Article 9.2 is that there is language in the collective agreement requiring the College to ensure that no discrimination is "exercised or practiced" with respect to any employee based on age. Health and welfare arguably fall within the matters listed in Article 9.2, namely terms and conditions of employment such as "hiring, wage rates, training, … , or otherwise". This sufficiently satisfies the *Weber* requirement that the dispute must arise from the agreement and vests the arbitrator with jurisdiction.

The Union relied on *Renfrew County v. Ontario Nurses' Association (Fox Grievance)*, [2012] O.L.A.A. No. 577 (Slotnick), where the grievor's son was denied extended health benefits because he had Down Syndrome. As in the present case, the employer argued that it was obligated only to purchase a plan and pay the premiums. Any dispute concerning eligibility was a matter between the insurer and the employee, and must be pursued in court, not before an arbitrator under the collective agreement. The employer said this was a Category 3 case and therefore the grievor's complaint was not arbitrable. The arbitrator acknowledged Brown & Beatty's Four Categories but added the following comment (at para. 10):

> This "four categories" approach has been affirmed by the courts (see *London Life Insurance Co. v Dubreuil Brothers Employees Assn*, (2000) 190 D.L.R. (4th) 428 (Ont. Ct. of App.).) It is important to note, however, that the Brown and Beatty passage goes on to state the following proviso that is relevant to the issues here:
>
> > However, a lack of reference to benefit plans in the collective agreement may not insulate their application from arbitral review. Such a review may result indirectly from the application of other provisions of the agreement such as, for example, where the agreement contains a general "no discrimination" provision or where an estoppel may be created through representations made at the bargaining table. As well, even where the obligation is met by provision of benefits through a plan which is in accordance with the agreement, the administration of a plan may also be subject to arbitral review as discriminatory and unauthorized by the collective agreement itself.

In *Renfrew County*, there was a no-discrimination clause, as follows (para. 16):

> 3.01 The Employer and the Association agree that there shall be no violation of the Human Rights Code by either party to this Agreement or discrimination by reason of political affiliation or other factors not pertinent to performance with respect to employment, placement, promotion, salary determination or other terms of employment.

The arbitrator held there was jurisdiction to consider the merits of the union's grievance, as follows (para. 22-26):

> I agree with the employer that the extended health care benefits language in this collective agreement is of the Category 3 type, which ordinarily would make any dispute over eligibility for benefits inarbitrable. The language, with its use of the phrase "billed premiums," contemplates the use of an insurer. Normally in this type of case, the employer has fulfilled its obligations by arranging a standard plan that provides the benefits specified in the collective agreement and pays its share of premiums.
>
> However, as the bulk of the case law makes clear, even in the Category 3 cases, there is a residual jurisdiction for the arbitrator where there is a question as to whether the plan arranged by the employer is discriminatory by nature. …
>
> Even in some cases where arbitrators have refused jurisdiction, they have allowed for the possibility that in Category 3 situations, the case may properly belong before an arbitrator if it deals with an allegation that the employer has not fulfilled its human rights obligations in arranging for a benefits plan, (see the *Niagara* and *Ontario Liquor Board Employees' Union* cases cited above,) or if the policy may not be a standard one (see *Re Sault Area Hospital and ONA* (2012) 219 L.A.C. (4th) 105 (Steinberg).)
>
> Here, the allegation is that the employer has arranged an extended health care plan that does not meet human rights requirements. As the *Parry Sound* case indicates, human rights obligations are part of any collective agreement and arbitrators have the jurisdiction and responsibility implement them. …
>
> In my view, the issues … must be heard on their merits. I find that the essential character of this dispute is one that arises under the collective agreement, namely whether, in fulfilling its obligation to arrange for a benefit plan, the employer has complied with human rights requirements. This is not simply a case where an employee or her dependant has been denied a particular benefit by an insurance company. The union here has raised the larger question of whether human rights have been violated by the denial of any extended health benefits to the grievor's son, solely based on his disability and regardless of whether the benefits claimed are related to any needs arising from the disability.

In a similar vein, the Union cited *Canpar Industries v. International Union of Operating Engineers, Local 115*, [2003] B.C.J. No. 2577 (C.A.), where it was held an arbitrator had jurisdiction to hear a dismissal grievance alleging discrimination based on disability. It was not necessary for the employee to pursue a human rights complaint under the Code in lieu of a grievance. *Canpar* was decided post-*Elkview Coal*. The court in *Canpar* applied *District of Parry Sound Social Services*

Administration Board v. O.P.S.E.U., Local 324, [2003] S.C.J. No. 42, where it was stated (at para. 36):

> … Even if the parties to the agreement had enacted a substantive provision that clearly expressed that, insofar as the collective agreement is concerned, the employer possessed the right to discharge a probationary employee for discriminatory reasons, that provision would be void. Put simply, there are certain rights and obligations that arise irrespective of the parties' subjective intentions. These include the right of an employee to equal treatment without discrimination and the corresponding obligation of an employer not to discharge an employee for discriminatory reasons. To hold otherwise would lessen human rights protection in the unionized workplace by allowing employers and unions to treat such protections as optional, thereby leaving recourse only to the human rights procedure.

The Union submitted that Article 9.2, as an anti-discrimination clause, should be given a fair, large and liberal construction. In *Alberta Hospital Ponoka v. Alberta Union of Provincial Employees, Local 43*, [1994] A.G.A.A. No. 4 (McFetridge), dealing with layoffs alleged to be due to anti-union animus, the board compared the test for human rights discrimination and the clause providing protection against anti-union activity under collective agreement, and stated (para. 48):

> … where a collective agreement includes similar anti-discrimination objectives, they too should be interpreted liberally. In our view, arbitration boards should not take a narrow view of anti-discrimination provisions or search for ways to minimize their impact. Subject always to the specific language of the Collective Agreement, the principles established by the courts in interpreting human rights legislation should be considered by arbitrators when interpreting anti-discrimination provisions in collective agreements so that the objects of these provisions can be attained. We can see no reason why the concept of adverse effect discrimination should not be applied in a case such as this where the prohibited discrimination is contained in a provision in the Collective Agreement rather than in a Human Rights Statute.

These comments were adopted in *Telus v. Telecommunications Workers Union (Perry Pasqualetto Grievance)*, (2007) CanLII 87542 (Sims). The award in *Alberta Hospital* was upheld on judicial review: [1995] A.J. No. 350 (Q.B.), affirmed [1997] A.J. 491 (C.A.).

The Union referred to Article 36.1 of the collective agreement (Grievance Procedure) which provides that "Any differences arising between OC and the Association concerning the interpretation, application, operation, or any alleged violation of this Agreement" shall be resolved in accordance with the procedures in the article, including grievance arbitration. Moreover, section 82 of the *Labour Relations Code* requires an arbitrator to address the real substance of the dispute:

> **Purpose of Part**
>
> **82** (1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
>
> (2) An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

Turning to the relevant provisions of the collective agreement, the Union disagreed with the Employer's interpretation of Article 39, although counsel noted that there are some "perplexing" aspects to the language.

To begin, it is clear that Article 39.1 does establish rights for employees, said the Union. The clause provides considerable detail describing the benefits in question and who can access those rights. Once an employee falls under one of the stated categories, he or she has a right to the benefit in question. While Article 39.2 states that clause 39.1 is provided "solely for the purpose of explaining the principal features of the plans", the fact remains that employees have entitlements under the "principal features" as enumerated. The language must be given a generous and expansive interpretation. The merits are to be considered later in the arbitration process, as agreed by the parties, but arguably *any employee* eligible under the categories listed in Article 39.1 has a right to benefit coverage.

The perplexing feature is that Article 39.2 goes on to state that "All rights with respect to the benefits of the plans will be governed by the policies issued by the carriers." This language requires careful analysis when the merits are reached in the present case, said the Union, but the rights negotiated in this article must not be treated dismissively by the arbitrator. Jurisdiction exists to apply Article 39 along with the parties' declaration in Article 9.2 that there will be no discrimination.

For guidance, the Union pointed to the approach taken in *Pacific Brewers Distributors Ltd. v. Brewery, Winery and Distillery Workers, Local 300 (Saini Grievance)*, [1995] B.C.C.A.A.A. No. 319 (Blasina). Disability benefits were available in several stages. The grievor was denied so-called "soft LTD", which continues for the first 104 weeks and requires proof of inability to perform the employees own job. Thereafter, "hard LTD" was payable but only if the employee was unable to perform *any job* at all. Analyzing the collective agreement and the insurance arrangements, the arbitrator noted that soft LTD was handled under a cost-plus agreement between the company and London Life, but no premiums were payable by the employer and there was no certificate of insurance. By contrast, hard LTD was provided under a policy of insurance, the employer paid premiums to Crown Life and employees were named as beneficiaries under the policy. The insurer assumed the risk of liability. For soft LTD, there was no provision disassociating the employer from liability for the payment of benefits (para. 9-12, 96).

Arbitrator Blasina stated (at para. 82) he was mindful of Arbitrator Hope's warning in the *Emergency Health Services* award that arbitrators "react warily to preliminary objections to jurisdiction which have the effect of putting a dispute beyond the reach of the grievance and arbitration provisions of a collective agreement." He hastened to add that this should not be taken as "an inducement to exceed jurisdiction or to

impose obligations that have not been contracted in the collective agreement." In the factual context before him, Arbitrator Blasina held the grievance was arbitrable, as follows (at para. 97-98, 101):

> Whether or not the Union was aware of the specific terms of the cost-plus agreement, it was at least aware that there was a cost-plus arrangement, and that such an arrangement has been long-standing. It can be concluded that such an arrangement was in the parties' minds when they renewed the collective agreement. Indeed the ancillary document is a neat fit with the collective agreement as it applies to weekly indemnity and soft LTD, just as the group insurance policy is a neat fit for hard LTD.
>
> There is no express provision under the collective agreement which would require that entitlement to soft LTD be determined by the courts. There is no express provision that entitlement be "as determined by the insurance carrier" as in the case of hard LTD. Clear language would be required to bar the arbitration board's jurisdiction; *Emergency Health Services, supra*, p. 9. The cost-plus agreement is a private contract between the Employer and London Life. It does not or cannot reduce the collective agreement between the Employer and the Union, and it does not or cannot reduce the arbitration board's jurisdiction.
>
> …
>
> Quite simply, jurisdiction cannot be avoided just because the collective agreement refers to weekly indemnity and long term disability plans. The plans, at least for weekly indemnity and soft LTD, are only vehicles for providing benefits to which the Employer is committed in the collective agreement. The Employer may presently submit that its only obligation was to secure an insurance plan and pay premiums. However, the language of the collective agreement does not support that conclusion. Furthermore, the Employer's understanding of the collective agreement is reflected in the ancillary document, and its cost plus arrangement with London Life does not support that conclusion either.

The Union conceded the Employer's point that no grievances had been filed before the present grievance was submitted in 2013. However, as the evidence revealed, misleading information was provided to faculty over an extended period of time, and this too must be taken into account, said the Union. Counsel clarified that no ill will is alleged against the College and its management. Still, it is clear that a message was delivered to employees over the age of 65 and to representatives of the Union that the age cut-off was due to the insurance contracts. This information was

presented with the clear implication that the insurer had control over benefit coverage and there was nothing to be done about it.

Employees were told that their benefits had been "terminated by the carrier" (for example, Ex. 17-2, on February 6, 2009 and the letters to individual faculty turning 65, Ex, 17-14). The FAQ chart prepared in 2009 (Ex. 17-3) explained the age-65 termination of benefits as follows:

> These provisions existed in the contract with the insurance carrier prior to the implementation of the legislation eliminating mandatory retirement. The provisions form the basis upon which our premiums are established. The Human Rights Code continues to make provision for age-based distinctions under a bona fide group benefit insurance plan.

While the foregoing was not factually incorrect, the message conveyed by all these materials was, in effect, "There is nothing we can do." Moreover, the Union submitted that after the repeal of mandatory retirement, the age-65 cut-off was continued mechanistically and arbitrarily. This suggests that the continuing denial of benefits reflected improper stereotyping based on age. For this reason, the Plan cannot qualify as *bona fide* under the exception in section 13(3)(b) of the Code, although the Union acknowledged this issue would be addressed later in the current proceedings, if and when the merits are reached.

The Union noted that when discussions were held between the parties in 2008 to review the implications of ending mandatory retirement, it did articulate the position that "all employees" were entitled to benefits, including those past age 65. The Employer's response was to state that "Plans are determined by the carriers." (January 8, 2008 Joint Committee Minutes, Facts, Tab 36.) In fact, coverage is negotiated between the College and the carrier and is subject to revision from time to time. The Employer's assertion was repeated so often that it began to take on an

aura of truth, said the Union. In 2012, the age limit for Extended Health and Dental was removed following common table bargaining (Facts, Tab 27). Thus, it was wrong to say or imply that the age-65 cutoff could not be changed. The Union submitted (Argument, at p. 6) that "the College very clearly misled the faculty about what was and was not possible."

In this regard, the Union cited *City of Vancouver v. CUPE, Local 15 (Rogers Life Insurance Grievance)*, [2014] B.C.C.A.A.A. No. 65 (Hall) where the collective agreement provided that "… effective the first day of the first full pay period worked following the date of hire, employees shall be insured under a group life insurance policy which has been taken out by the Employer on behalf of the employees. The group life insurance policy includes among other benefits coverage for each of such employees in an amount equal to one and one-half (1 1/2) times the employees' basic annual salary …". When the benefit was first negotiated, mandatory retirement was still in effect and age 65 was the cutoff for benefits. In 2008, with the Code amendments, the employer then contacted the insurer to ask about extending benefit coverage. The insurer agreed to enhanced coverage but only up to age 70. The union had no involvement in those discussions and grieved that the employer was precluded from unilaterally setting the benefit.

At arbitration, the City argued that the policy had been incorporated into the collective agreement, along with the age limitations expressed in the policy, but this position was rejected by the arbitrator (at para. 22). The language was unambiguous that the employer must provide group life insurance for all employees, and eligibility was not made subject to the policy (para. 33). The City further argued (para. 30) that it would be impossible to find, at reasonable premium cost, a carrier willing to provide group insurance without an age-based termination clause. As a result, the employer would effectively become liable to these costs itself, an outcome not

contemplated by the parties when they negotiated the insurance clause in the collective agreement. The Union in the present case highlighted the arbitrator's response, as follows (at para. 31):

> I find these submissions are not supported by the relatively spartan evidence on this aspect of the case. The facts are that the Employer was able to extend the age restriction from 65 to 70 in 2009, and was able to obtain a further extension from 70 to 75 in 2013. On both occasions, there was apparently no increase in the premium cost. The Mercer Report suggests at least two major insurance carriers would underwrite a basic life benefit with no termination age, although there would be an assessment of other factors. There would also be the associated possibility of a reduction in benefits and/or an increase in premiums.

According to the Union, these findings show the College was wrong in suggesting to faculty that it was impossible to provide post-65 benefits.

Finally, the Union noted the following basic legal principles, all of which it said support arbitral jurisdiction in the present case. The Charter applies to the College and the collective agreement: *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] S.C.R. 570. The College cannot contract out of its Charter obligations with respect to age discrimination: *Eldridge v. Attorney General of British Columbia*, [1997] 3 S.C.R. 624; *Prigden v. University of Calgary*, [2012] A.J. 443 (C.A.). The Union did not and could not waive its members' Charter rights: *Amselem v. Syndicate Northwest et al*, [2004] S.C.R. 551 at para. 100. A generous and expansive approach must be taken to Charter remedies: *B.C. Public School Employers' Association v. B.C. Teachers' Federation*, [2017] B.C.C.A.A.A. No. 6 (Lanyon) at para. 41.

Employer reply argument

The Employer rejected the argument that the carrier can be construed as an agent of the College for purposes of Article 9.2, as suggested by the Union. The relationship

between the College and the carrier is contractual. In exchange for premiums received, the carrier is obligated to pay claims in accordance with the policy. In no sense does the carrier represent the College as its principal nor does it have capacity to bind the College, as an agent may do. See *Fridman's Law of Agency, 6th Ed.*, at p. 19, cited in *Gooderham v. Bank of Nova Scotia*, [2000] O.J. No. 890 at para. 22, stating as follows:

> Three features of agency emerge ... They are service; representation; power to affect the legal position of the principal. An agent performs a service for his principal; he represents him to the outside world; he can acquire rights for his principal and subject his principal to liabilities .... the term agent' should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts ...

The Employer noted that the word "agent" has appeared in the collective agreement for many years, back to 1975-1976 (Facts, Tab 1, sections 28(7), 30(1), 33). The usage in those cases reflected a true agency relationship – an agent of the College imposing disciplinary censure on an employee, a person serving as agent of the College on its bargaining committee, College membership on the Interpretation Committee.

Responding to *Renfrew County, supra*, a 2012 award, where the arbitrator took jurisdiction to consider an allegation of discriminatory denial of benefits to the grievor's Down Syndrome child, the Employer observed that *Elkview Coal* was not even mentioned. While *Renfrew* was an Ontario case, a decision by an appellate court from another province should at least have been considered. Normally such a court decision would have significant persuasive value. The analysis in *Renfrew County* is therefore incomplete. By contrast, *Elkview Coal* is binding. The Employer conceded that there did not appear to be a no-discrimination clause in *Elkview Coal*, as far as it appears from the various reported decisions, but the question of discrimination was at the heart of the case and was addressed by the

court. The essence of *Elkview* is that an arbitrator has no jurisdiction to deal with alleged discrimination in a carrier's policy when the collective agreement is a Category 3 or hybrid formulation.

Most of the Union's other authorities were unhelpful, said the Employer. *Canpar Industries* simply followed *Parry Sound*, but there was no issue involving a third party insurer. The grievance was about the employer's decision to dismiss an employee without further accommodation. After *Parry Sound*, the Supreme Court decided *Quebec Commission des droits de la personne et des droits de la jeunesse v. Attorney General of Quebec*, [2004] 2 S.C.R. 185, and reaffirmed the *Weber* approach to arbitral jurisdiction. In that case, it was held that the human rights tribunal had jurisdiction, not an arbitrator, because the issue was whether it was discriminatory to negotiate a term that adversely affected younger teachers (para. 23-25).

The *Labour Relations Code* provisions cited by the Union assume a dispute *under the collective agreement*. So does Article 36.1 (Grievance Procedure). *Douglas College* applied the Charter but again the age discrimination issue arose from an express clause in the collective agreement (mandatory retirement at age 65). *Eldridge* applied the Charter to a private entity implementing a government program, which affirms individual Charter rights, but does not dictate the proper forum for claiming the right. Finally, the Employer clarified that it does not assert a waiver of constitutional rights by the Union in this case.

With respect to the interpretation of Article 39.1 and 39.2, the Employer reiterated its position and noted that it would have been simple for the parties to state that employees have benefits post age 65. Instead, the agreement declares that all rights with respect to benefits will be governed by the policies. The Employer insisted that

a full contextual reading, including the evolution of the language and the conduct of the parties, supported its position.

As for allegedly misleading statements by the College, there was no evidence called by the Union on this point. The documents alone do not allow such a finding. The College did not tell faculty that "nothing could be done" about the termination of benefits. It was always open to the Union to bargain about benefits, and on some aspects of the Plans, the Union did so. At Joint Committee, Rawson simply explained that there were financial limitations on the Employer during bargaining. Enhancing a benefit means that something else must be given up or a way must be found to pay for the new benefit. These were realities well known to the Union. However, after several years' delay, the Union opted to file a grievance instead of bargaining an improvement in benefit coverage.

Analysis and conclusions

The effect of the decision in Elkview Coal

The arbitrator in *Elkview Coal* ruled he had jurisdiction because the grievance was not a dispute between the insurance carrier and the union: "Properly understood, … it is a dispute that arises under the collective agreement whether the health care, dental care and vision care benefits required to be provided by the Employer under Art. 16 and, which are affected by the definition of common law spouse, are void as being discriminatory" (award, at para. 25). As summarized by the Court of Appeal, the union was seeking an order that the employer "compel the insurer to amend the definition" to make it comply with the Code (judgment, at para. 7). Applying *Weber*, the court stated that its task was to define the essential character of the dispute and to consider the ambit of the collective agreement. Did the dispute arise from the

interpretation or violation of the agreement? The appeal court concluded that nothing in the grievance related to a breach of the collective agreement (at para. 22-23):

> ... The definition of common law spouse is a term of the insurance policy, a term agreed to be "standard" in the industry, and expressed in the language of the insurer's choosing. The application of that definition to the circumstances of this case was made by the insurer. It declined to provide coverage to the employee's same-sex partner, based on its interpretation of the language of the insurance policy. The insurer's decision does not relate in any way to the Collective Agreement, or to any breach of its provisions.
>
> Similarly, the remedies sought are remedies against the insurer. The Union seeks a declaration that the definition of common law spouse in the policy is discriminatory. If such a declaration is to be made, it will be directed to the language of the insurance policy. That declaration will have no relation to, nor impact upon, the Collective Agreement, or the parties' rights under it. …

Further, it was held that the arbitrator erred in characterizing the dispute as whether the benefits were void for discrimination (at para. 28):

> … Benefits cannot be said to be "void." They are either payable or not payable, depending on the true interpretation of the document under which they are provided for. What may, or may not, be "void" is the language of the insurance policy, if it can be shown to offend the provisions of the *Human Rights Code*. In posing the question as he did, the arbitrator confused the employer's obligation under the Collective Agreement, with the insurer's obligation under the policy. As I have said, the Union's real dispute is not with the employer, but with the insurer.

The arbitrator committed a fundamental error and misinterpreted the collective agreement, said the court (para. 29).

While the present case has some similarities to *Elkview Coal*, I accept the Union's submission that there are material distinctions because of Article 9.2, which for convenience is reproduced, as follows:

ARTICLE 9 – NO DISCRIMINATION

9.1 There shall be no discrimination based on the grounds set out in the *Human Rights Code* of British Columbia.

9.2 Further, OC and its agents agree that there shall be no discrimination, interference, restriction or coercion exercised or practiced with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, termination, discipline, dismissal or otherwise by reason of age, race, creed, colour, nationality, political or religious affiliations, physical or mental disability, sexual orientation, sex or marital status, nor by reason of membership in a labour union, and employees shall at all times and in like manner act in good faith toward OC.

Under Article 9.2, the present parties agreed that there shall be no discrimination or restriction exercised or practiced, by reason of age, with respect to certain conditions of employment such as hiring, wage rates and training, or otherwise. No such article had been negotiated in *Elkview*. In Article 9.2, health and welfare benefits are not listed expressly but arguably they may fall within the generic phrase "or otherwise." This was the holding in *Re Kootenay Savings Credit Union and United Steelworkers, Local 9090*, [1991] B.C.C.A.A.A. No. 7 (Chertkow) at para. 30 dealing with denial of benefits during pregnancy (cited by the arbitrator in *Elkview Coal* at para. 20 of his award). The no-discrimination clause in *Kootenay Savings* was as follows: "Neither the Union nor the Employer in carrying out their obligation under this Agreement shall discriminate in matters of hiring, training, promotion, transfer, layoff, discharge or otherwise because of race, colour, creed, national origin, age sex or marital status, or for union activity" (at para. 4).

Article 9.2 is not simply a duplication of Code protections. That topic is addressed by Article 9.1. Article 9.2 begins as follows: "*Further*, OC and its agents agree that there shall be no discrimination …" (emphasis added). The clause does cover traditional human rights grounds but also extends to membership in a labour union. Moreover, an employee duty of good faith toward the College is included in Article 9.2. As noted by the Union, all words in a collective agreement must be given effect.

Article 9.2 cannot be ignored. It creates a legal obligation, although the precise meaning of the provision need not be determined at this stage of the proceedings.

The Union's point was that the employer in *Elkview Coal* was not subject to a "no-discrimination" clause like Article 9.2. This fact was specifically noted by counsel for Elkview in argument before the arbitrator (award, para. 21). On appeal, the court's *Weber* analysis focused solely on the insurance clause, which provided as follows:

> 16.01 The Company agrees to pay the premiums to the insurance companies for providing the benefits set out below for any employee who has elected or in the future may elect to be covered by the Plans provided that such employee meets the eligibility requirements for enrolment. Coverage provided is subject to the terms of the respective insurance policies. All the benefits provided in this agreement are payable by the insurer and not by the Company.

Article 16.01 in *Elkview* was roughly analogous to the scheme negotiated by the present parties in Article 39, as the Employer emphasized in argument before me. The obligation was to purchase the plan and pay the premiums. Coverage was subject to the plan. Benefits were payable by the carrier, not the employer. However, in the present case, unlike *Elkview*, is it alleged by the Union that the Employer breached an express collective agreement obligation not to allow discrimination flowing from its purchase of the requisite benefit plans.

Elkview Coal dictates that as arbitrator in the present case, I would have no jurisdiction to settle an eligibility dispute under the insurance policy between an employee and the carrier. For this reason, I am specifically not relying on *Renfrew County, supra*, cited by the Union for the proposition that "there is residual jurisdiction for the arbitrator where there is a question as to whether the plan arranged by the employer is discriminatory by nature …" (at para. 23). *Renfrew* was decided after *Elkview Coal* but did not cite or discuss the decision of the B.C. Court

of Appeal. In *Renfrew*, it was suggested that an arbitrator could determine whether the plan administrator acted in a manner which was discriminatory. The union in that case sought an order that the insurer, characterized as agent of the employer, must provide benefits to the grievor's child (at para. 8).

Nevertheless, in the present case, I am still mandated to determine whether the Employer breached Article 9.2 of the collective agreement. This falls squarely within the *Weber* formula for jurisdiction. I confirm that I would have no authority over the carrier. I am doubtful of the Union's argument that the carrier may be construed as an agent of the Employer, for all the reasons advanced by the Employer in final argument.

In *Elkview Coal*, the court stressed the fact that "the remedies sought are remedies against the insurer" (para. 23). Not so here. A declaration or other remedial order could be made directing the Employer to pursue amendments to the Plans, or to arrange new plans, such that no discrimination or restriction is exercised or practiced based on age. Such a remedy would have no immediate effect on coverage in place under the Plans but in due course, the Union might well achieve its desired outcome. I say "might" because under the collective agreement, the parties agreed that benefits would be delivered through a third party, so what can be achieved depends in part on what is available in the market.

Conceivably, arbitral jurisdiction in the present case could be retained while the Employer sought to revise the plans, or the parties engaged in cost-related collective bargaining, or both. I am sensitive to the Employer's complaint, explained by Rawson in her testimony, that benefits do cost money and are negotiated by the parties as part of a total collective agreement package. Given the history in this case, imposing an enhanced benefit obligation on the Employer by arbitral fiat might be

unfair, especially if divorced from the bargaining process. Still, that goes to the question of remedy and not arbitrability. At the very least, a declaration that the Employer has breached the collective agreement as alleged would be a strong incentive for the parties to find a solution that avoids discriminatory effects. To be clear, all the foregoing comments are confined to the arbitrability question currently before me and are subject to the Union establishing its case on the merits.

Another distinction between *Elkview Coal* and the present facts is raised by the following passage in the Court of Appeal decision (at para. 25):

> It is of note that the employer in this case had nothing to do with drafting, or settling, the language of the insurance policy. The Union had the language of the policy in its possession before the last Collective Agreement was signed. There is no suggestion of any dispute between the Union and the employer over the terms of the policy in general, or the definition of common law spouse in particular. Beyond the bare allegation that the employer is in breach of the Collective Agreement, there is nothing in the nature of this dispute, or in the terms of the Collective Agreement, that would give substance to that allegation.

While again there are similarities in the present case, there are also material differences. I acknowledge the Employer's point, forcefully conveyed during argument, that denial of post-65 benefits continued for decades without any objection or grievance by the Union. For much of this time, faculty were permitted to continue working past age 65, with approval, and some did so. The question of post-65 benefits did finally surface when the Code was amended in 2008 to eliminate mandatory retirement, apparently rousing the Union to assert an entitlement to post-65 benefits during discussions with the College (January 8 & 25, 2008 Joint Committee). It was suggested by Union representatives that the collective agreement entitled "all employees" within the designated categories to receive benefits.

Surprisingly, the Union warned that it would grieve if a member was *hired* after age 65 and denied benefits, but it did not lay down a full, direct challenge on behalf of all post-65 working faculty. It did not challenge the issuance of informational communications such as the FAQ and the newsletter that continued to portray LTD, Group Life and AD&D benefits as unavailable post-65. Neither did the Union seek to bargain post-65 benefits during negotiations leading to the 2010-2012 or the 2012-2014 collective agreements. However, the Union did propose a new clause allowing it to appoint an agent of record to represent employee interests in Plan design and the purchase of benefits (in June 2010). The proposal was not accepted.

The foregoing recital shows that the present case differs from *Elkview Coal*, where there was "no suggestion of any dispute between the Union and the employer over the terms of the policy in general" or the alleged discrimination in particular. In *Elkview*, the union had been recently certified and the benefit dispute arose just prior to the first renewal of the collective agreement (award, at para. 2-7). In the present case, unlike *Elkview*, there was discussion between the Employer and the Union about the process by which insurance policy conditions were set or could be changed. During bargaining, the Union asked for a window into the process by having an agent of record. Ultimately, the Union grieved over post-65 benefits in September 2013. While this course of conduct could have set up an estoppel against the Union until the expiry of the then-current collective agreement, we are now well down the road and no estoppel has been raised by the Employer.

This much can be said. Unlike *Elkview Coal*, a dispute did arise between the parties concerning the availability of benefits under the Plans, arranged pursuant to the Health and Welfare article of the collective agreement. The matter was discussed at the Joint Committee on the Administration of the Agreement, a body created by the parties "to review matters arising from the administration, interpretation and

operation of the Agreement", as well as to facilitate communication and better working relationships (Facts, Tab 16, 2005-2010 collective agreement, Art. 44.4). The Union was relatively passive on the issue for several years but it did alert the College to its concerns before eventually filing the present grievance.

Before leaving the subject of *Elkview Coal*, it is worth reviewing the line of argument advanced before the Court of Appeal by counsel for the Labour Relations Board (at para. 30), which bears some resemblance to my own conclusions. It was suggested that arising out of Article 16.01 in that case, there might be an *implied obligation* on the employer to secure a benefit plan compliant with the general law. By this reasoning, an arbitrator would have jurisdiction to decide whether the employer was bound to arrange a plan that conformed to the Code. Rejecting the Board's submission, the court held that it would be unreasonable to imply a "unilateral obligation" on the employer to ensure the lawfulness of the plan. "There is nothing in Article 16.01 to support that position" (at para. 31).

By contrast in the present case, there is specific collective agreement language that arguably does require the Employer to avoid discrimination in benefits, which pursuant to Article 39 are arranged with insurance carriers. *Weber* affirmed that "the question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement" (at para. 67). In the present case, the Employer's duty is not implied at all. It is rooted in the language of the collective agreement.

As the Supreme Court of Canada observed in *Weber* (para. 52), usually the nature of the dispute is clear: "either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious." The present case may be one, insofar as there is a controversy over alleged age discrimination in the carrier's

policies. Is the essential character of the dispute related to an insurance policy or related to the no-discrimination clause in the collective agreement? Obviously, there are elements of both in this case, but it is only because of the collective agreement, negotiated by the Union on behalf of its members, that the insurance policy exists at all. Layered on top of the Employer's Article 39 obligation to arrange coverage is the no-discrimination clause. Thus, to use the court's phrasing, the dispute "had to do with the collective agreement", and that suffices here for purposes of arbitrability. Faced with anti-discrimination provisions in collective agreements, arbitrators should not "search for ways to minimize their impact": *Alberta Hospital Ponoka, supra*, at para. 48, followed in *Telus v. Telecommunications Workers Union, supra*.

Much was said in argument about the *Brown & Beatty* taxonomy, which is really just another way of analyzing the essential character of the dispute and ascertaining the intent of the parties. The Court of Appeal decided *Elkview Coal* without mentioning the taxonomy. In the present case, the Union did not directly dispute the Employer's position that the language falls within Category 3, or a hybrid of Categories 2 and 3, which normally renders the dispute inarbitrable. The Union conceded there are some "perplexing" aspects to the language of Article 39 but insisted that employees do have enforceable rights under the "principal features" set forth in the Article. However, the Employer failed to purchase the plans as agreed. This alone makes the case arbitrable, said the Union. The Union also focused on the Employer's obligation not to allow discrimination. Reading the language of Article 39 together with the duty in Article 9.2, the Union said it was entitled to arbitrate the grievance and obtain a remedy, whatever the taxonomy.

For its part, the Employer submitted that Article 39 itself dictates that the grievance is inarbitrable. The Employer urged a contextual reading of the collective agreement

and said it has fully met its obligations under Article 39. The Union's "all employees" argument should be rejected out of hand. I turn to this subject next.

The meaning of Article 39.1 and the Union's "all employees" argument

For convenience, the essential provisions in question are reproduced, as follows:

> **39.1 <u>Benefits Eligibility</u>**
>
> This clause applies only to employees on a full-time continuing appointment, 50% part-time continuing employees who hold six-month appointments and, with the exception of section 39.1.3, to employees on full-time term appointments which are greater than five calendar months in length. OC shall pay the full premiums for the health and welfare plans while the employee is in receipt of a salary from OC.
>
> …
>
> **39.2**
>
> Clause 39.1 is provided solely for the purpose of explaining the principal features of the plans. All rights with respect to the benefits of the plans will be governed by the policies issued by the carriers. There will be no change to the level of health and welfare benefits without prior consultation between the parties.

The Union's argument was that Article 39.1 (the preamble) plainly states an entitlement to benefits for those employees falling under the listed categories (full-time continuing, 50% part-time continuing with 6-month appointments, full-time term appointments longer than five calendar months). If the clause applies to these employees, then logically it applies to *all such employees*, without regard to age. In *City of Vancouver, supra*, where the agreement said that effective the first full pay period "employees shall be insured", the employer was precluded from denying group life coverage post-65. There was a clause stating that coverage "for each of such employees" was 1.5 times basic annual salary, "subject to the terms and conditions of the group life insurance policy". The arbitrator interpreted the language as follows in upholding the grievance (at para. 27):

> In my view, the first of these sentences is directed to eligibility or the general promise of insurance. The plain and ordinary meaning of the words indicates that all employees shall be insured under a group life insurance policy -- there is no limitation or other qualification. This conclusion is reinforced by use of the phrase "each of such employees" in the second sentence. It is my further view that the second sentence is directed to the level of benefits, and it is only there that coverage is made "subject to" the terms of the policy. Stated somewhat differently, I have determined that all employees are eligible for life insurance under the group policy, although the level of benefits is subject to its terms and conditions provided those are not inconsistent with the Collective Agreement. …

However, as the Employer emphasized, Article 39.2 significantly qualifies the preamble and says it is provided "solely" to explain the principal features of the Plans. In addition, "All rights with respect to the benefits of the plans will be governed by the policies issued by the carriers." This is stronger qualifying language than in the *Vancouver* case. The Employer cited *Kwantlen University College, supra*, where the clause said "benefits shall be set at three times the employee's annual salary", but also indicated that benefits were subject to insurance policy limitations. The *Kwantlen* grievance was denied. Employees not "actively at work" as specified by the policy were not entitled to the enhanced benefit in question. Clearly, each case turns on the specific wording of the agreement.

In the present case, Article 39.2 limits the effect of the preamble, but reading the two clauses together, there is still an entitlement to, at least, the principal features of the Plans. Arguably, in saying that all rights will be governed by the policies, the parties could not reasonably have meant that an employee's entitlement could be rendered nugatory by the insurer. A more harmonious and purposive interpretation would be that administrative terms and conditions are within the purview of the insurer. In this sense, benefits are governed by the policies. Admittedly, an employee could be denied coverage for failure to meet necessary insurance-based requirements, but *prima facie* the collective agreement provides for the benefits negotiated and enumerated by the parties in Articles 39.1.1, 39.1.2 and 39.1.3.

On the facts in *City of Vancouver*, *supra*, the distinction was between "the general promise of insurance" and the level of benefits. Beyond that, I accept the Employer's point that Article 39.1 cannot dictate the eligibility of all employees at all times, regardless of compliance with basic coverage conditions such as active work status, vocational program participation or the furnishing of necessary medical information. It is implicit that an insurance policy purchased by the Employer under Article 39 must be administratively workable. As shown in *Kwantlen University College*, *supra*, some employees may be disentitled on such grounds. But reading out an entire class of employees based on age arguably exceeds the bounds of Article 39.2. Further, as discussed above, the Union is alleging that the Employer breached the no-discrimination clause in Article 9.2 when it arranged Plans that deny post-65 benefits. A contextual interpretation of Article 39.2 would reasonably include Article 9.2 as a related part of the collective agreement.

These are issues to be decided as part of the merits. I am not able to conclude at this stage that the grievance is bound to fail and therefore inarbitrable, as the Employer has argued.

The Employer also submitted, based on the historical evolution of the collective agreement, that the preamble was added to the article in 1987 to separate those employees participating in benefits under the Plans from those who would henceforth receive 4% of salary in lieu of actual benefits. Prior to that, there was no preamble, the Plans were delivered with an age-65 termination and the Union never objected. After the preamble appeared, there was no change in post-65 benefits. I appreciate the argument but I have reservations because, even before the introduction of the 4% payment in lieu, collective agreements back to 1977 contained an in-lieu cash payment for certain temporary, replacement and sessional employees (Facts, Tabs 3-7). Previously the amount payable in lieu was $42 per

month or $2.00 per working day. In the 1987-1990 agreement, the preamble appeared and the payment was changed to a percentage of salary. The payment was in lieu of benefits, but also for professional development, although the latter reference did not recur in subsequent agreements.

Subject to receiving further evidence and argument, it appears to me that the preamble language was not essential to making a distinction between employees entitled to benefits and those receiving payment in lieu. Before 1987, without a preamble, it was implicit in the Health and Welfare article that the Plans would be generally available to employees, except for those on temporary, replacement or sessional appointments of five months or less, who would receive cash in lieu. Now the wording of the preamble clarifies and amplifies the point. To some extent, the language does separate classes of eligible and non-eligible employees, but this begs the question of whether those who are enumerated as eligible have an enforceable commitment under the collective agreement.

The historical evolution of the agreement is not determinative against the "all employees" argument.

Finally, the Employer pointed to the Union's long acquiescence and failure to grieve the termination of benefits at age 65. In response, the Union argued that the College misled the faculty about whether the policies could be changed. According to the Union, the College conveyed a continuing message that the terms of the Plans were determined by the carriers. I do not accept the Union's argument in this regard. The Union knew or ought to have known that it could attempt to bargain for revised terms. It knew or ought to have known that the Employer was contracting with carriers to arrange for benefits in line with the provisions of the Health and Welfare article. Extended Health and Dental coverage was improved for older faculty

following Common Table collective bargaining on this subject for the 2010-2012 agreement. It defies belief that the Union was unaware of how to go about seeking an end to age-65 termination. No witness was called by the Union to make such a claim.

Nevertheless, I am unable to accept the Employer's submission that the Union's course of conduct establishes conclusively that the "all employees" argument will fail. Yes, the College was clear and consistent over the years in conveying to employees approaching age 65, and to faculty in general, the terms of the Plans. Nothing was hidden. As reviewed above, the Union did raise the issue in conjunction with discussions surrounding the end of mandatory retirement in 2008-2009. Until that point in time, while some faculty did work past age 65 subject to College approval, there was no *right* to continue employment after age 65. The Union's acquiescence from the inception of the Plans in or about 1975 until the Code amendment in 2008 must be understood, at least to some extent, in that light. It was not seen as a live issue. It does not necessarily follow that the Union's conduct in this respect was an acceptance that post-65 benefits were rightly terminated under the Plans. Once mandatory retirement was ended, the Union took a position on post-65 benefits albeit it was passive in pursuing the issue until the grievance was filed.

The Employer's authorities are informative but each case falls to be decided on its unique facts. In *Brewers' Distributor, supra*, the extended health plan was in force for 35 years with a lifetime maximum of $7,500. The union never objected. When the union grieved the cap, the arbitrator held that this long acquiescence was relevant to the mutual intention of the parties and dismissed the grievance. While intent is to be derived as far as possible from the plain meaning of the words used in the agreement, the language must also be read in the context of the surrounding circumstances at the time of contracting, said the arbitrator (para. 54-55).

In *Brewers*, the collective agreement did not reveal the extent or scope of the coverage and the union was unable to prove that it achieved an unlimited benefit. By contrast, in the present case, the Union alleges that the agreement expressly requires coverage of all employees and further, that the College is barred from arranging a discriminatory plan that omits post-65 faculty members. As reviewed above, the Union's course of conduct was less definitive than in *Brewers*.

The Employer also cited *Peace River South, supra*, but conceded a key factual distinction. Those parties themselves negotiated the terms of the insurance plan, including the age 65 termination of benefits (at para. 12). Thus, while the collective agreement provided benefits "for all employees" working 15 weekly hours or more, it was held that the terms of coverage were set forth in *both* the plan and the agreement. Mutual intent was best ascertained by considering the details in the plan as expressly agreed between the parties. The arbitrator observed that form should not triumph over substance.

I acknowledge that the Union's course of conduct is a significant feature of the present case but I am unable to find, at this stage, that it is determinative in construing the meaning of Article 39.

Conclusion and finding

For the above reasons, I find the grievance is arbitrable, to the extent as stated herein. The hearing will continue in accordance with the parties' procedural agreement.

DATED at Victoria, B.C. on June 15, 2018.

ARNE PELTZ, Arbitrator