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
(Expert evidence ruling)

Appearances:

Lindsie Thomson, for the Employer.
Leo McGrady, Q.C., Maria Koroneos and Zoe Towle, for the Union.
Leah Greathead and Ashley Caron, for the Attorney General.

Hearing dates and location:

October 3-4, 2018; Kelowna, B.C.

Background to the disputed issue

1. In September 2013, the Union grieved that Group Life Insurance, Long Term Disability and Accidental Death and Dismemberment benefits provided to faculty members under policies purchased by Okanagan College ("the Plans") terminate at age 65. In its grievance, the Union cited provisions of the collective agreement and the *Human Rights Code*, R.S.B.C. 1996, c. 210 ("the Code"). The grievance 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.
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> 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 [Union] that this is a violation of Article 39 as well as the Human Rights Code provisions against age discrimination.
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> 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).

2. In denying the grievance on October 22, 2013, the Employer stated as follows:

> … 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 [Union], of the effect on employee benefits for those employees who chose to work beyond age 65. The College and the [Union] 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.

3. 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(1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*").

4. 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 does authorize age discrimination under the Plans, then the Code itself violates section 15(1) of the *Charter* and is not saved as a reasonable limit under section 1 of the *Charter*.

5. Section 13 of the Code provides as follows:

> **Discrimination in employment**
>
> **13** (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or

> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
>
> (2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).
>
> (3) Subsection (1) does not apply
>
> (a) as it relates to age, to a bona fide scheme based on seniority, or
> (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

6. Notice of constitutional question was served pursuant to section 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 and the Attorney General of B.C. intervened. The notice stated as follows:

> The Union challenges the legality of the College's conduct in its denial of benefits to [Faculty Association] members post age-65.
>
> The [Union] says that the College has violated section 15 of the *Charter* and section 13 of the *Human Rights Code* by denying its employees 65 years of age or older access to those health benefits available to its employees who are under age 65, on the basis of their age. This conduct by the College constitutes discrimination against these employees on the basis of their age.
>
> The College cannot establish that its plan(s) are exempted by section 13(3) of the *Code*. Alternatively, that provision is unconstitutional insofar as the College seeks to apply it to its employees 65 years of age or older.
>
> In the further alternative, the College has failed to meet its duty to accommodate.

> Nor can the College satisfy its onus under section 1 of the *Charter* that this is a reasonable limit prescribed by law.

7. The Employer objected to the arbitrability of the grievance. After hearing evidence and argument, I held that the grievance was arbitrable: [2018] B.C.C.A.A.A. No. 41.

8. The Attorney General took no position on arbitrability but appeared on a watching brief at that stage.

9. The current hearing was convened to deal with contested expert evidence and particulars. As a result of case management discussions, the only remaining issue is the admissibility of an expert report prepared for the Union by Professor Michael Lynk, Faculty of Law, University of Western Ontario, entitled "Expert Report on Collective Bargaining and Human Rights" (hereafter "the Report"). Both the Employer and the Attorney General objected to the Report in its entirety. During the hearing, the Union stated that in its view, the Report is relevant and necessary to a determination of whether section 13(3)(b) of the Code qualifies as a reasonable limitation under *Charter* section 1. The Union described this as the "real battle ground" in the present case.

10. However, the Employer and the Attorney General did not concede a *prima facie* breach of Charter section 15(1), despite the fact that the Code expressly denies protection against age discrimination in *bona fide* group insurance plans. The Attorney General cited *Withler v. Attorney General of Canada*, [2011] 1 S.C.R. 396 and *Quebec v. A.*, [2013] 1 S.C.R. 60, which now establish a two-part test for assessing a claim under Charter section 15(1): (a)

Does the law create a distinction that is based on an enumerated or analogous ground? (b) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The second part of the test is concerned with the economic and social context of the alleged inequality, and calls for evidence to support the contextual analysis.

11. The Employer and the Attorney General sought further particulars of the alleged section 15 violation, which have been provided by the Union. The Union now states that in light of the defences being raised, the Report would be used in support of its position on section 15(1) as well as the reasonable limits issue under section 1.

12. The Union's most recent particulars are as follows:

> A number of the grievors and other faculty are obliged to continue to work because of their financial circumstances. These financial circumstances include, but are not limited to: insufficient savings; an inadequate pension because of the age at which they returned to the workforce after raising a family; divorce and increased financial pressures resulting from the divorce; and supporting or assisting in the support of children who are attending school, university or college.
>
> Some of these faculty have investigated replacing this lost coverage from private insurers on an individual basis, but have decided the expense was too great.
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> A number of the grievors and other faculty are not financially compelled to continue to work, but rather are motivated by the enjoyment and satisfaction they receive from teaching at Okanagan College, including the enjoyment of the continuing contact with students, as well as their colleagues at the College.
>
> Others continue to work simply because it is such an important part of their identity and sense of dignity; and/or for intellectual stimulation.
>
> All of these employees continue to perform the same work once they reach the age of 65 as they performed prior to reaching the age of 65.

They have not received nor been offered any alternative benefits nor any compensation by the College despite this significant and arbitrary reduction in benefits.

In addition, the College continues to receive funding from the government for these same employees in the same amount as the College received prior to these employees reaching the age of 65. Those funds are not provided to these employees to assist them purchasing alternate insurance, but are rather put to other uses by the College.

The decision of the College to terminate these benefits once the employees reach the age of 65 is not based on any actuarial data. In fact, there is no reliable actuarial data supporting that decision. The College can provide benefits to these employees in a manner that is actuarially sound and financially sustainable. There are employers who are doing so at the present time.

The effect of the College's decision is to create a disadvantage for all of these employees regardless of their individual economic or other personal circumstances by perpetuating a prejudice and/or stereotype. This decision sends a message that these faculty are of lesser worth and value than the younger faculty and coworkers. The decision reinforces negative and ageist stereotypes and assumptions about the abilities and contributions of older workers. It devalues these older workers.

The College's decision fails to recognize the contribution of these faculty to the College, as well as fails to recognize the importance of work to the older workers. The decision is offensive to their dignity.

The cost of providing these benefits to employees over 65 who wish to continue to work is a reasonable cost for the College to bear. The sick leave absence history of this group is statistically only slightly greater than the under 65 faculty. Their inclusion would not cause undue hardship to the College. In addition, there are insurers available who are prepared to provide that coverage.

There was no pressing or substantial concern relied on by the College to justify its decision under section 1 of the *Charter*. The section at issue does not minimally impair the *Charter* rights of this group of faculty.

The proposed expert evidence

13. Professor Lynk is an Associate Professor of Law teaching constitutional, labour and human rights law. Previously he practiced labour, employment and human rights law. He also served as a part-time Vice-Chair of the Ontario Public Service Grievance Board and an Adjudicator under the *Canada Labour Code*. As a labour arbitrator, primarily in Ontario, he has issued over 90 awards. Professor Lynk has numerous publications in his field including books on labour law and trade union law. He is currently preparing a new book on human rights law at work and the duty to accommodate. He presents regularly at academic and professional conferences in Canada and internationally. This is a brief overview of a lengthy resume.

14. Professor Lynk has testified previously as an expert in constitutional law challenges. In 2006, he submitted an affidavit on the employment rights of RCMP officers who were excluded from collective bargaining: *Mounted Police Association of Ontario v. Attorney General of Canada* (2009), 96 O.R. (3d) 20, reversed [2012] ONCA 363, reversed [2015] S.C.J. No. 1. In 2010, he testified before the Saskatchewan Labour Relations Board as an expert in Canadian and international labour law relating to public sector essential services legislation: *CUPE, Local 3967 v. Regina Qu'Appelle Health Region*, 2010 CanLII 5199. His report was updated and received by the court in subsequent litigation on the same issue: *Saskatchewan v. Saskatchewan Federation of Labour*, [2012] S.J. No. 49 (Q.B.), reversed [2013] S.J. No. 235, reversed [2015] S.C.J. No. 4. In 2015, he was accepted by the Ontario Human Rights Tribunal as an expert in labour law and human rights law in a case

dealing with post-age 65 benefits, somewhat similar to the present case: *Talos v. Grand Erie District School Board*, 2018 CanLII HRTO 680.

15. According to Professor Lynk, he was asked to address four issues (para. 6): equality of bargaining power in the workplace; collective bargaining and minority human rights interests; the uneven development of human rights in the workplace; and age as a protected human rights ground in the workplace. Much of the discussion involves court decisions and legislation, interspersed with evidentiary references and citations from academic literature.

16. The Report asserts there is inequality of collective bargaining power between unions and employers despite longstanding legal regulation. Considering developments over the past 30 years, the Report notes declining rates of unionization and a consequential erosion of bargaining power, a diminished labour share of national income, declining political influence and an inability to achieve desired legislative reforms. The Report next reviews the manner in which negotiated collective agreements remain subject to human rights law compliance, even if the union has, willingly or unwillingly, bargained a provision that infringes employee human rights. The Report considers the labour relations mechanisms that might remedy such infringements and concludes that only human rights law can effectively protect minority rights. The Report critically analyzes the historic, uneven development of various equality rights, pointing to jurisprudence but also social and political factors. Some rights began in a half-formed state due to political exigencies in the legislature and society, but then slowly expanded as the initial restrictions were found to be indefensible in litigation.

17. Professor Lynk states that although equality rights may differ in kind due to their particular characteristics, "they share a common essence: a history of scorn, vulnerability, stereotyping, disadvantage, discrimination and oppression that spills into the present" (at para. 27). He characterizes protection against age discrimination as a laggard in Canadian human rights and equality law. Among other causal factors, he identifies a sense, sometimes inarticulate in decision making, that "age is different" and therefore requires less analytical rigor. He also refers to the fact that unions traditionally opted to defend mandatory retirement and other age-based distinctions. They saw these provisions as allowing for generational workplace renewal and enhanced pension benefits. While the courts were generally deferential, eventually the legislatures enacted reforms such as the abolition of mandatory retirement.

18. The Report culminates with a review of academic legal writing on age discrimination as compared with the other equality rights. The notion that "age is different" has been criticized on a number of grounds, including social construction and stereotyping, as well as contestable claims that older workers cause higher costs. The Report sums up as follows (para. 51):

> The development of human rights in Canada has been uneven and inconsistent, with some rights enjoying a broader and more liberal application at times than other rights. While, in principle, all human rights grounds are to be interpreted and applied in the same fair, large, broad and liberal fashion, and there is to be no hierarchy among them, the reality has been different. Some rights in Canada have developed in a half-formed fashion, with a basic legislative and jurisprudential recognition of their status as a human right, but without the comparable breadth and depth of other human rights grounds. Only with subsequent litigation, social debates and legislative review have some of these half-formed rights acquired a full maturity and richer legal reach.

> Age as a protected ground against discrimination is one of these half-formed human rights that is still awaiting full legal maturity in Canada. Age discrimination as a human rights concern has traditionally been relegated in Canada to the jurisprudential backburner, and this ground has not enjoyed the seminal caselaw treatment that many other areas of human rights law – disability, sexual orientation, family status, religion and gender, among others – have enjoyed. A persuasive and compelling explanation for this deficient approach in human rights has been offered by Professor Pnina Alon-Shenker. Her recent academic work has criticized the prevailing "age-is-different" and *Complete Lives Approach* adopted by some legal decision-makers, and developed instead the *Dignified Lives Approach* to articulate the need for a robust, dynamic and purposive approach to age discrimination, and to enable it to work as hard as many of the other human rights grounds in Canada.

19. Professor Lynk clearly endorses the *Dignified Lives Approach* to age-based human rights. He presents a critique of the alternative model and gives principled justifications for his position (at para. 48-50). His main point is that the *Dignified Lives* theory "offers a broader, more liberal and more dynamic human rights approach toward the scourge of age discrimination in the workplace …". However, in keeping with instructions provided by counsel, the Report does not explicitly consider the merits of the grievance, whether section 13(3)(b) of the Code violates section 15(1) of the *Charter*, or whether such a violation can be justified as a reasonable limit under *Charter* section 1.

Objections by the Employer and the Attorney General

20. The Employer acknowledged that an arbitrator appointed under the *Labour Relations Code* must have regard to the real substance of the dispute and is not bound by strict common law rules as to the admissibility of evidence: section 82(2), section 92(1). Nevertheless, it has been held that these rules should not be ignored: *British Columbia (Ministry of the Attorney General) v.*

BCGEU (Holbeche Grievance), [1996] B.C.C.A.A.A. No. 350 (Greyell) at para. 13; *B.C. Public School Employers' Association v. BCTF*, [1999] B.C.C.A.A.A. No. 203 (Taylor) at para. 13. As stated in the *Holbeche* award, "… the admissibility of evidence should be assessed from the perspective of whether such evidence will assist or impede an arbitrator's ability to perform his/her statutory mandate under S.82(2) of the *Labour Relations Code* while at the same time preserving the integrity of the arbitration process in providing (and appearing to provide) both parties with a fair hearing and while proceeding in a timely, inexpensive and informal fashion".

21. The Attorney General adopted the same position. Expert reports should not be received without scrutiny, especially in the present case where the proposed witness is put forward as an expert in domestic labour law. Labour arbitrators themselves are experts in this subject. Despite the broad discretion granted by the *Labour Relations Code*, in many instances arbitrators have applied evidence law principles to exclude expert testimony. While Professor Lynk has been accepted as an expert in several other cases, this is "of passing interest only" and his qualifications must still be scrutinized "in the specific context of the present case": *R. v. Violette*, [2008] B.C.J. No. 2766 at para. 13.

22. Expert evidence is presumptively inadmissible, said both the Employer and the Attorney General. It is allowed only when the expert's specialized knowledge is required to help the adjudicator draw true inferences from the facts stated by witnesses. As explained in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] S.C.J. No. 23 at para. 14-15:

> ... Witnesses are to testify as to the facts which they perceived, not as to the inferences -- that is, the opinions -- that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness …". While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading …
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> Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Professor Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24 at p. 42.

The *Mohan* test

23. Both the Employer and the Attorney General cited the four-part threshold test for admissibility of expert evidence as established in *R. v. Mohan*, [1994] S.C.J. No. 36, as follows: relevance; necessity in assisting the trier of fact; absence of any exclusionary rule; and a properly qualified expert. If the proposed evidence meets these criteria, a cost-benefit analysis is applied to determine whether the evidence is sufficiently beneficial to warrant its reception. In *White Burgess, supra*, the gatekeeper test was described as follows (at para. 24):

> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey* [2009], stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm

> to the trial process that may flow from the admission of the expert evidence": para. 76.

24. Benefits and costs were discussed as follows in *R. v. Abbey*, [2009] O.J. No. 3534 (C.A.) at para. 87, 90-91):

> The "benefit" side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective. …
>
> The "cost" side of the ledger addresses the various risks inherent in the admissibility of expert opinion evidence, described succinctly by Binnie J. in *J.-L.J.* at para. 47 as "consumption of time, prejudice and confusion". Clearly, the most important risk is the danger that a jury will be unable to make an effective and critical assessment of the evidence. The complexity of the material underlying the opinion, the expert's impressive credentials, the impenetrable jargon in which the opinion is wrapped and the cross-examiner's inability to expose the opinion's shortcomings may prevent an effective evaluation of the evidence by the jury. …
>
> In addition to the risk that the jury will yield its fact finding function, expert opinion evidence can also compromise the trial process by unduly protracting and complicating proceedings. Unnecessary and excessive resort to expert evidence can also give a distinct advantage to the party with the resources to hire the most and best experts …

Relevance and necessity

25. In the Employer's submission, the Report is not relevant because it amounts to an academic lawyer's opinion on how human rights law should be interpreted and developed. Out of 103 total footnotes, six relate to facts, all of which can readily be proven by other means. The Report is an argument, not expert evidence within the *Mohan* framework. The Union did not indicate

how this evidence would support the grievance or how the *Charter* argument would be advanced.

26. Further, the Report fails the necessity test because the subject matter is not outside the common experience of a labour arbitrator in British Columbia. In *Mohan*, *supra* (at para. 22), the court stated that the requirement of necessity

> … is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey* [2003], *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". …

27. Inherent in the necessity test is the notion that an expert must not be permitted to usurp the function of the trier of fact. The hearing should not become "a contest of experts with the trier of fact acting as referee in deciding which expert to accept": *Mohan*, para. 24. While the 'ultimate issue' doctrine "is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue": *Mohan*, para. 25.

28. The Attorney General reiterated these submissions and referred to the following additional general authorities on the reception of expert evidence:

Sengbusch v. Priest (1987), 14 B.C.L.R. (2d) 26 at 40; *R. v. Turner*, [1975] 1 Q.B. 834 at 841; *Emil Anderson Construction Co. Ltd. v. British Columbia Railway Co. (No. 2)*, (1987), 17 B.C.L.R. (2d) 357 at 361; *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2005 ABCA 46 at para. 85-87, leave to appeal refused [2005] S.C.C.A. No. 167 (QL); *Albu v. University of British Columbia*, 2014 BCSC 1624 at para. 61. If a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.

29. The Attorney General argued as follows with respect to necessity in a labour relations context (Argument, para. 15):

> While the court has opined that the application of the test of necessity is not exact, it is important to recognize that, in this case, the arbitration board is an expert in labour relations, collective bargaining and British Columbia's general labour relations scheme. The arbitration board was appointed under the [*Labour Relations*] *Code* to resolve disputes between parties such as the College and the Union specifically because of the expertise that the board brings to the arbitration process. The legislature in enacting the *Code* has created an expert body, arbitration boards, and has heightened the importance of their expertise by providing these decision-makers with a privative clause that provides, that the decision of an arbitration board is "final and conclusive and is not open to question or review in a court on any grounds whatsoever".

30. The Attorney General noted that all parties have tendered expert evidence on actuarial science and benefit valuation, which is necessary to understanding the financial impacts of the age-based cut off in the present case. By contrast, the Report does not meet the test of necessity. None of the content of the Report is outside the general knowledge and expertise of a labour arbitration board. In *Canpar Industries v. International Union of Operating Engineers, Local 115*, [2003] B.C.J. No. 2577 (B.C.C.A.), the court recognized the authority of an arbitrator to interpret and apply human rights law (at para. 46,

48). Arbitrators have developed their expertise by grappling with such issues on a repeated basis (at para. 55).

31. The Employer cited cases where labour arbitrators and boards rejected expert evidence because the tribunal was able to reach its own conclusions without the necessity of hearing from the expert: *Holbeche, supra*, alleged excessive force in restraining a prisoner; *Malaspina University College and Malaspina College Faculty Association (Nishihara Grievance)*, [1996] B.C.C.A.A.A. No. 554 (Bruce), selection committee process; *Government of Province of British Columbia and West Coast Liquor Company Ltd. and BCGEU*, [2006] B.C.L.R.B.D. No. 315, whether a business had been sold giving rise to a successorship; *Canada Post Corporation and Canadian Union of Postal Workers*, [2012] C.L.R.B.D. No. 3, opinion of a franchise expert on who was the true employer. In *Air Line Pilots Association and Air Canada*, [1999] C.I.R.B.D. No. 44, there was a single employer application and the union tendered testimony by renowned arbitrator and professor Paul Weiler. The report was rejected for the following reasons, which the Employer said were directly applicable to Professor Lynk's evidence in the present case (at para. 114-115):

> What is at issue here is not Professor Weiler's labour expertise or integrity but the appropriateness of accepting into the record his report and testimony on the interpretation of the Code. The easy route would have been to admit the report and weigh it later. This would have rendered a disservice to the parties and put into question the Board's forthrightness in its consideration of the evidence. Administrative tribunals exercise a great deal of discretion with respect to the admissibility of evidence; nonetheless, the evidence must be relevant and appropriate. In the instant matter, the Board is asked to rule on the labour relations purpose that underlies the application. The Board's decision is based on the facts before it and the application of the law. The Board is enlightened by such evidence that will give it the necessary insight as to the particular industry

> under review, including any economic, statistical and sociological information that provides an explanation for the organization of the industry and its labour relations. It is then up to the Board to interpret and apply the Code according to its accepted principles and spirit.
>
> Professor Weiler's report offered not so much an expert's view of the organization of the industry, but rather a point of view on the interpretation of the Code. [The union] was free to do this in closing argument. It would have been wasteful to allow it to be introduced as evidence.

32. Similarly, in a wage discrimination case, the Canadian Human Rights Tribunal refused to accept expert evidence on European Community, United States and International Labour Organization jurisprudence: *Public Service Alliance of Canada v. Northwest Territories (Minister of Personnel)*, [2001] C.H.R.D. No. 26. The Tribunal stated, "We have an obligation to make up our own minds on legal issues and cannot delegate that responsibility to expert witnesses, however learned they may be" (at para. 16). The Tribunal added that parties were free to argue all matters of law that were relevant to the case, including international law. Professor Weiler was proposed in *Public Service Alliance* as an expert on the joint liability of management and the union in collective bargaining regarding sex discrimination. The Tribunal held it would not be appropriate to receive his opinion on the law. Moreover, it was not shown that the Weiler evidence would assist the Tribunal in deciding the facts (at para. 19-20).

33. The Employer acknowledged that the Report might potentially be allowed as expert evidence in a different kind of forum. However, because a labour arbitrator has expertise in the subject matters addressed in the Report (labour relations history, inherent inequality of bargaining power, human rights in the workplace, arguably also the application of the *Charter* in an employment context), or has ready access to this information, there is no necessity to admit

the Report. It is immaterial that Professor Lynk's opinions have been accepted by courts (Saskatchewan and Ontario) and the Ontario Human Rights Tribunal. Neither courts nor human rights tribunals possess the robust and specialized labour relations knowledge base acquired by experienced labour arbitrators. In sum, the arbitrator is in as good or better position as Professor Lynk to reach conclusions on the issues raised by the Report. The Report is inadmissible for this reason alone, said the Employer.

34. The Attorney General cited *R. v. Comeau*, [2018] S.C.J. No. 15 where the court considered a challenge to section 121 of the *Constitution Act, 1867*, which provides that goods from any of the provinces shall be "admitted free" into each of the other provinces. The accused was charged under New Brunswick legislation that limited the amount of liquor a person could bring in from another province. He maintained that section 121 is essentially a free trade clause. At trial, the accused called an historian to give expert evidence concerning the drafters' motivations for including section 121 in the constitution. The expert also expressed an opinion of "what those motivations tell us about how s. 121 should be interpreted today" (at para. 27). The trial judge accepted the expert evidence on both points – "one of history, the other of law" (at para. 36). On appeal, the court held as follows (at para. 40):

> … This reliance was erroneous. As a preliminary observation, it is difficult if not impossible to contemplate a situation where evidence on domestic law (e.g. interpreting a Canadian statute) would ever be admissible as expert opinion evidence under *R. v. Mohan*, [1994] 2 S.C.R. 9. The application of contextual factors, including drafters' intent, to the interpretation of a statutory provision is not something that is "outside the experience and knowledge of a judge": *Mohan*, at p. 23. To depart from precedent on the basis of such opinion evidence is to cede the judge's primary task to an expert.

35. The Attorney General argued that *Comeau* was determinative on the question of whether a legal opinion is admissible as expert evidence in the interpretation of domestic law. Especially in a labour arbitration, there is no necessity to receive such evidence. Although the present case raises a question of legislative validity under *Charter* equality law, not a subject addressed in the typical labour arbitration, the special expertise of an arbitrator extends to such an issue, said the Attorney General. To the extent that the Report includes legislative and social facts that the Union wishes to reference (*e.g.*, employee vulnerability, declining unionization rates, efficacy of collective bargaining, political dynamics affecting attitudes to mandatory retirement, determinants of legislative reform), it is free to present that type of information without an expert as part of a "Brandeis brief". However, the approach to age discrimination advocated by Professor Alon-Shenker (the Dignified Lives Approach) is legal argument and must be presented in a legal memorandum, not by way of an expert witness. The Union is not unduly hampered in its case. Legal texts and other literature may be quoted as part of final argument.

Exclusionary rules

36. The third criterion under *Mohan* refers to any applicable exclusionary rules. The Employer cited authorities for the proposition that evidence will not be received from a lawyer on matters of law. In *Yewdale v. Insurance Corporation of B.C.*, [1995] B.C.J. No. 76 (S.C.), expert reports were proposed dealing with the standard of care required of solicitors in personal injury claims and other legal issues. The court stated the following general principles (at para. 4):

> Opinion evidence is admissible only where it would be of assistance to the court in deciding a question requiring long study or experience. Conversely, such evidence is not admissible with respect to matters that lie within the ordinary experience of the trier of fact; …
>
> The expert must not be permitted to displace the role of the trier of fact. …
>
> Given the special privilege accorded to experts to testify as to their opinions, they must not become advocates. They must express their opinions as opinions and must leave for the court the required conclusions of law. In theory at least, the court "knows the law" --- in practice it has the responsibility of finding and applying it. Thus the expert should express his or her opinion in an objective and impartial manner, and must not present argument in the guise of expert evidence.

37. The above passage from *Yewdale* was adopted in *Burnaby v. CUPE (Rossner Grievance)*, [2000] B.C.C.A.A.A. No. 95 (Sanderson), a case of termination for absenteeism, where the union tendered medical reports to show the grievor's misconduct was mitigated by Attention Deficit Disorder. Among other reasons, the evidence was rejected because the reports "stray into the area of advocacy" (at para. 15). Arbitrators and courts expect "objectivity and impartiality" from an expert witness (at para. 16). In *Bullmoose Operating Corporation v. Communication, Energy and Paperworkers Union of Canada, Local 443*, [2000] B.C.C.A.A.A. No. 158 (Larson), it was alleged that the grievor falsely claimed he had been injured at work. A medical report was rejected because the doctor stated an opinion that the accident had occurred on the job. This usurped the function of the arbitrator (at para. 25-26).

38. Similarly, in *Murray v. Galuska*, [2002] B.C.J. No. 2674 (B.C.S.C.), a malicious prosecution action, the court applied the exclusionary rules under *Mohan* in refusing to accept a lawyer's report stating that a Crown counsel of ordinary competence would have approved the criminal charges in question.

The report failed to qualify as expert evidence because it included findings of law and taken as a whole, it was "more properly argument than opinion evidence" (at para. 15-17). The report addressed "the very questions that a trial judge hearing this matter will have to determine" (at para. 18). The *Murray* decision was followed more recently in *Henry v. Attorney General of British Columbia*, [2015] B.C.J. No. 2189 (B.C.S.C.), a wrongful conviction action in which the plaintiff sought to file a lawyer's opinion that the prosecution had failed to meet reasonable disclosure requirements as they existed in 1983. The court rejected the evidence as offending "the exclusionary rule respecting the receipt of evidence from a lawyer on matters of law" (at para. 24).

39. The Employer argued that the Report herein is a legal argument presented in the guise of an expert opinion. Professor Lynk cites 40 case authorities in the Report. He makes numerous assertions and advances his own interpretations about the state of labour and human rights law. As reviewed above, such a report is inadmissible as expert evidence. If the Union wishes to make these points, counsel should include them in closing argument.

40. The Attorney General endorsed these submissions and as well cited *Surrey Credit Union v. Willson*, [1990] B.C.J. No. 766 (B.C.S.C.) and *Walsh v. BDO Dunwoody LLP*, [2013] B.C.J. No. 1781 (B.C.S.C.). In *Walsh*, the proposed expert had practiced tax law for 40 years and also sat on the Federal Court of Appeal for three years. His report was tendered to support the plaintiff's claim that the defendant had provided negligent tax advice. In considering the admissibility of the evidence, the court cautioned against defaulting to simply admitting the report subject to weight (at para. 19). The report "purports to

'educate' the court on the interpretation of domestic law and suggests what the court's conclusions should be in applying the law to the facts that might be found at trial" (at para. 23). The court acknowledged that the intricacies of tax law may present a challenge to a generalist court but stated that it is the role of counsel to educate the judge, if necessary (at para. 69). Applying *Mohan*, it was held that the expert evidence was not "necessary" in all the circumstances (at para. 87): "It is not outside the competence of judges of this Court to determine the applicable domestic law and apply it." The Attorney General said this finding applies with greater force in the present case where the arbitrator does have specialized expertise.

41. The Attorney General reviewed the Report paragraph by paragraph, concluding that as in *Walsh*, *supra*, it is entirely a discussion of the interpretation and development of domestic law. It is not possible to sever some parts and admit the remainder as evidence. It is legal argument. Moreover, if the Report was admitted, undeserved weight would be accorded to the Union's legal argument, which would potentially prejudice the opposing parties.

A properly qualified expert

42. The fourth preliminary criterion under *Mohan* is a properly qualified expert. In *White Burgess, supra*, this aspect of the test was expanded to include the proviso that the expert must be able and willing to fulfill his or her duty of objectivity in assisting the court (at para. 53). The court described the elements of the expert's duty as follows (at para. 32):

> Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her … These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

43. The Employer acknowledged that normally an expert witness's attestation (as filed in the present case) is sufficient to meet the requirement of objectivity. Here there is "some concern" about Professor Lynk's independence and impartiality because the content of the Report, as well as his past testimony, shows that he wishes "to push the law in a particular direction" (Employer Argument, para. 57). On this basis, the Employer submitted that "it is arguable" that Professor Lynk has an interest in the outcome of the current litigation and has failed to meet his duty of independence and impartiality. The Report "exhibits bias" (Argument, para. 63).

Cost-benefit analysis

44. Turning to the cost-benefit analysis, the Employer said the Report fails on this test as well. There is minimal probative value to the Report. Some parts are legally irrelevant, such as the discussion of unequal bargaining power. On the other hand, admitting the Report will cause expense, delay and overall inconvenience to the parties. Accepting such evidence would be contrary to the *Labour Relations Code* mandate of timely, inexpensive and informal proceedings. Reception of the Report, followed potentially by the filing of

opposing reports and lengthy cross examinations at the hearing, would be a waste of time, given that the same points can be advanced in final argument. The Employer noted that cross examination itself would be problematic as it would likely devolve into an extended argument between the witness and the examining counsel. For all these reasons, the Report should be rejected. The Attorney General concurred.

Submission of the Union

45. The Union made the following main points in response to the objections by the Employer and the Attorney General. First, since this is a case before an administrative tribunal with a mandate to be flexible in receiving evidence, the *Mohan* test does not apply as it would in court litigation. The arbitrator should exercise discretion and admit the Report, especially since other tribunals and courts have received similar evidence from Professor Lynk in the past. Second, even if *Mohan* is applicable, the Report qualifies as expert evidence. In particular, the necessity test is met because in a *Charter* challenge, it is essential to create an adequate section 1 record for the reviewing courts. In *Charter* litigation, there is greater latitude to receive evidence of social and legislative facts. The real issue is weight rather than admissibility.

Previous expert testimony

46. There was no challenge to Professor Lynk's scholarly or professional qualifications. While the Employer lodged a tepid objection to the professor's impartiality, saying he wishes to "push the law in a particular direction", he

has been accepted in several cases as an independent expert. The opposing parties also claimed that evidence of this nature can never be received, as a matter of law, but Professor Lynk's reports have been accepted in *Charter* cases by both courts and tribunals. The Union called this "remarkable" in light of the position taken by the Employer and the Attorney General. The Union did not say that the fact of Professor Lynk's past testimony was determinative in the present case. However, it does suggest that there is discretion to receive the Report.

47. In 2006, Professor Lynk submitted an affidavit in *Mounted Police Association of Ontario, supra*, described as follows by the court (at footnote 52): "Professor Lynk was retained by the applicants 'to examine the employment rights and industrial relations status of the officers of the Royal Canadian Mounted Police'". This was an opinion on domestic law subjects, notwithstanding the contention of the Employer and the Attorney General that such expert evidence is inadmissible. The trial court struck down the statutory exclusion on bargaining and the Supreme Court of Canada ultimately upheld that ruling. Neither appellate court commented adversely on the filing of this expert report.

48. In *CUPE, Local 3967 v. Regina Qu'Appelle Health Region*, 2010 CanLII 5199, the Saskatchewan Labour Relations Board received testimony from Professor Lynk concerning *The Public Services Essential Services Act* (PSESA), as follows (at para. 48):

> The Union called Professor Michael Lynk as an expert witness. Professor Lynk was accepted by the Board as an expert in domestic and international labour law, including public sector labour law and essential services legislation. However,

> the Board did note that this was the first time that Professor Lynk had testified as an expert witness with respect to essential services legislation.

49. The same legal issue was later litigated before the Saskatchewan courts. Professor Lynk gave evidence at trial: *Saskatchewan Federation of Labour v. Saskatchewan*, [2012] S.J. No. 49 (Q.B.) at para. 128 and footnote 42. His report began as follows:

> In this expert opinion, I will examine the PSESA by addressing the following issues:
>
> (i) A review, analysis, interpretation and opinion evidence respecting the internationally accepted standard with respect to essential services and public sector in the context of a strike, and how the Saskatchewan legislation compares to these international standards;
>
> (ii) A review, analysis, interpretation and opinion evidence with respect to how the Saskatchewan essential services legislation compares with essential services legislation in the rest of Canada with respect to the ability of public sector unions to engage in meaningful collective bargaining with recourse to a meaningful withdrawal of services at an impasse, or recognizing the need for the public to have access to essential services during a withdrawal of services;
>
> (iii) A review of Case No. 2654, issued in March 2010 by the Committee on Freedom of Association of the International Labour Organization with respect to the compliance of the Saskatchewan essential services legislation with international labour standards; and
>
> (iv) A review of the Canadian academic literature with respect to the collective bargaining process and essential services.

50. Restrictions in the PSESA on public sector strikes were struck down and the Supreme Court of Canada subsequently sustained the ruling: [2015] S.C.J. No. 49. Professor Lynk's evidence on international labour law standards was referred to favourably by the high court (at para. 55, 69, 86).

51. In 2015, Professor Lynk was retained by the Ontario Human Rights Commission and testified as an expert before the Ontario Human Rights Tribunal: *Talos v. Grand Erie District School Board*, [2018] O.H.R.T.D. No. 525. The Tribunal described his involvement as follows (at para. 181-182):

> The intervenor AG called Prof. Richard P. Chaykowski as an expert to provide opinion evidence on Ontario's labour relations regime. On July 14 and 15, 2015, he gave *viva voce* evidence and expanded on his report (Exhibit 6).
>
> Prof. Michael Lynk was put forward by OHRC as an expert in labour law, employment law, human rights in the workplace, industrial relations, and collective bargaining to respond to Prof. Chaykowski. On Nov 6, 2015, he gave *viva voce* evidence and expanded on his revised report (Exhibit 54).

52. The Union reviewed the content of the Report and acknowledged there is a mix of labour law academic literature, legal commentary, social fact evidence and comparative analysis about the uneven development of different equality rights in Canada. The Union argued that academic criticism of the jurisprudence on age discrimination is relevant and necessary in the present case. This is not a topic that falls within the expertise of labour arbitrators. Neither is the Report a legal argument disguised as evidence, as alleged by the Employer and the Attorney General. In general terms, said the Union, the Report presents legal, social, economic and cultural context relevant to the denial of benefits based on age. The Union submitted this kind of evidence is essential, at a minimum, in determining whether discrimination (if so found) is a reasonable limitation under section 1 of the *Charter*.

Expert evidence before administrative tribunals

53. The Union described *Mohan* as the starting point for a judicial determination on the admissibility of expert evidence, whereas different considerations apply in an administrative agency or tribunal context. The Union relied on *British Columbia Lottery Corporation v. Skelton*, [2013] B.C.J. No. 12 (B.C.S.C.) (hereafter "*Skelton*"), where the B.C. Privacy Commissioner, acting under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*"), conducted a hearing to consider a journalist's request for disclosure of "Sales Figures" that the Lottery Corporation had refused to release for commercial reasons. Before the Commissioner, the Corporation tendered an expert report (the Lauzon Report) stating that the Sales Figures had significant competitive value and asserting that disclosure would harm the Corporation, to the benefit of third party grey market competitors. The Commissioner held that the report was not admissible as expert evidence because it gave an opinion on the precise matters she must determine under FIPPA. However, the report was received as evidence and weighed in rendering a decision. Disclosure was ordered and the Corporation sought judicial review on several grounds, including the failure to admit its report as expert evidence.

54. The court held that the Lauzon Report did meet the *Mohan* test and should have been received as expert evidence (at para. 67). This was an error that led to a breach of natural justice. The Commissioner's decision was set aside and a new hearing directed (at para. 72, 75). The Union referred to the following passage in support of a broad discretion to admit evidence like the Report, whether or not it qualifies under *Mohan* (at para. 62-64):

> In this case the Commissioner stated that Mr. Lauzon's evidence would be admissible, but not as expert evidence, because he was providing an opinion on the precise matter she was legally obliged to decide and further that the evidence was general and speculative with regard to the issue of reasonable expectation of harm.
>
> The Lauzon Report contains opinions. Opinions are only admissible as expert evidence. If the opinion meets the *Mohan* criteria, it is not open to the Commissioner to determine that she will admit the evidence "but not as expert evidence". Opinion evidence is only admissible as expert evidence. It cannot be admitted in any other way.
>
> What the Commissioner had to decide was whether or not the Lauzon Report met the *Mohan* criteria. If it did, it was then admissible as expert evidence. If it did not, given the relaxed rules of evidence in administrative proceedings, she could at her discretion admit it in any event. (Emphasis added)

55. The Union also emphasized that, as held in *Skelton*, fairness is at stake when a tribunal refuses to admit evidence, thereby depriving a party of the right to be heard (at para. 68-71).

56. *Skelton* was followed in *Order F15-56; Re City of New Westminster*, [2015] B.C.I.P.C.D. No. 59, another FIPPA adjudication, where the City tendered a lawyer's opinion that there was a credible risk of harm if development documents were disclosed to an applicant. The *Mohan* test was applied as both parties treated it as expert evidence. The adjudicator found that the evidence was relevant, the lawyer was qualified to give the opinion and there was no applicable exclusionary rule. However, the evidence failed to meet the necessity test as defined by *Mohan* because the issues were not so technical that the legal opinion was needed to fully appreciate the matters in dispute (at para. 21). The report was not admissible as expert evidence. Even so, the evidence was admitted: "given that the rules of evidence need not be strictly

applied to administrative proceedings, I still admit it as evidence and have considered it" (at para. 22).

57. The flexible approach to expert evidence before administrative tribunals was endorsed in *Alberta Workers' Compensation Board v. Appeals Commission*, [2005] A.J. No. 1012 (C.A.). An injured worker appealed against a denial of benefits by the Board, claiming he suffered a brain injury. The Appeals Commission accepted technical medical evidence from the worker's physician (quantitative EEG testing) and allowed the appeal. On further appeal to the court, the Board argued that the *Mohan* test should have been applied and the expert evidence should have been rejected under the fourth criterion (a properly qualified expert). The appeal court disagreed, holding as follows (at para. 63-67):

> This argument departs from established principles of administrative law. As a general rule, strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed: *Toronto (City) v. CUPE, Local 79* (1982), 35 O.R. (2d) 545 at 556 (C.A.). See also *Principles of Administrative Law* at 289-90; Sara Blake, *Administrative Law in Canada, 3rd ed.*, (Markham, Ont.: Butterworths, 2001) at 56-57; Robert W. MacAulay, Q.C. & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf (Toronto: Carswell, 2004) at 17-2. While rules relating to the inadmissibility of evidence (such as the *Mohan* test) in a court of law are generally fixed and formal, an administrative tribunal is seldom, if ever, required to apply those strict rules: *Practice and Procedure before Administrative Tribunals* at 17-11. "Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law": *T.A. Miller Ltd. v. Minister of Housing and Local Government*, [1968] 1 W.L.R. 992 at 995 (C.A.); *Trenchard v. Secretary of State for the Environment*, [1997] E.W.J. No. 1118 at para. 28 (C.A.). See also *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (C.A.).
>
> This general rule applies even in the absence of a specific legislative direction to that effect. While many statutes stipulate that a particular tribunal is not constrained by the rules of evidence applicable to courts of civil and criminal jurisdiction, "these various provisions do not however alter the common law; rather they reflect the common law position: in general, the normal rules of

> evidence do not apply to administrative tribunals and agencies": *Administrative Law, supra*, at 279-80. …
>
> As strict rules of evidence do not apply to Appeals Commission hearings, it follows that the Appeals Commission's failure to formally qualify Dr. Flor-Henry to give expert evidence does not give rise to an arguable question of law or jurisdiction. The record reflects that the Appeals Commission considered Dr. Flor-Henry's resumé, professional qualifications and testing methodology, and concluded that his evidence deserved some weight. The Appeals Commission did not rely on this evidence alone, but found it supported the evidence of other medical practitioners …
>
> It appears, therefore, that the WCB's real complaint is with the weight the Appeals Commission placed on Dr. Flor-Henry's evidence. In an administrative law context, "[r]elevant expert evidence is admissible. Any frailties in the facts or hypotheses upon which an opinion is based, or in the qualifications of the expert, affect the weight of the evidence, but not its admissibility": *Administrative Law in Canada, supra*, at 59, citing *Canada (A.G.) v. Restrictive Trade Practices Commission* (1980), 113 D.L.R. (3d) 295 at 306-07 (F.C.T.D.); *University of Sask. Engineering Students Society v. Sask. (Human Rights Commission)* (1983), 24 Sask.R. 167 at 176 (Q.B.).
>
> The reviewing judge correctly concluded that it was not open to the WCB to argue that the Appeals Commission was bound to apply the admissibility criteria outlined in *Mohan* …

58. The Union referred to section 82(2) and section 92 of the *Labour Relations Code*.

59. An arbitrator is not bound by a strict legal interpretation of the issue in dispute and has discretion to receive evidence whether or not it would be admissible in a court of law. The Labour Relations Board has stated that arbitrators "have broad discretion to accept evidence as they consider appropriate" in order to address the real substance of the matter: *Re International Forest Products Ltd. and United Steelworkers, Local 1-1937*, [2012] B.C.L.R.B.D. No. 147 at para. 40. This, however, does not allow an arbitrator to exclude evidence that is otherwise admissible: *Re Pacific Pallet and United Steelworkers, Local 2009*, [2010] B.C.L.R.B.D. No. 210. "The overall thrust of the Code is to expand

rather than limit the scope of evidence that is admissible; section 92 is directed toward that purpose" (at para. 60). As stated by the Canadian Human Rights Tribunal, operating under a similar legislative provision, the *Mohan* criteria must be reviewed when expert evidence is tendered, but this "must be done taking into consideration the rules of evidence that are much more flexible in the CHRA, and not despite this regime": *Lafreniere v. Via Rail Canada Inc.*, [2018] C.H.R.D. No. 19 at para. 20.

Weight rather than admissibility

60. The Union referred to authorities for the proposition that the ultimate issue rule remains relevant but is no longer strictly applied. An expert report will be received even if it relates directly to the ultimate question before the trier of fact, but the closer the evidence comes to the ultimate issue, the greater the scrutiny that will be applied. The court or tribunal will deal with such evidence as a matter of weight: *R. v. Khan*, [2015] B.C.J. No. 3072 (Prov. Ct.), affirmed 2017 BCCA 101; *Cantlie v. Canadian Heating Products Inc.*, [2017] B.C.J. No. 332 (B.C.S.C.). In *Surrey School District No. 36 v. Surrey Teachers' Association (Wang Grievance)*, [2007] B.C.C.A.A.A. No. 119 (Burke), the arbitrator allowed the expert evidence, subject to the caveat that the union could later argue that portions should be disregarded if they strayed too close to the ultimate question.

61. Contrary to the arguments of the Employer and the Attorney General, the Union said that a lawyer is permitted to give expert testimony in certain circumstances. In *Attorney General of Quebec v. Canada*, [2008] F.C.J. No. 896 (F.C.), a challenge by Quebec seeking cost sharing payments for various

social services under the *Canada Assistance Plan*, a law professor was allowed to testify about juvenile justice and child protection systems. The topics included principles of the *Juvenile Delinquents Act (JDA)*, application of the *JDA* in six provinces, interaction between the *JDA* and child welfare systems, and the impact of the coming into force of the *Young Offenders Act* (*YOA*). The court stated that an expert opinion will be rejected if it amounts to nothing more than "reworking of the argument of counsel" (at para. 161). The court continued (at para. 163):

> Does this mean that legal professionals can never testify as experts and that their testimony (and expert reports) must always be excluded from the evidence? I do not think so. If an expert does not try to answer the legal question at issue in the proceedings but instead seeks to shed light on the debate by providing insight into the political, historical and social context of which the relevant legislative provisions are a part, the expert's testimony may be admissible. …

62. The court accepted the expert evidence but excluded portions that were "strictly legal in nature" (at para. 167-168). The evidence was admissible "to place the debate in its true historical and sociopolitical perspective" (at para. 165).

63. In *Ross River Dena Council v. Attorney General of Canada*, [2011] Y.J. No. 121 (Y.T.S.C.), the report of a legal historian was accepted as expert evidence in a case requiring interpretation of an 1870 constitutional enactment. It was objected that the tone and content of the report showed that the writer was advocating for a position. He was not therefore an impartial expert. The report also reached conclusions of law and suggested answers to the core issues in the case. It did not address the meaning of the enactment itself. The expert evidence was allowed and the court stated that the report "is focused

on historical context, some of which is legal, some political, and some cultural." The purpose was not to engage in legal argument but rather to describe the nature of Crown-Aboriginal relations in that era (at para. 63). Similarly, in *Alderville First Nation v. Canada*, [2014] F.C.J. No. 1377 (F.C.), it was held that "properly qualified experts may be permitted to provide opinion evidence which may relate to legal issues" (at para. 46). In the present case, said the Union, the Report reaches a number of legal conclusions but does not seek to answer the ultimate question, *ie*, whether there is a violation of the Code and the *Charter*. The Report "assists in clarifying or contextualizing the issue in dispute, in terms of where 'age' stands in the collective bargaining – human rights context" (Argument, p. 13).

64. In *Radek v. Henderson Development (Canada) Ltd.*, [2004] B.C.H.R.T.D. No. 364, a racial discrimination case, the complainant tendered an expert report discussing prejudicial attitudes and stereotypes held about Aboriginal people. The adjudicator considered the *Mohan* test, including the necessity requirement, along with the statutory discretion to accept evidence which might not be admissible in court. The adjudicator added that "evidence may be necessary which serves the function of clarifying or contextualizing the issues in dispute" (at para. 33). The report was admitted.

65. In *Clarke Institute of Psychiatry and Ontario Nurses Association (Adusei Grievance)* [1997] O.L.A.A. No. 96 (Knopf), the grievance alleged racial discrimination in wage rates (recognition of out-of-country nursing experience). The union sought to adduce expert evidence regarding various forms of discrimination based on country and race, as well as measures to remedy institutional racism. The arbitration board considered *Mohan* to be

helpful in analyzing the evidentiary issue but found the decision "neither binding nor determinative of the issue at hand" (at para. 11). The board noted that it "is not like a jury of citizens" assembled to judge criminal guilt or innocence (at para. 12). An arbitration board is itself an expert tribunal, with "the ability to determine the proper use of evidence without the concerns that would apply to a lay jury as to the potential of distorting the fact finding process". The board "would welcome the assistance of an expert opinion" in areas outside the board's experience" (at para. 13).

66. The board admitted the expert evidence, reasoning as follows (at para. 14):

> … the question that the Employer raises is whether the Board should only accept evidence from an expert where that opinion would be necessary to provide information which is likely to be outside the experience and knowledge of this tribunal. This is a very high standard to be met. Given that a Board of Arbitration has the discretion to determine its own procedure and accept evidence that would be otherwise inadmissible by a court of law, this may be too strict a standard to impose upon a Board of Arbitration. Instead, it is more appropriate for a Board of Arbitration to look at all the factors operative in the case. First, the evidence must be relevant, tendered through a properly qualified expert and not otherwise inadmissible because of an exclusionary rule. Then, consideration should be given to the purpose of the evidence. … If the nature of the evidence is such that will only prolong, without providing any assistance, again the evidence should be excluded. On the other hand, if the special knowledge of the expert will be such that it will be of significant assistance in enabling the Board of Arbitration to appreciate the matters in issue, then the evidence ought to be admitted. The ultimate weight of that evidence will depend on the Board of Arbitration's determination of the facts and analysis of the inferences made by the expert. It is solely up to the Board of Arbitration to form its own conclusions based on the proven facts. What ultimate assistance the expert's opinion will be in that process is a matter to be determined at the end of the day. But that is a question of weight, not admissibility.

Legislative and social facts in Charter Litigation

67. The Union referred to *Trinity Western University v. Nova Scotia Barristers' Society*, [2014] N.S.J. No. 588 (N.S.S.C.) as a recent authority on social science evidence presented by experts in *Charter* cases. In that case, the University objected to affidavits that contained a mixture of opinion, fact and strongly expressed advocacy. The court held that the approach outlined in *Abbey* [2009], *supra* (which followed and adapted *Mohan*) should be applied, with special care taken at the gatekeeper stage (at para. 10-14):

> Technically, a report of an expert would contain a statement of assumed facts that would have to be proven in court. The expert would then offer an opinion or a theory relevant to the case, using training, knowledge and expertise of a kind not possessed by the judge. That opinion would be based on those assumed and to be proven facts. That opinion would be testable or verifiable.
>
> Charter litigation has changed that.
>
> Social science evidence is critical in making decisions on the interpretation of the Charter especially when those matters involve public policy. Reports from experts in those areas convey a kind of information that may be quite different. The way in which those reports are used by courts can also be quite different. Adjudicative facts are those that are proven by evidence and relate directly to the subject matter of the proceeding. Judges can take judicial notice of facts that are widely known and beyond dispute. Social science evidence or legislative facts fall between those more traditional categories.
>
> Charter decisions can't be made in a "factual vacuum". A proper factual foundation has to exist for example when measuring legislation against the provisions of the Charter. Legislative facts provide a social, economic and cultural context. They are subject to less stringent requirements of admissibility. The Supreme Court of Canada has continued to make use of social science evidence in a wide range of matters.
>
> The Supreme Court has noted that when social and legislative facts are put before a trial judge he or she has to "evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case". The trial judge can be involved in a time consuming exercise of reviewing material and reconciling differences between the experts, studies and research results. Social and

> legislative facts are also intertwined with adjudicative facts. The judge has to analyze and give appropriate weight to the evidence in its different forms.

68. The court stated that in the cost-benefit analysis, the most significant "cost" concern was that arguments and conclusions presented in sworn testimony by experts might be given more weight than they deserved. On the "benefit" side, the expert reports "contain the kind of context information that will be important in deciding the case" (at para. 24). The court found that the value of the reports outweighed the potential prejudice or confusion, concluding as follows (at para. 60):

> Taken as a whole, both affidavits do comply with the basic requirements of expert opinion. The elements of argument contained in both involve the kind of prejudice that can be minimized by acknowledging them for what they are. They are not a subtle attempt to slip an argument past the gatekeeper, hidden in an expert opinion. In the context of an expert report on legislative or social facts latitude can be given to allow the entire report to become a part of the record. Editing of the reports, in the absence of some more significant prejudicial effects being shown, could result in a loss of some of the full context that may be required both for understanding of the report as a whole and assessing the weight to be given to its conclusions.

69. The Union argued that the same reasoning should be applied to the Report in the present case, where the necessity to consider social and legislative facts calls for greater latitude in receiving expert evidence.

70. In *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, [2016] B.C.J. No. 1600 (B.C.S.C.), a *Charter* challenge to provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286, the court recognized "that some latitude as to the admissibility of legislative facts is appropriate" to establish a "full and inclusive record" (at para. 40, 41). The

role of expert witnesses was recognized. The court quoted from Hogg, *Constitutional Law of Canada*, *5th Edition*, as follows (at para. 36):

> In principle, the general rules regarding the proof of facts in litigation ought to apply to constitutional cases no less than to non-constitutional cases, and they ought to apply to both "adjudicative facts" and "legislative facts". Adjudicative facts (sometimes called "historical facts") are facts about the immediate parties to the litigation: "who did what, where, when, how, and with what motive or intent?" Legislative facts (sometimes called "social facts") are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena. Legislative facts are rarely in issue in most kinds of litigation, but they are often in issue in constitutional litigation …
>
> Legislative facts obviously cannot be proved by the testimony of eye witnesses, but they can be proved by the opinion testimony of persons expert in the relevant field of knowledge. Like other witnesses, experts are subject to cross-examination, and their testimony may be contradicted by the testimony of other experts. These safeguards provide some assurance of reliability for factual findings of controverted legislative facts. ...

Necessity to create a section 1 record

71. The Union submitted that the necessity test under *Mohan* does not mean absolute necessity: *R. v. D.D.*, [2000] 2 S.C.R. 275. The question is

> … whether the expert will provide information which is likely to be outside the ordinary experience and knowledge of the trier of fact. … "Necessity" means that the evidence must be more than merely "helpful", but necessity need not be judged by "too strict a standard" (at para. 21).

72. While labour arbitrators have expertise in labour and human rights law, here the necessity is to create a proper section 1 record for the reviewing courts. In *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, the accused was denied the right to tender expert evidence consisting of legislative and constitutional facts. The accused had raised a Charter challenge to the *Narcotic Control Act* regarding

possession of marihuana. The Supreme Court held that the trial judge should have admitted the evidence, despite some misgivings, so as to permit the accused "to put forward a full record in the event of an appeal" (at para. 29).

73. In this regard, the Union cited a series of early *Charter* authorities: *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 at para. 59, advantages of compiling a record before the arbitrator or administrative agency; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at para. 16, "ability to compile a cogent record"; *R. Oakes*, [1986] 1 S.C.R. 103, evidence is generally required to prove the elements of section 1 and it should be cogent and persuasive (at para. 68); *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, where it was stated that "the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects." More recently, in *Reference Re Criminal Code of Canada (B.C.)*, [2011] B.C.J. No. 2211 (B.C.S.C.) ("*the Polygamy Reference*"), the judge admitted all evidence tendered, to maximize "the trial reference's potential in terms of creating an evidentiary record" (at para. 46).

74. The Union said that the weight of authority is that termination of benefits after age 65 infringes section 15(1) of the *Charter*, leaving section 1 as the real battleground: *Chatham-Kent Municipality v. Attorney General of Ontario*, [2010] O.L.A.A. No. 580 (Etherington); *Talos v. Grand Erie District School Board, supra*. Similarly, in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, the majority had "no hesitation" in concluding that mandatory retirement violated section 15(1) (at para. 55). The real issue was reasonable

limits under section 1. Therefore, urged the Union, latitude must be given to establish a fulsome record for judicial review.

75. In summation, the Union argued that strict adherence to the *Mohan* criteria, developed from jury-trial precedents over a century old, was inappropriate in the present case. It is preferable to take a flexible approach, consistent with the mandate of the *Labour Relations Code*, in order to ensure a fair hearing and a proper *Charter* record.

Reply argument

76. The Employer responded to the Union's submission that less stringent rules apply when expert evidence is tendered before administrative tribunals, as discussed in *Alberta Workers' Compensation Board, supra*. Even under the more flexible approach, relevance is a requirement. The Alberta court noted that tribunals "are entitled to act on any material which is logically probative …" (at para. 63). The Union failed to demonstrate that the Report is relevant in this sense.

77. The Employer acknowledged that social science and historical context evidence is appropriate in *Charter* cases, as illustrated in *Ross River Dena, supra*, *Alderville First Nation, supra,* and *Cambie Surgeries, supra*. In presenting such, an expert assembles relevant data and develops an opinion, which can then be tested before the court or tribunal. The Report is different. It simply argues that the law regarding age and section 15 of the *Charter* should be more robust, as with various other equality rights. The Employer characterized the Report as strictly legal analysis or argument, which the court

in *Attorney General of Quebec, supra*, found was not admissible from a lawyer (at para. 167). As the court there observed, it was "in at least as good a position as the witness to make this analysis." In *Trinity Western, supra*, the expert report was laden with argument but was accepted nonetheless. The court explained (at para. 59), "In its favour it can at least be described as being openly and unapologetically argumentative. Its blatant nature limits its prejudicial effect. …". In the present case, the Union persists in treating Professor Lynk's legal opinion as social science evidence, which it is not.

78. If the Union wishes, it may present the content of the Report in final argument, which may also include reference to published scholarly literature, as mentioned in *Douglas/Kwantlen, supra* (at para. 59). However, it is an abdication of the adjudicative function if expert lawyers are allowed to advise the judge or arbitrator on the law. As stated by the court in *Walsh, supra* (at para. 67-68):

> The argument that the opinion is necessary for the proper disposition of this case raises the issue of the very functioning of the court. …
>
> If a matter comes before a judge who has little or no experience in the area, the judge is not expected to throw up his or her hands and announce an inability to decide the matter without the benefit of an expert lawyer who does have experience. To do so would be an abdication of the judicial function. The parties and the public must have the confidence that every judge has the capability to decide each and every case fairly and adequately and in accordance with the law. This concern was raised in an article entitled "Expert Legal Testimony" (1984) 97:3 *Harv. L. Rev.* 797 (the "*Review*"), relied on by Mr. Walsh. At p. 810 of that article, in relation to the admission of such expert evidence, the author concedes that "[t]he image of the judiciary and public confidence in the legal system are genuine concerns".

79. The Attorney General adopted the Employer's reply submissions. With respect to social science evidence in *Charter* cases, the Attorney General

conceded that the rules have been relaxed, but this is subject to a properly qualified social scientist presenting and defending the evidence. Professor Lynk is not a social scientist. He is a lawyer delivering a legal opinion. In any event, in *Cambie Surgeries, supra*, cited by the Union, the court put clear boundaries on the latitude allowed for *Charter* evidence. Referring to the *Polygamy Reference, supra*, the court stated as follows (at para. 40):

> I do accept from that judgment that some latitude to the admissibility of legislative facts is appropriate, as was discussed in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 and by Professor Hogg. As noted above, it seems to me that this latitude can apply most appropriately to issues of hearsay with respect to legislative facts and some of the paragraphs discussed below are examples. Opinion evidence is less amenable to this latitude because it is, of course, opinion and there can be both informed and other kinds of opinions. …

80. While the Union referred to *Attorney General of Quebec, supra*, as an example of a law professor giving evidence on legal topics, the Report in the present case more closely resembles the proposed evidence in *Walsh, supra*, which was rejected. In *Walsh*, the tax law expert was going to be "identifying the applicable law, both statute and jurisprudence, interpreting and understanding that law, and applying it to the facts as found" (at para. 64).

81. As to Professor Lynk's previous appearances as an expert witness, the Attorney General suggested that the thrust of his past testimony was more factual than legal. Nothing in the respective court judgments showed a reliance on his legal analysis in reaching a conclusion. The Attorney General submitted that the very recent Supreme Court of Canada ruling in *Comeau, supra*, decisively answers the question of whether legal opinions may be tendered as expert evidence.

Analysis and conclusions

Nature and content of the Lynk Report

82. What is the Report? The Employer and the Attorney General characterize it as a legal argument and insist that it cannot be received under the guise of expert evidence. Without question, the Report includes a significant amount of legal citation and commentary. Even so, it would be inaccurate to call it legal argument because this misunderstands the essence of the Report.

83. First, the Report does not address the question of whether post-65 termination of benefits violates the Code or *Charter*, whether section 13(3)(b) of the Code infringes *Charter* section 15(1), or whether the alleged violations are saved by *Charter* section 1. These legal issues will be argued at the end of the hearing by counsel and decided by me as arbitrator. To the extent that the ultimate issue rule is germane, it is not applicable in the present case. This is not a situation like *Murray, supra* (lawyer's opinion that a Crown counsel would have approved charges), where the court rejected the evidence because it addressed "the very questions that a trial judge hearing this matter will have to determine" (at para. 18). Unlike *Walsh, supra* (lawyer's opinion on application of tax statute to a transaction), the Report does not suggest "what the court's conclusions should be in applying the law to the facts that might be found at trial" (at para. 23). The Report makes no reference to the benefit plans at issue or the Code provision relied upon by the Employer as a defense to the grievance.

84. Second, the Report provides social and political context for reduced union bargaining power and influence in recent decades, which Professor Lynk suggests has prevented the achievement of collective bargaining and legislative goals. In his view, this leaves human rights law as the only effective means of protecting minority rights in the workplace. In saying so, the professor is not expressing a legal opinion but rather a policy perspective. This part of the Report does not answer the legal questions at issue in the present case but it does highlight the importance of taking a broad, liberal and dynamic approach to age-based rights, according to Professor Lynk. Certainly, the Union tendered the Report in the belief that this line of reasoning helps to support its position. That remains to be seen. However, I do not find that the proposed expert evidence is properly characterized as a legal argument.

85. Third, the Report describes how human rights have developed unevenly and some rights have remained half-formed over an extended period of time. Here, as emphasized by the Employer and the Attorney General, the Report does describe the state of the law in respect of different equality rights, but this is more than a recitation of case law. The Report seeks to explain why age has been a "laggard" and considers both socio-political factors and recent theoretical academic writing. Professor Lynk favours the Dignified Lives Approach, advanced by Professor Alon-Shenker, which is premised on "five substantial principles of equality: individual assessment, equal influence, sufficiency, social inclusion and autonomy" (at para. 47). The Report discusses theories that have influenced some of the modern jurisprudence and policy-making on age issues and age discrimination in the workplace (at para. 48). This may be legal philosophy but it is not a legal argument *per se*. The

Union believes that this evidence helps to make its case and again, that remains to be seen. As the Union said, the Report contextualizes the age issue in the workplace. However, I find that nothing in the Report would trigger an abdication of the arbitrator's responsibility to decide the facts and law.

The *Mohan* rules are not binding

86. The authorities cited by all parties suggest that the *Mohan* rules should be considered by a labour arbitrator or an administrative tribunal, but generally speaking *Mohan* is not binding if the governing statute permits flexibility in the reception of evidence. *Alberta Workers' Compensation Board, supra*, and the *Skelton* line of authority cited by the Union support the principle that tribunals may be entitled to act on any material which is logically probative, whether or not it would be admissible under the court rules of evidence. It depends on the legislative framework.

87. In the case of a labour arbitration board, section 92(b) of the *Labour Relations Code* provides that the board may "receive and accept evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law." Section 82(2) directs that an arbitration board "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."

88. The Employer and the Attorney General endorsed Arbitrator Greyell's approach to expert evidence in the *Holbeche* award, *supra*, which I adopt for purposes of the present case, as follows (at para. 13):

> But having made the observation that an arbitrator is not bound by the strict rules as to admissibility of evidence is not to say that these rules should be ignored. Rather, the admissibility of evidence should be assessed from the perspective of whether such evidence will assist or impede an arbitrator's ability to perform his/her statutory mandate under S.82(2) of the Labour Relations Code while at the same time preserving the integrity of the arbitration process in providing (and appearing to provide) both parties with a fair hearing and while proceeding in a timely, inexpensive and informal fashion.

89. Based on the foregoing, I conclude that the admissibility of the Report must be decided as an exercise of arbitral discretion.

90. Notwithstanding the provisions of the *Labour Relations Code*, the Attorney General relied heavily on the following passage from *Comeau, supra*: "it is difficult if not impossible to contemplate a situation where evidence on domestic law (e.g. interpreting a Canadian statute) would ever be admissible as expert opinion evidence under *R. v. Mohan* ... To depart from precedent on the basis of such opinion evidence is to cede the judge's primary task to an expert" (at para. 40). Because *Comeau* is a very recent decision of the Supreme Court of Canada, post-dating all of the case law reviewed herein on expert evidence, it is useful to consider at this point whether *Comeau* is determinative against reception of the Report. The passage cited by the Attorney General requires analysis.

91. The issue in *Comeau* was whether section 121 of the *Constitution Act, 1867* was a guarantee of interprovincial free trade. The expert's report analyzed the

drafters' motivations for including section 121 in the Act and presented an interpretation of the provision based on the witness's historical analysis. The trial judge relied on the report and this was held to be an error.

92. The warning not to "depart from precedent" or "cede the judge's primary task" related to the trial judge's refusal to follow binding Supreme Court precedent in *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424. *Gold Seal* held that section 121 prohibits direct tariff barriers on goods moving between provinces, a more limited interpretation than outright free trade. The judge found that *Gold Seal* was wrongly decided given the historian's expert evidence on the framers' intent (para. 15, 19). In doing so, the trial judge applied "the new evidence exception" to vertical *stare decisis* (para. 30). However, the Supreme Court stated that this exception required "a significant evolution in the foundational legislative and social facts" (para. 31), related to Lord Sankey's famous "living tree" metaphor for changes in constitutional interpretation (para. 33). The high threshold was not met. The court explained as follows (para. 39-41):

> Although it is true that *Gold Seal* was decided prior to *Edwards* and was arguably interpreted under a different rubric than constitutional provisions under the shadow of the living tree, it does not follow that the historical evidence permitted the trial judge to bypass an existing binding interpretation on the basis of a new understanding of the legislative context and history. …
>
> In addition to the historical evidence of the founders' intentions, the trial judge also relied on the expert's opinion of the correct interpretation of s. 121. This reliance was erroneous. As a preliminary observation, it is difficult if not impossible to contemplate a situation where evidence on domestic law (e.g. interpreting a Canadian statute) would ever be admissible as expert opinion evidence under *R. v. Mohan*, [1994] 2 S.C.R. 9. The application of contextual factors, including drafters' intent, to the interpretation of a statutory provision is not something that is "outside the experience and knowledge of a judge": *Mohan*,

> at p. 23. To depart from precedent on the basis of such opinion evidence is to cede the judge's primary task to an expert.
>
> More to the point in the present matter: to rely on such evidence to rebut vertical *stare decisis* is to substitute one expert's opinion on domestic law for that expressed by appellate courts in binding judgments. …

93. There is no issue of *stare decisis* in the present case. On the admissibility of expert opinion to interpret a statute, *Comeau* is distinguishable on two grounds. First, in that case, the expert analyzed section 121 and gave an interpretation of it, thereby trespassing on the judge's function. The Report in the present case is different and stays in bounds, as reviewed above.

94. Second, *Comeau* was a court proceeding, subject to the strict rules of evidence, and not an administrative tribunal case where the legislature has mandated that court admissibility rules are not controlling. The court in *Comeau* doubted that expert evidence could ever be admissible under the *Mohan* test to interpret a domestic statute. But section 92(b) of the *Labour Relations Code* stipulates that *Mohan* does not apply strictly in the present case, at least not to the extent that arbitral discretion is displaced. As held in *Pacific Pallet, supra*, "The overall thrust of the Code is to expand rather than limit the scope of evidence that is admissible" (at para. 60).

95. Thus, there is no outright prohibition against receipt of the Report. A variety of factors are relevant to admissibility, including the statutory mandate, integrity of the arbitration process, fairness, timeliness, expense and the informality of arbitration proceedings. In the end, notwithstanding the court's recent admonition in *Comeau*, admissibility of the Lynk Report remains a matter of arbitral discretion.

Relevance

96. The question of relevance was not pressed by the Employer and the Attorney General, except to reiterate that a legal opinion may not be received as expert evidence. I have already addressed that point. As stated in *Attorney-General of Quebec*, *supra*, "If an expert does not try to answer the legal question at issue in the proceedings but instead seeks to shed light on the debate by providing insight into the political, historical and social context of which the relevant legislative provisions are a part, the expert's testimony may be admissible (at para. 163)." I accept the Union's submission that the objection goes to weight rather than admissibility.

97. In reply, it was argued that the Union failed to establish the probative value of the Report. I do not agree. The grievance concerns denial of employment benefits based on age and the Union's particulars allege a serious affront to the dignity and well-being of affected employees. At issue is the legality of the Employer's conduct and the validity of the age-based exception in section 13(3)(b) of the Code. In its grievance reply, the Employer has pointed to collective bargaining opportunities that were open to the Union following the elimination of mandatory retirement. While the Report does not express an opinion relating to adjudicative facts, I find it is logically relevant insofar as it provides arguably useful context for the consideration of age-based human rights in the workplace. In *Abbey*, *supra*, it was stated that "the proposed opinion must be logically relevant to a material issue" (at para. 80). The court held that in the *Mohan* context, "relevance sets a low threshold for

admissibility and reflects the inclusionary bias of our evidentiary rules" (at para. 82).

Necessity

98. Turning to necessity, it was argued that the content of the Report does not fall outside the knowledge and experience of a labour arbitrator. It has been broadly recognized that arbitrators themselves are expert in topics such as collective bargaining and workplace human rights. However, even in *Mohan*, the court observed that it "would not judge necessity by too strict a standard" (at para. 22). If arbitrators develop their expertise in human rights "by grappling with such issues on a repeated basis", as stated in *Canpar Industries, supra* (at para. 55), then *Charter* expertise may be less robust than expertise in routine grievance subject matters such as discharge, discipline, seniority and accommodation. Labour arbitrators rarely grapple with *Charter* issues.

99. As noted in the decisions cited by the Employer, where the tribunal was able to reach its own conclusions, it was unnecessary to hear from the expert: *Holbeche, supra*, assault on a prisoner; *Malaspina University College, supra*, selection committee process; *West Coast Liquor, supra*, sale of business and successorship; *Canada Post Corporation, supra*, true employer; *Air Line Pilots Association, supra*, single employer application; *Public Service Alliance, supra*, joint liability of employer and union for bargained pay discrimination. A *Charter* case may be different. This is not to say that arbitrators lack capacity to decide *Charter* issues. The contrary is true and the practical experience of arbitrators is surely helpful in sorting through constitutional jurisprudence. The question, however, is whether in hearing

the present case, expert evidence is necessary in the sense that the arbitrator's mandate under the Code would be served by receiving such evidence.

100. I agree with Arbitrator Knopf's test in *Clarke Institute*, *supra* (at para. 14) that the report must be "of significant assistance in enabling the Board of Arbitration to appreciate the matters in issue …". Professor Lynk's expertise does overlap to some degree with that of a typical labour arbitrator but clearly it extends further, as illustrated by his curriculum vitae and the content of the Report itself. In this regard, the professor's academic analysis and perspective does "enable the trier of fact to appreciate the matters in issue due to their technical nature": *Mohan*, at para. 22. I echo the statement in *Clarke Institute* (at para. 13) that an arbitration board "would welcome the assistance of an expert opinion" in such circumstances. I also adopt the following caveat (at para. 14):

> … The ultimate weight of that evidence will depend on the Board of Arbitration's determination of the facts and analysis of the inferences made by the expert. It is solely up to the Board of Arbitration to form its own conclusions based on the proven facts. What ultimate assistance the expert's opinion will be in that process is a matter to be determined at the end of the day. But that is a question of weight, not admissibility.

101. The Union further argued that the Report was necessary to build a proper evidentiary record for appellate review under section 1 of the *Charter*. I do not disagree but the primary purpose of the evidence is to facilitate a full and fair hearing before the arbitrator.

102. As for the professor's past appearances as an expert on legal topics before courts and tribunals, I agree with the Attorney General that this is not a

significant factor in assessing the necessity or appropriateness of his current opinion. Each case depends on its own facts. It appears that Professor Lynk appeared without objection in those cases so there was no substantive determination, as in the present matter.

Absence of any exclusionary rule

103. As discussed above, I find no applicable exclusionary rule.

A properly qualified expert

104. I reject the criticism that Professor Lynk lacks impartiality or independence because he has expressed an opinion on the direction in which the law should evolve. He has conducted an objective assessment of the questions put to him by Union counsel. There was no suggestion that he has been influenced by the party retaining him. He has not unfairly favoured one party's position over that of another. The Report is not argumentative in tone, as in *Trinity Western University, supra,* and even there, the evidence was accepted by the court (at para. 59).

105. Of course, the Report was solicited and tendered by the Union in the belief that it will aid the cause, but as noted in *White Burgess, supra* (at para. 32), "Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias."

106. Professor Lynk's certificate and attestation was filed (Ex. 18). He has confirmed that his duty as an expert is to assist the arbitration board and not to be an advocate for any party.

Cost benefit analysis

107. Applying the gatekeeper test to the Report, I find no reason for concern that the value of the proposed evidence is outweighed by costs or harm to the arbitral process. Many of the authorities cited by the Employer and the Attorney General were civil or criminal court litigation matters. As stated in *Abbey, supra* (at para. 72), "it seems that a deluge of experts has descended on the criminal courts ready to offer definitive opinions to explain almost anything." The court framed the problem as follows (at para. 71): "Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases." In *White Burgess, supra*, the court said, "The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury 'will be unable to make an effective and critical assessment of the evidence' …" (at para. 18). Again I adopt the approach in *Clarke Institute, supra,* where it was held that such concerns were inapplicable to a board of arbitration (at para. 13):

> … A professional Board of Arbitration has the ability to determine the proper use of evidence without the concerns that would apply to a lay jury as to the potential of distorting the fact finding process. A Board of Arbitration is able to determine the facts and must do so on the basis of the evidence presented. …

108. I appreciate that the *Mohan* rules have been broadly considered or applied, not merely in jury cases. Even so, the institutional expertise and sophistication

of labour arbitrators, stressed so much in the present case, is a complete answer to the concern that experts will overwhelm the trier of fact. This is especially so in the present case where the contested expert evidence is largely contextual analysis and perspective, including legislative and social facts to some degree. The parties were in agreement that in principle such evidence is admissible and helpful in *Charter* cases. An arbitrator can handle this evidence. The arbitration process will not be in jeopardy.

109. It was faintly argued that unfairness could result if some of the Union's legal points were put forward in the form of expert evidence instead of final argument, thereby according them greater weight. I have already held that the Report is not a legal argument, but to the extent that there is legal analysis in the Report, I do not accept that any unfairness will result. An arbitrator can and will assess the merit and weight of all submissions, however received. Moreover, arbitrators in this province have great respect for the experience and integrity of counsel. In a *Charter* case, a final argument may include Brandeis Brief materials, the accuracy of which are confirmed by counsel, and an arbitrator will accord such submissions weight notwithstanding the absence of a witness. A party also has the option of calling opposing expert evidence if so advised, which may be done in the present case.

110. In the end, the cost-benefit argument against the Report came down to an assertion of undue delay, expense and inconvenience. It was asserted that the Report's probative value was minimal at best. However, it would trigger protracted but essentially argumentative cross examination, opposing expert testimony and unnecessary expense to all parties. These are precisely the kind

of pitfalls the Code seeks to avoid in the resolution of disputes under a collective agreement.

111. It bears mentioning that simply hearing and deciding the admissibility issue caused delay, expense and inconvenience. Collectively, the parties filed 57 pages of written argument, presented 74 authorities and consumed two full days of hearing time. The hearing schedule was interrupted, although other case management issues were involved as well. Given the comprehensive and forceful submissions, it was necessary to reserve my decision and prepare this full-fledged award. If Professor Lynk had been called and cross examined, along with an opposing expert, it is doubtful that more time and resources would have been expended. This is not intended as criticism. It is merely to make the point that in pursuit of timely, inexpensive and informal arbitration proceedings, objecting to evidence on legal grounds may be counter-productive. Beyond these considerations, there is the integrity and fairness of the process. A party whose evidence was not heard by the arbitrator is unlikely to feel confident that it was fairly treated, whether or not the evidentiary ruling was technically correct.

112. There is a reason that arbitrators frequently receive contested evidence subject to weight, subject to a subsequent ruling or subject to the filing of contrary evidence. It keeps the hearing moving, reduces expense, allows all parties to feel they have been fairly heard and allows the arbitrator, at the end of the day, to deal with the real substance of the matters in dispute, consistent with the industrial relations policy of the Code. In the present case, I agreed with the parties that a ruling should be made because the Employer and the Attorney

General did not wish to consider retaining their own experts unless the Lynk Report was to be admitted in evidence.

113. Considering all the cost-benefit factors reviewed above, I find that the potential benefit of the Report outweighs the possible negative impacts on the arbitration process. The evidence is relevant and necessary, as discussed above. The witness has excellent credentials. His methodology is transparent and not controversial. The opposing parties have the option of calling their own witness or responding by way of final argument. If they choose to cross examine Professor Lynk, I am confident that skilled counsel can probe and challenge the testimony as may be required, without losing control of the hearing process. Receiving the Report will cause additional expense but the parties are relatively evenly matched in resources and there will be no unfairness or disadvantage.

114. There will be delay. Everything about the present grievance proceeding has been slow and costly, admittedly the antithesis of an idealized labour arbitration process. On the other hand, this is hardly a typical grievance arbitration. Collective agreement benefits are at stake and so is the validity of legislation, should the Union succeed in its *Charter* challenge and prevail on judicial review.

115. The grievance was filed on September 25, 2013 and the merits are now scheduled to be heard in September 2019. Delay is not a reason to reject relevant evidence. However, it does suggest that going forward, the parties should make all reasonable efforts to complete the hearing as quickly and efficiently as possible.

Decision

116. Exercising my discretion and applying the principles in *Holbeche*, *supra*, I find that the Report is admissible.

ISSUED at Victoria, B.C., on January 7, 2019.

ARNE PELTZ, Arbitrator