

COURT OF APPEAL OF NEW BRUNSWICK

97/05/CA

NEW BRUNSWICK  
HUMAN RIGHTS COMMISSION

COMMISSION DES DROITS DE LA  
PERSONNE DU NOUVEAU-  
BRUNSWICK

(Respondent) APPELLANT

(Intimée) APPELANTE

- and -

- et -

POTASH CORPORATION  
OF SASKATCHEWAN, INC.

POTASH CORPORATION OF  
SASKATCHEWAN, INC.

(Applicant) RESPONDENT

(Requérante) INTIMÉE

New Brunswick Human Rights  
Commission v. Potash Corporation of  
Saskatchewan, Inc., 2006 NBCA 74

New Brunswick Human Rights  
Commission c. Potash Corporation of  
Saskatchewan, 2006

NBCA 74

CORAM:

CORAM :

The Honourable Justice Turnbull

L'honorable juge Turnbull

The Honourable Justice Daigle

L'honorable juge Daigle

The Honourable Justice Robertson

L'honorable juge Robertson

Appeal from a decision

Appel d'une décision

of the Court of Queen's Bench:

de la Cour du Banc de la Reine :

May 24, 2005

Le 24 mai 2005

Appeal heard:

Appel entendu :

November 17, 2005

Le 17 novembre 2005

Judgment rendered:

Jugement rendu :

July 20, 2006

Le 20 juillet 2006

Reasons for judgment by:

Motifs de jugement :

The Honourable Justice Robertson

L'honorable juge Robertson

Concurred in by:

Souscrit aux motifs :

The Honourable Justice Turnbull

L'honorable juge Turnbull

Dissenting reasons by:

Motifs dissidents :

The Honourable Justice Daigle

L'honorable juge Daigle

Counsel at hearing:

Avocats à l'audience :

For the appellant:

Pour l'appelante :

Christian R. C. Whalen

Christian R. C. Whalen

and Seamus I. Cox

et Seamus I. Cox

For the respondent:

Peter T. Zed, Q.C.

THE COURT

The appeal is dismissed and the cross-appeal is allowed. The matter is remitted to the Board of Inquiry in accordance with the reasons for judgment.

The cost order granted below is set aside. The respondent is entitled to costs of \$2,500 on the judicial review application, and a total of \$2,500 on the appeal and cross-appeal.

Daigle, J.A., dissenting, would have allowed the appeal and dismissed the cross-appeal.

Pour l'intimée :

Peter T. Zed, c.r.

LA COUR

L'appel est rejeté et l'appel reconventionnel accueilli. L'affaire est renvoyée devant la commission d'enquête conformément aux motifs du jugement.

L'ordonnance en matière de dépens rendue par le tribunal d'instance inférieure est annulée. L'intimée a droit à des dépens de 2 500 \$ au titre de la requête en révision et à des dépens de 2 500 \$ au total relativement à l'appel et à l'appel reconventionnel.

Le juge Daigle, dissident, aurait accueilli l'appel et rejeté l'appel reconventionnel.

The following are the reasons delivered by

DAIGLE J.A. (dissenting)

I. Introduction

[1] This appeal raises questions about the interpretation of *bona fide* exemptions in human rights legislation in light of the recent Supreme Court of Canada decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (S.C.C.), [1999] 3 S.C.R. 3 (hereafter referred to as *Meiorin*), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (S.C.C.), [1999] 3 S.C.R. 868 (hereafter referred to as *Grismer*). More specifically, it concerns the interpretation of s. 3(1) of the *Human Rights Code*, R.S.N.B. 1973, c. H-11, which prohibits discrimination on the basis of age, among other prohibited grounds in an employment context, and s. 3(6)(a), which creates an exemption to the general prohibition if the discriminatory practice or policy is a term or condition of a *bona fide* retirement or pension plan.

[2] In brief, the complainant in this case, D. Melrose Scott, was forced to retire from his employment as a miner when he reached age 65 because of the mandatory retirement policy contained in his employer's pension plan. He subsequently filed a complaint with the Human Rights Commission in which he alleged discrimination on the basis of age in respect of employment. When the matter was referred to a Human Rights Board of Inquiry, the parties agreed to seek a ruling, prior to a hearing on the merits, on a preliminary question of law regarding the correct interpretation of s. 3(6)(a) of the *Code*. The preliminary question submitted to the Board was: "What criteria must be met to make a finding that a pension plan is a "*bona fide*" pension plan such to satisfy the requirements of s. 3(6)?"

[3] Following a hearing on the preliminary question, the Board held that the three-step test established by the Supreme Court of Canada in

*Meiorin* is to be used in determining whether a pension plan is *bona fide* within the meaning of s. 3(6)(a). On judicial review, the reviewing judge overturned the Board's decision, holding that the decision was incorrect and that the test set out by the Supreme Court of Canada in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (S.C.C.), [1992] 2 S.C.R. 321 is the appropriate test to determine the section's meaning. The central question to be determined in this appeal is whether the reviewing court erred in reversing the Board's decision and holding that the test set out in *Zurich* is applicable to this case. A second issue is also raised by the cross-appeal of the respondent, Potash Corporation of Saskatchewan, Inc. In short, PCS had argued before the reviewing judge that only the subjective component of the *Zurich* test applied in interpreting s. 3(6)(a), thus excluding the objective component. The reviewing judge rejected PCS's argument. PCS now argues that the judge erred and asks that his decision be varied to provide that only the *bona fide* portion of the *Zurich* test is required in determining whether a pension plan is *bona fide* within the meaning of s. 3(6)(a).

[4] I have read the reasons of my colleague Justice Robertson and, with respect, I disagree with his conclusions. I agree with my colleague's review of the factual and procedural background of this case and with his conclusion that the proper standard of review is correctness, the standard also applied by the reviewing judge. I disagree, however, with his conclusions regarding the criteria to be met and the appropriate test to be applied in determining what constitutes a *bona fide* pension plan within the meaning of s. 3(6)(a) of the *Code*.

[5] For the reasons that follow, I conclude that the reviewing court erred in reversing the Board's decision and holding that the test set out in *Zurich* is the correct means by which to interpret the meaning of *bona fide* in s. 3(6)(a). I am of the view that the Board's decision that the test set out in *Meiorin* is the appropriate test is correct. I would therefore allow the appeal and dismiss the cross-appeal.

## II. Analysis

[6] To put the question submitted to the Board in a more concrete perspective, the issue was whether the complainant's forced retirement at age 65 pursuant to the mandatory retirement policy incorporated in his employer's pension plan constituted age discrimination under s. 3 of the *Human Rights Code*. Employment is of central importance to our society. As to the fundamental role it has assumed in the lives of our society's members, Dickson C.J.C. observed in *Reference Re Public Service Employee Relations Act (Alberta.)*, 1987 CanLII 88 (S.C.C.), [1987] 1 S.C.R. 313 at para. 91 that "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." It has been said also that the manner in which employment can be terminated is equally important (see *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (S.C.C.), [1992] 1 S.C.R. 986). Therefore, the *Code's* remedial provisions dealing with employment discrimination should receive such broad and purposive interpretation as will best ensure attaining the *Code's* objects and the protection of employees from discrimination. Human rights legislation has also been recognized by the courts as having a quasi-constitutional status. As Sopinka J. stated in para. 18 of *Zurich* (for the majority), it has been so described because "it is often the final refuge of the disadvantaged and the disenfranchised" (see also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at 383-84).

[7] In order to determine what criteria must be satisfied for a finding that a pension plan is *bona fide* within the meaning of s. 3(6)(a), the logical first step is the interpretation of the exemption set out in that provision. Applying a purposive and contextual analysis to the interpretation of the *Code's* relevant provisions, I will consider the plain meaning of the words "*bona fide* pension plan" in light of the object and legislative scheme of s. 3, and then proceed to read the exemption provision in the broader context of the *Code*.

[8] Section 3 deals with discrimination in respect of employment. The full text of this provision is reproduced in Appendix "A" to my colleague's reasons. Subsection 3(1) states that an employer must not refuse to employ or continue to employ on the basis of any one of a number of prohibited grounds, including age. It provides a general anti-discrimination rule on specified grounds in the employment context.

Similarly, subsections 3(1), (3) and (4) forbid discrimination by employment agencies against any person seeking employment, by trade unions and employer's organizations in respect of their membership, and by any person in respect of the use of employment application forms or employment advertisements. Five distinct exemptions to the application of the anti-discrimination rules prescribed in ss. 3(1)-(4) are provided in ss. 3(5)-(7). In the present case, PCS only invokes the exemption provided by s. 3(6)(a), but for the purposes of a full consideration of the issues and for ease of reference, both ss. 3(5) and (6)(a) are reproduced in abbreviated form:

**3(5)** Notwithstanding subsections (1), (2), (3) and (4), a limitation [...] on the basis of [...] age, [...] shall be permitted if such limitation, [...] is based upon a *bona fide* occupational qualification as determined by the Commission.

**3(5)** Nonobstant les paragraphes (1), (2), (3) et (4), une restriction [...] reposant sur [...] l'âge, [...] est autorisée si elle se fonde sur des qualifications professionnelles réellement requises, selon ce que détermine la Commission.

**3(6)** The provisions of subsections (1), (2), (3) and (4) as to age do not apply to

**3(6)** Les dispositions des paragraphes (1), (2), (3) et (4) quant à l'âge ne s'étendent pas

(a) the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan; [...]

a) à la cessation d'emploi ou au refus d'emploi en raison des modalités ou conditions d'un régime de retraite ou de pension effectif; [...]

[9] Turning now to the ordinary meaning of the words "because of the terms or conditions of any *bona fide* retirement or pension plan" used in s. 3(6)(a), the wording of the exemption makes it clear that a *bona fide* pension plan defence can only be raised where the plan itself contains a term or condition creating an age-based distinction or limitation with respect to employment or continued employment. A requirement of mandatory retirement at a fixed age imposed upon plan members would

constitute such a term or condition. A further requirement which is apparent from a plain reading of the provision is that the pension plan to which the employee belongs must be *bona fide* in order to be exempt under s. 3(6)(a). It follows that not just any pension plan imposing age-based distinctions or requiring mandatory retirement will pass muster. The terms or conditions of a pension plan which an employer or pension plan administrator may invoke to justify the discriminatory practices incorporated in the plan must satisfy the criteria required for determining the *bona fides* of the plan. Put another way, the *bona fides* or good faith requirement relates to the terms or conditions which can be required in good faith of employees or pension plan members. To determine the *bona fides* of a pension plan, the inquiry must therefore, in every case, focus on the terms or conditions raised as a justification for the discriminatory practice.

[10] While an ordinary reading of s. 3(6)(a) clearly shows that the *bona fides* of a pension plan is a critical factor in arriving at a purposive interpretation of the exemption at issue, the expression “*bona fide* pension plan” is relatively vague and is not determinative of the scope of the exemption. To my mind, the language of s. 3(6)(a) rather leaves the scope of the exemption open-ended. Words cannot be isolated from their context and it is necessary to consider the broader context in order to explore the purpose and legislative scheme of the provision in issue as well as the overall scheme of the *Code* itself.

[11] With respect to the legislative scheme of s. 3, the objective is to discover how the various components of the provision work together to give effect to a coherent plan and point to the proper interpretation of the legislature’s intention. The first consideration is the fact that s. 3(1) lays down the general prohibition against age discrimination in respect of employment. Clearly the legislature’s intention is to prevent employers from refusing to employ or continue to employ an individual simply because he or she has reached a certain age. It should also be emphasized that, unlike legislation found in other provinces, the *Code*’s provisions do not specify a maximum age as coming within the definition of age. The provinces of Ontario and British Columbia define age as any age of 18 or 19 years or more and less than 65 years and thereby prevent individuals over 65 from bringing age-based discrimination claims. New Brunswick’s legislation permits such claims to proceed, subject to an exception for termination either under s. 3(5) based upon a *bona fide* occupational qualification (BFOQ) or an exception under s. 3(6)(a) arising out of a term or condition of a *bona fide* retirement or pension plan. The significance of

the distinction in human rights legislation found in these other provinces is that New Brunswick has made a different legislative choice and provides a more progressive and proactive legislative scheme. Our legislation ensures that no person, including those over the age of 65, is denied the *Code's* protection with respect to forced retirements and hiring practices.

[12] This remedial non-discrimination rule is not absolute. Because of concerns for the repercussions on workplaces, or on the integrity of existing pension plans that would result from abolishing mandatory retirement, the legislature enacted an exemption under s. 3(6)(a). That section allows employers or pension plan administrators to discriminate on the basis of age in relation to the terms or conditions of pension plans. As I suggested earlier, discrimination being the exception, it must be construed narrowly. Reading together the provisions of ss. 3(1) and (6)(a) to create a harmonious interpretation, an employer clearly cannot justify a *prima facie* act of discrimination simply by establishing a term or condition in a pension plan that creates age-based distinctions eliminating the protection from age discrimination accorded employees under s. 3(1). That would defeat the purpose of the provision and subvert the very purpose of human rights legislation. Surely that could not have been the legislature's intention. Since employers cannot discriminate without restriction in matters of pension plan administration, the inquiry must then be about what kinds of age distinctions or limitations are justifiable under s. 3(6)(a) as terms or conditions of a *bona fide* pension plan. That question brings us to the heart of this case: what criteria must be met to make a finding that a pension plan is *bona fide* such as to satisfy the exemption requirements set out in s. 3(6)?

[13] This interpretation of the purpose of s. 3(6)(a) is consistent with the interpretation of the "*bona fide* retirement superannuation or pension plan" given to s. 8(3)(b) of the *British Columbia Human Rights Act*, S.B.C. 1984, c. 22 (now s. 13(3)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210). That provision is similar to s. 3(6)(a) of our *Code*. In *Keshen v. Carrier Canada Ltd.*, (1989), 41 B.C.L.R. (2d) 121 (S.C.), the B.C. Supreme Court quoted with approval the decision of arbitrator J.M. Weiler of the B.C. Human Rights Council in *Re Prince Rupert Fishermen's Cooperative Association and Prince Rupert Amalgamated Shoreworkers' and Clerks' Union, Local 1674* (1978), 19 L.A.C. (2d) 308 in which he discusses the purpose of the *bona fide* pension plan exemption and concludes, at 320:

In summary, I do not think that the mere setting of a retirement age constitutes a term of the type of plan envisaged by s. 8(3). The purpose of this subsection is simply to ensure that given a proper plan there may be distinctions or differentials in benefits which depend on age. If that were not the case the actuarial basis of such plans might be seriously affected and improper benefits might be provided.  
[...]

[14] Arbitrator Wieler's interpretation of British Columbia's *Code* as being very limited in scope has been cited and followed several times by human rights tribunals and courts in various jurisdictions (see *Gerlach v. Canada Trust Co.*, [1990] B.C.C.H.R.D. No. 37 (QL) at para. 12; *Davenport v. University of British Columbia*, [1990] B.C.C.H.R.D. No. 32 (QL) at para. 30 and *McCabe v. B.C. Transit*, [1990] B.C.C.H.R.D. No. 27 (QL) at para. 32).

[15] Finally, with respect to the overall scheme of the *Code*, it is important to note that it prohibits discrimination in a number of other areas of human activity: s. 4 deals with occupancy of premises and sale of property; s. 5 deals with accommodation, services or facilities and s. 6 deals with the publishing or displaying of notices or signs. For all of these prohibitions of discrimination, a legislative structure similar to that in s. 3 is set up in which exemptions are provided in relation to specified prohibited grounds. In subsections 3(5), 3(6), 3(7), 4(4), 5(2) and 6(3), the exemptions are expressed in terms of a *bona fide* occupational qualification, a *bona fide* retirement or pension plan, a *bona fide* group or employee insurance plan, or a *bona fide* qualification as determined by the Commission. It should be emphasized that the term "*bona fide*" qualifies each of these exemption provisions and, unless a contrary intention appears in the statute, the *bona fide* standard must be interpreted and applied consistently in each distinct context where it appears. The only significant distinction lies in the terms qualified, for instance an occupational requirement, pension or group insurance plan, or a qualification in the very important service sector. Each relates to a separate anti-discrimination provision and to a distinct context which will require the consideration of different factors arising out of the circumstances of each case.

[16] I find no differences in the wording or legislative scheme of any of these exemption provisions and nothing in the *Code* that would indicate that a diminished standard is intended for any of these exemptions. Therefore, in the absence of evidence of a contrary legislative intention, it seems to me that similar qualifying words defining the standard of *bona fides* applicable under the *Code* should be interpreted in a manner that will harmonize the fundamental equality rights granted to individuals or particular groups of individuals under the legislation. There is no doubt that if each *bona fide* exemption was interpreted differently and given a greater or lesser standard of equality depending on the provisions it qualifies, such an approach would add confusion to the law and would be inconsistent with the legislature's intention that is evidenced by its use of similarly defined standards for all of the exemption provisions.

[17] The purpose of human rights legislation that is often affirmed in the jurisprudence strongly supports an interpretative approach favouring the same legislative standard of good faith for all exemptions. The object of the *Human Rights Code* is the protection and promotion of fundamental individual rights by eliminating discrimination and achieving equality (see the *Code's* "Preamble"). Using a purposive approach, defences to discrimination must be narrowly interpreted so that the *Code's* larger objects are not frustrated. These exemptions provide defences to what would otherwise be discrimination contrary to the *Code* and determine what the offender must establish to justify its discriminatory practices. Keeping in mind the *Code's* remedial purpose, the determination of a *bona fide* exemption in a particular case will invariably involve the balancing of an individual's protected right under the *Code* against the validity of the particular justification raised as a defence by the offender. Therefore the fact that all exemption provisions have essentially similar purposes under the *Code* also supports the conclusion that the legislature intended the *bona fide* standard be interpreted consistently for all exemption provisions.

[18] For reasons that will become apparent in my examination of the *Meiorin* and *Grismer* decisions, I should nonetheless point out at this time that I disagree with my colleague's assertion that the interpretation that the Commission advances with respect to s. 3(6)(a) would have the Court "reintroduce the BFOQ requirement into s. 3(6)(a), thereby defeating the very reason for its existence". It makes no interpretative sense, it is said, to have a BFOQ requirement in both s. 3(5) and s. 3(6)(a) because it would defeat the legislature's clear intention.

[19] It follows from the analysis I have set out above that all of the exemption provisions contain the same *bona fide* standard which applies consistently to each of the provisions' distinct contexts. For example, the BFOQ exemption involves the consideration of an occupational requirement or qualification that relates directly to the workplace and the nature of the employment concerned, affecting either the public safety or that of fellow workers, or productivity concerns of the employer's business. As I stated earlier, the *bona fide* pension plan exemption under s. 3(6)(a) is available to permit age distinctions or differentials to be drawn to accommodate the actuarial requirements of various employee benefit plans and to protect the actuarial integrity of such plans. As is readily apparent, the subject matter and scope of these two exemptions are completely distinct and each will require the consideration of different factors. I fail to see how any aspect of an occupational qualification could permeate the consideration of the factors likely to arise out of a s. 3(6)(a) defence. In the present case, if PCS had wanted to justify its mandatory retirement policy on the basis of a BFOQ defence, it would have relied upon s. 3(5). It did not and chose instead to invoke the *bona fide* pension plan defence under s. 3(6)(a).

[20] A cursory review of the human rights jurisprudence in Canada over the past three decades reveals that, very early on and throughout this period, the central issue in age discrimination cases before human rights tribunals and courts has been the BFOQ defence raised in employment cases. In determining the meaning of the *bona fides* of an occupational requirement, human rights tribunals dealt with complaints relating, for example to the forced retirement of firemen at age 60, and later the Supreme Court of Canada developed a two-pronged test encompassing both a subjective (honest belief), and an objective (reasonableness) element (see *Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (S.C.C.), [1982] 1 S.C.R. 202 and *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, 1989 CanLII 18 (S.C.C.), [1989] 2 S.C.R. 1297). As we shall see, the elements of this dual test have now been incorporated into the *Meiorin* test and applied in the *Grismer* decision. What I wish to underscore at this time is the fact that the *Etobicoke* test, which dealt with a BFOQ defence has been applied, although slightly modified, to the insurance context in *Zurich*. Similarly, the *Meiorin* decision, involving a BFOQ defence in the employment context has been applied to the public services context in *Grismer*. In a similar fashion, what is involved here is the application of the *bona fides* test developed in relation to a BFOQ defence in *Meiorin* to the *bona fide* pension plan exemption under s. 3(6)(a). What must be applied are the elements or criteria of the *bona fides* test, not the workplace or job-related factors considered in *Meiorin* in determining a BFOQ defence. In light of the purpose and scope of the exemption set out in s. 3(6)(a), those BFOQ factors do not relate in any way to the *bona fide* pension plan defence, and

consequently applying the *Meiorin* test does not reintroduce, as my colleague concludes, a BFOQ requirement into a justification of the exemption under s. 3(6)(a).

### III. Decisions under Review

[21] At paras. 21 and 22 of its reasons for decision, the Board held that the *Meiorin* test was applicable to this case. It reasoned that although the *Meiorin* case concerned a BFOQ defence in an employment context, the same test applies in determining whether a pension plan is *bona fide* in accordance with s. 3(6)(a). It further reasoned that because the qualifying words “*bona fide*” are present in both ss. 3(5) and (6), the three-step approach in *Meiorin* is equally applicable to interpreting both subsections.

[22] On judicial review, the reviewing judge reversed the Board’s decision and held that the full test, encompassing both the subjective and objective components set out by the Supreme Court in *Zurich*, applies in this case to interpret the meaning of *bona fides* in s. 3(6)(a). In essence, he reasoned in para. 16 that “the tests adopted in *Meiorin* related to a specific individual and are not compatible with assessing the *bona fides* of a pension plan.” At paras. 9 and 10 of his decision, the reviewing judge gave the following reasons:

With respect, this test does not easily fit into an analysis of the *bona fides* of a pension scheme. A “bona fide occupational scheme” relates, usually, to an individual such as in *Meiorin*. A pension scheme, on the other hand, relates to a group of people and individual characteristics must, of necessity, be somewhat subordinated to group requirements. The context and purpose of each are different.

There has been ample judicial analysis of the words “bona fide pension scheme” in terms of an exception to the general rule barring age discrimination. Cases that flow from *Zurich* (supra) have been applied utilizing the full definition in that judgment even though the word “reasonable” is

implied. I conclude these interpretations, applying the subjective and objective elements of *Zurich*, are correct.

[23] With respect, I cannot agree with the reviewing judge's reasoning that the *Meiorin* test does not easily fit into an analysis of the *bona fides* of a pension plan because a pension scheme "relates to a group of people and individual characteristics must, of necessity, be somewhat subordinated to group requirements." On the basis of that finding the reviewing judge then went on to adopt the rationale in *Zurich* and concluded that the appropriate test to be applied in interpreting the words "*bona fide* pension scheme" is that set out in *Zurich*. He further cited and relied upon a B.C. Council of Human Rights decision in *O'Neil v. Canadian Paperworkers Union et al.*, [1996] B.C.C.H.R.D. No. 39 (QL), a decision rendered prior to the *Meiorin* and *Grismer* decisions, and cited as well other decisions rendered more recently in 2004 by the same tribunal in which the interpretative approach adopted in *O'Neil* was applied.

[24] The difficulty with the reviewing judge's reasoning is that it is founded on a finding of fact, i.e., that pension benefit schemes subordinate individual characteristics to group requirements. Yet, there was no evidence in the record before him upon which to make such a finding, just as there is no such evidence in the record before this Court. The parties agreed in this case to seek the Board's ruling on a preliminary question of law. I can readily understand the benefit of having the criteria for determining a *bona fide* pension plan exemption defined by the Board or the courts before proceeding to a hearing on the merits. So far as I am concerned, however, there is a serious downside to this approach. Although the preliminary question does not require the Court to decide whether the mandatory retirement policy is actually justified in this case, the Court is asked to identify and determine the criteria upon which a justification may be made to satisfy the requirements of s. 3(6)(a). To my mind, deciding what criteria should be satisfied in determining how or if discriminatory practices, like forced retirement, affect the operation or integrity of pension plans requires some knowledge and understanding of the principles that govern the operation of pension plans and a consideration of the relevant factors. Without the benefit of such evidence, the Court is left to attempt an answer on a theoretical plane or in the abstract, or, like the reviewing judge, to accept the finding made in precedents like *O'Neil* and others cited by him. Those precedents would advance the argument that, because there are sufficient parallels between

the insurance context and the pension plan context, pension benefit schemes suborn individual characteristics to group requirements.

[25] In *Zurich*, Sopinka J. (writing for the majority), in interpreting the exemption based on “reasonable and *bona fide* grounds”, found that it was necessary to determine whether the test developed in employment cases can be transplanted to the special field of insurance and, in particular, to the setting of insurance rates. To answer that question, he extensively reviewed the substantial expert evidence that the parties had presented to the Board of Inquiry, particularly on the actuarial requirements of rate setting in the insurance business. On the basis of that inquiry, he found that the insurance and employment contexts are different, and articulated as the governing principles of insurance practice the requirement that premiums charged to individual policy holders be, as much as possible, commensurate with the degree of risk posed by each individual policy holder. Because individualized assessment is highly impractical, it is necessary to classify the degree of risk on the basis of groups who share characteristics material to the risk. He concluded that the basic human rights principles applied in the employment cases must take into account these differences when applied in the insurance context.

[26] Of course, without the benefit of evidence in the record relating to the principles and factors applicable to the operation of pension plans, I can only rely on the insights that I have been able to glean from the discussions of pension practices and actuarial matters in the several cases referred to the Court. Armed with that knowledge, I am required to discern the differences between the insurance and pension contexts and to decide whether Sopinka J.’s analysis and conclusion regarding the insurance sector is apposite to the pension plan context. On the basis of my review of *Zurich* and *O’Neil*, I conclude that it is not. In my view, the key principle in the insurance sector, that insurance rates are set according to risk, and risk being determined based on broad categorizations by personal characterizations, has no application to pensions. In fact, it is because of this requirement that the insurance sector is by its very nature inherently discriminatory. By contrast, a defined benefit plan, which is the most common type of pension plan employed in the industry, provides that a retiring employee receives a pension in an amount known in advance, calculated as a function of years of service and averaged income. Therefore, pension plans do not categorize beneficiaries, but rather differentiate among them on a variety of personal characteristics, depending on the type of benefits that are offered (retirement, survivor, termination or disability to name a few). I therefore conclude that the

reviewing judge erred in finding that pension benefit schemes suborn individual characteristics to group requirements and, for that reason, in holding that the appropriate test to be applied in interpreting the exemption of *bona fide* pension plan set out under s. 3(6)(a) is that set out in *Zurich*.

#### IV. The *Meiorin* and *Grismer* Decisions

[27] Before examining the three-step test for discrimination set out in *Meiorin*, it is useful to briefly review some of the significant changes brought about by the adoption of a new unified approach, and a modified test to adjudicating discrimination claims under human rights legislation. In my view, the criteria required to justify a *prima facie* case of discrimination under the conventional approach (applied to discrimination claims before *Meiorin*), and those incorporated into the revised *Meiorin* test are substantively different. These differences go far beyond the mere elimination of the distinction between the two classes of discrimination claims. In some cases, however, the differences derive from the fact that two different analyses were joined into a single unified approach.

[28] Prior to *Meiorin*, the test for discrimination applied in the conventional analysis distinguished at the outset between “direct” and “adverse effect” discrimination. Direct discrimination arose where the standard is discriminatory on its face, while adverse effect discrimination arose where the facially neutral standard discriminates in effect. The threshold distinction between the two classes of discrimination was important because different defences and remedies applied to each class, and the outcome of each case might turn on the distinction. In the case of direct discrimination, an employer could justify the discriminatory standard or practice on the basis of a BFOQ by establishing that: (1) the standard was imposed honestly and in good faith (the subjective element); and (2) the standard was reasonably necessary for the safe and efficient performance of the work and did not impose an unreasonable burden on those to whom it applied (the objective element). The conventional analysis also drew distinctions between the elements an employer was required to establish to rebut a *prima facie* case of direct discrimination and those an employer was required to establish to rebut a *prima facie* case of adverse effect discrimination. For example, a distinction has been drawn between the obligation to explore “reasonable alternatives” applicable to direct discrimination, and the obligation to consider “individual accommodation” applicable to adverse effect discrimination.

[29] In *Meiorin*, the Supreme Court decided that there were compelling reasons to reject this dual approach and adopt a new model of analysis. That case arose out of a complaint based on gender discrimination when Ms. Meiorin, a female forest firefighter, failed an aerobic fitness standard designed for all forest firefighters. That case involved a discriminatory employment standard, the aerobic fitness test, and the issue was whether the standard qualified as a *bona fide* occupational requirement (BFOR) under s. 13(4) of the B.C. *Human Rights Code*. I note that the precise wording of the exemption in that provision is similar to the exemption provided by s. 3(5) of the New Brunswick *Code*. The Court, at para. 54, articulated the following three-step test for determining whether a *prima facie* discriminatory standard is justified as a BFOR: (1) that it adopted the standard for a purpose rationally connected to the performance of the job; (2) that it adopted the particular standard in an honest and good faith belief that it was necessary to fulfill the employer's legitimate work-related purpose; and (3) that the standard is reasonably necessary to accomplish the legitimate work-related purpose in the sense that it is impossible to accommodate individual employees sharing the characteristics of the employee without imposing undue hardship upon the employer.

[30] To understand the impact of the *Meiorin* decision on the conventional analysis applied to adjudicating discrimination claims, it is interesting to note that the substantive modification incorporated into the third element of the test changed the outcome in that case. In fact, the Supreme Court reversed the decision of the B.C. Court of Appeal precisely by questioning the legitimacy of the aerobic standard and by finding it wanting. In short, Ms. Meiorin having established a *prima facie* case of adverse effect discrimination, the respondent B.C. Government took the position (based on the existing applicable test to indirect discrimination) that its duty to accommodate Ms. Meiorin had been satisfied by allowing her to compete in gender-blind testing. The Supreme Court disagreed, and in adopting a unified approach and articulating a modified three-step test, integrated the concept of accommodation within the BFOR defence, a substantive content that was not previously required for that defence. The Court held that the Government had failed to show that passing the aerobic standard was necessary to the safe and efficient performance of the work of a forest firefighter and that it would experience undue hardship if a different standard was employed. The Court also rejected the suggestion that the fact that Ms. Meiorin was tested individually immunized the Government from a finding of discrimination. The Court stated that individual testing, without more, does not negate discrimination because the individual must be tested against a realistic standard that reflects his or her capacities and potential contributions.

[31] The Supreme Court's reasoning in *Meiorin* clearly illustrates, in my opinion, the impact of incorporating the duty to accommodate into the standard itself and the extent to which the conventional approach to determining when an employer may be justified in applying a standard with discriminatory effect has been modified. This substantive change extends beyond what may be perceived as a mere procedural or cosmetic blending of different analyses into a revised unified approach. Indeed, the Supreme Court emphasized the need to focus on criteria that question the legitimacy of the standard itself, not just whether the individual complainant can be accommodated, but also question the legitimacy of the substantive norms underlying the standard or policy. The Court stated at para. 55 (but see also paras. 24 & 50):

This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. [...] It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary.

[32] In *Grismer*, the Supreme Court had occasion to apply the new model of analysis developed in *Meiorin* to a completely different context which involved another exemption under the British Columbia *Code*. As indicated earlier, the three-step test was developed in the employment context in which a BFOR defence had been raised to justify a discriminatory standard allegedly designed to protect workplace safety. In *Grismer*, the discriminatory practice arose in the public services context and the defendant offender invoked the exemption of a "bona fide and reasonable justification" provided by s. 8 of the British Columbia *Code* to justify the impugned practice. The question before the Court was therefore whether the discriminatory practice could be justified under the test set out in *Meiorin*. It should be noted that the exemption raised and considered in *Grismer* is similar in nature and to the same effect as the "bona fide qualification" provided by s. 5(2) in the New Brunswick *Code* as a defence to discrimination in the public services sector.

[33] In short, *Grismer* concerned the Superintendent of Motor Vehicles' blanket refusal to issue a driver's license to the complainant on the basis of the complainant's physical disability. Mr. Grismer had suffered a stroke and, as a result, suffered from "homonymous hemianopia" which eliminated almost all of his left-side peripheral vision in both eyes. The Superintendent cancelled the complainant's licence without giving him a chance to prove that he could drive by way of individual assessment.

[34] Applying the *Meiorin* test, the Court concluded that the Superintendent's absolute refusal to issue a driver's licence was not justified. He was obliged to give Mr. Grismer the opportunity to prove whether or not he could drive safely by assessing him individually. It held that the charge of discrimination was established. Once again, as the Court had done in *Meiorin*, it stressed the central place of accommodation, or the duty to accommodate, in deciding whether the absolute prohibition to drive with H.H. was reasonable necessary to accomplish the legitimate purpose of reasonable highway safety. The Court stated (at para. 19):

*Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. [...] While the *Meiorin* test was developed in the employment context, it applies to all claims for discrimination under the B.C. *Human Rights Code*.

[35] To summarize the Supreme Court's pronouncements in *Meiorin* and *Grismer*, the *Meiorin* decision mandates that a unified approach and a

revised three-step test to be applied to adjudicating discrimination claims. Although developed in an employment context which involved a BFOR defence, the *Meiorin* test was applied in *Grismer* to a different context in which a different exemption was raised, namely a discriminatory practice arising out of a complaint involving public services and a defence based on a *bona fide* and reasonable justification. Finally, the Court expressly stated in *Grismer* that the *Meiorin* test applies to all claims for discrimination under the B.C. *Human Rights Code*. Therefore, to my mind, the Court's pronouncements in *Meiorin* and *Grismer* must be considered in this province in the context of the governing principles for the interpretation of the human rights statutes I have outlined earlier and the applicable provisions of the New Brunswick *Code*.

[36] Applying a purposive approach to the interpretation of the *bona fide* pension plan exemption provided by s. 3(6)(a), I conclude that the section must be interpreted in a manner consistent with the meaning of the words "*bona fide* pension plan" that will ensure that the *Code*'s dominant purpose of achieving equality and eliminating discrimination based on age is met. In my view, that objective can best be achieved by adopting as criteria for determination of a *bona fide* pension plan the three-step test set out in *Meiorin*. Applying these criteria will ensure that a mandatory retirement policy is only justified as a term or condition of a pension plan if it is reasonably necessary to the effective operation or integrity of the plan and that other less discriminatory means of achieving the legitimate actuarial goals are not available.

[37] Thus, applying the *Meiorin* test to the factual context of this case, the employer or pension administrator must prove the following criteria to justify the *prima facie* discriminatory policy of mandatory retirement: (1) that the mandatory retirement policy was adopted for a purpose that is rationally connected to the pension plan's effective operation or integrity; (2) that the mandatory retirement policy was adopted in good faith, in the belief that it was necessary to the fulfillment of that legitimate pension plan-related purpose or goal; and (3) that the mandatory retirement policy is reasonably necessary to accomplish the chosen pension plan-related purpose or goal, in the sense that it is impossible to accommodate individual members over 65 like the complainant without imposing undue hardship upon the employer or plan administrator.

V. Cross-Appeal

[38] PCS argued on cross-appeal that the “reasonable” portion of the *Zurich* test should be excluded from the test to determine whether a pension plan is *bona fide* because there is no mention of a “reasonable” requirement in s. 3(6)(a) of the *Code*. The reviewing judge rejected PCS’s argument for the reasons stated in *O’Neil* and concluded that the full test set out in *Zurich* applies to the interpretation of s. 3(6)(a). I would agree that the reviewing judge was correct in rejecting PCS’s contention on the basis of the four reasons given in *O’Neil*. Furthermore, in light of my decision on this appeal that the *Meiorin* test applies to determine the *bona fides* of a pension plan, I have already implicitly rejected PCS’s argument in that the *Meiorin* test posits the application of both a more searching standard of equality, and a more stringent objective component than the reasonableness portion of the *Zurich* test. In fact, the objective criteria of reasonableness in *Meiorin* are described as a standard which is rationally connected to a legitimate business purpose, and is in fact reasonably necessary in the sense that it is impossible to accommodate individual differences without experiencing undue hardship. In *Zurich*, these criteria are described as a standard which is desirable to adopt in the absence of a practical alternative.

[39] To interpret the *bona fide* exemption in s. 3(6)(a) on the sole basis of subjective criteria requiring a subjective honest belief in business necessity for the impugned practice is to ignore decades of jurisprudence in which courts and tribunals have invariably held that the *bona fide* requirement imported a two-part test encompassing both a subjective and objective element. The rationale for inferring an objective standard in the earliest of the mid-seventies decisions was simply the common sense realization that a person may honestly believe that a practice or policy is right and reasonable even though, objectively, his or her belief may be quite unreasonable and unfounded. If such a practice lacks an objective basis in reality or fact, then an employer or other offender, relying on stereotype and entrenched practices, might impose practices which would defeat the plain purpose of the legislation. As observed by McLachlin J. (as she then was), dissenting in *Zurich*, at para. 129: “[i]t is a fact of life that discriminatory practices have often in the past been so widespread as to be perceived as reasonable and justifiable.” It was in that sense that the Supreme Court held in *Etobicoke* that to be a *bona fide* occupational qualification, the qualification must be shown to be reasonably necessary. Finally, the concept that the objective component of the *bona fide* test does not relate in any way to the employer’s subjective belief in the

business necessity of the impugned practice is clearly established in the jurisprudence. Therefore the necessary inquiry is not whether the pension plan is objectively adopted in the interests of sound and accepted business practice and not for the purpose of defeating the rights protected under the *Code*, but whether it is objectively reasonable in its substantive content, or put another way, in its terms and effects.

[40] To conclude, I have no hesitation in finding that the objective requirement of the *bona fide* pension plan must be satisfied in this case to justify the *prima facie* discriminatory mandatory retirement policy, as otherwise the protection afforded the complainant under s. 3(1) would be rendered totally meaningless and ineffective.

#### VI. Disposition

[41] For these reasons, I would allow the appeal and dismiss the cross-appeal. I would remit the matter to the Board of Inquiry to be dealt with in accordance with these reasons for judgment. The Commission is entitled to costs of \$1,500 on the application for judicial review, and \$2,500 on the appeal and cross-appeal.

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J.Z. DAIGLE, J.A.

The judgment of Turnbull and Robertson JJ.A. was delivered by

ROBERTSON J.A.

[42] This administrative law appeal deals with the issue of mandatory retirement under New Brunswick's *Human Rights Act*, R.S.N.B. 1973, c. H-11. While s. 3(1) imposes a blanket prohibition against all forms of age discrimination, s. 3(5) offers a defence to employers who can establish that an age limitation is a *bona fide* occupational qualification ("BFOQ"). However, that is not the end of the matter. Paragraph 3(6)(a) goes on to provide that s. 3(1) does not apply to forced retirements imposed under a *bona fide* pension plan. In brief, when it comes to age discrimination in New Brunswick, employers do not have to establish that a mandatory retirement policy qualifies as a BFOQ. They need only establish that forced retirement is imposed under a *bona fide* pension plan, in order to defeat an allegation of *prima facie* age discrimination. Within this abbreviated context, the parties raise two interpretative issues surrounding the meaning of the term "bona fide pension plan" and the applicability of two Supreme Court decisions: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (S.C.C.), [1999] 3 S.C.R. 3 (hereafter referred to as *Meiorin*), and *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (S.C.C.), [1992] 2 S.C.R. 321.

[43] With respect to the first of the interpretative issues, the appellant, the New Brunswick Human Rights Commission, argued that the reference to "bona fide pension plan", in s. 3(6)(a) of the *Human Rights Act*, must be interpreted to include the BFOQ test set down in *Meiorin*. The argument was accepted by the Board of Inquiry but rejected by the review judge, after concluding that the Board's interpretation was owed no deference. I agree that no deference is owed. I also agree that it is impermissible to read into s. 3(6)(a) a BFOQ test. To do so would defeat the clear intention of the legislature: to ensure that employers would not have to defend mandatory retirement policies by satisfying the BFOQ requirement set down in s. 3(5). Instead, employers may invoke the defence of *bona fide* pension plan. In brief, it makes no interpretative sense to have a BFOQ requirement in both s. 3(5) and s. 3(6)(a). Accordingly, I would dismiss the appeal.

[44] The second interpretative argument focuses on the application of the Supreme Court's decision in *Zurich Insurance*. In that case, the Supreme Court applied two separate and statutorily imposed tests when ruling on the legality of a discriminatory practice (the setting of insurance premiums based on age, sex and marital status). Those tests are *bona fides* and reasonableness. The review judge accepted the Commission's alternative argument that for an employer to obtain the benefit of s. 3(6)(a)

of the *Human Rights Act*, the employer must not only meet the *bona fides* test set down in *Zurich Insurance* but also the reasonableness test formulated in that case. With respect, I disagree for the following reason. The reasonableness test outlined in *Zurich Insurance* requires consideration of whether a practical alternative to a discriminatory practice exists. As we shall see, the BFOQ test outlined in *Meiorin* consists of three criteria. The third criterion focuses on the question of practical alternatives to the discriminatory work rule or practice. Hence, if we were to accept and apply the reasonable test formulated in *Zurich Insurance*, we would be reintroducing an essential component of the BFOQ test. As a matter of statutory interpretation, we cannot deviate from the clear wording of s. 3(6)(a) of the *Human Rights Act* by reintroducing a fundamental component of the BFOQ test under the guise that we are merely applying the *Zurich Insurance* test of *bona fides*. Accordingly, I would allow the cross-appeal.

[45] Before commencing with my formal analysis, I acknowledge that the Commission drew attention to commentaries and case law directed toward the understanding that the Supreme Court may be asked to revisit its fractured endorsement of mandatory retirement policies, as articulated in *McKinney v. University of Guelph*, 1990 CanLII 60 (S.C.C.), [1990] 3 S.C.R. 229. As to the law's future, see generally Tarnopolsky and Pentney, *Discrimination and the Law* (Toronto: Carswell, 2004) and *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District* 2001 BCCA 435 (CanLII), (2001), 206 D.L.R. (4<sup>th</sup>) 220 (B.C.C.A.).

[46] Recall that *McKinney* is the case in which the Supreme Court concluded, in *obiter*, that while mandatory retirement policies could offend s. 15 of the *Charter* they could be saved under s. 1. Whatever the future may hold for this area of the law, this case does not involve a *Charter* challenge to s. 3(6)(a) of the *Human Rights Act*. Moreover, I am not prepared to interpret that provision in manner that is inconsistent with its obvious legislative objective. In truth, the Commission is asking us to redirect the Board's attention from the *bona fides* of the employer's pension plan to the issue of whether there are any practical alternatives to forced retirement. Inevitably, this type of analysis opens the door to the imposition of a duty on employers to accommodate individual employees, subject, perhaps to individualized testing in appropriate cases and subject to the employer's right not to be exposed to undue hardship.

[47] Melrose Scott was employed by the respondent, Potash Corporation of Saskatchewan, until June 1, 2004. On that date, he turned 65 years of age. However, this otherwise celebratory occasion was marred by Mr. Scott's forced retirement, as mandated under his employer's registered pension plan. In anticipation of his pending retirement, Mr. Melrose filed a complaint with the Commission, on February 12, 2004, alleging that his employer's mandatory retirement policy qualifies as age discrimination, prohibited under s. 3(1) of the *Human Rights Act*. The complaint was placed before a Board of Inquiry which was asked to make a preliminary ruling on the following question: "What criteria must be met to make a finding that a pension plan is a *bona fide* pension plan such to satisfy the requirement of s. 3(6)?"

[48] At the Board hearing, the Commission argued that the term *bona fide* must be interpreted in accordance with the test laid down by the Supreme Court in *Meiorin*. That test provides employers with a defence to an allegation that an occupational requirement or qualification is discriminatory. In *Meiorin*, the Supreme Court was asked to rule on whether a physical fitness standard imposed on all fire fighters qualified as sex discrimination, in so far as that standard applied to female firefighters. In its distilled form, the issue was whether the employer's aerobic standard qualified as a *bona fide* occupational requirement. To answer that question the Supreme Court abolished the distinction that had grown up in the law between direct and indirect discrimination and substituted a tri-partite framework of analysis. According to *Meiorin*, the "BFOQ" defence is predicated on the employer satisfying three criteria: (1) that it adopted the job requirement or standard for a purpose rationally connected to the performance of the job; (2) that the job requirement was adopted in the honest and good faith belief that it was necessary to the fulfillment of the legitimate work-related purpose; and (3) that the job requirement is reasonably necessary to accomplish a legitimate work-related purpose. The Supreme Court translated the third criterion into an obligation to show that it is impossible to accommodate individual employees sharing the characteristics of the employee alleging discrimination, without imposing undue hardship on the employer.

[49] Potash Corporation countered with the argument that the term "*bona fide* pension plan" must be interpreted in accordance with the Supreme Court's decision in *Zurich Insurance*. In that case, *Zurich Insurance* had been accused of discriminating against the complainant when setting insurance premiums for drivers based on age, sex and marital status. While s. 21 of the Ontario *Human Rights Code* prohibited

discrimination in contracts, it provided an exemption if the contract “differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds”. Understandably, the Supreme Court held that the exemption was applicable only if both the reasonable and *bona fide* components of the exemption could be satisfied. A discriminatory practice would be “reasonable” within the meaning of s. 1 of the *Code* if it were based on a sound and accepted insurance practice and no practical alternative existed. A sound practice was defined as one adopted for the purpose of achieving the legitimate business objective of charging premiums commensurate with risk. The availability of a practical alternative was held to be a question of fact to be determined having regard to all of the facts of the case. To meet the test of *bona fides* the impugned practice had to be one that was “adopted honestly, in the interests of sound and accepted business practice and not for the purpose of defeating the rights protected under the *Code*.”

[50] The Board of Inquiry accepted the interpretation advanced by the Commission, thereby, imposing on Potash Corporation the obligation to establish the *bona fides* of its pension plan and also to satisfy the tripartite test set down in *Meiorin*. The Board distinguished *Zurich Insurance* on the basis that it involved age discrimination in the setting of automobile insurance premiums, while in *Meiorin* the issue of discrimination arose in an employment context. The essence of the Board's decision is found at paragraphs 21 and 22 of its decision:

It is the view of the Board that the *Meiorin* test defined by the Supreme Court of Canada is applicable to this situation. Although the court was specifically dealing with legislation that allowed justification for discriminatory practices in an employment situation where there was a *bona fide* occupational requirement, the Board concludes that this same test applies in determining if a pension plan is *bona fide* in accordance with section 3(6) of the *Act*.

It is the determination of the Board that the qualifying words in both section 3(5) (*bona fide* occupational qualification) and 3(6) (*bona fide* retirement or pension plan) are *bona fide*. In the view of the Board, the Supreme Court of Canada, three-step approach in *Meiorin* is equally applicable

to interpreting both sections 3(5) and 3(6) of the *Act*.

[51] On judicial review, the parties agreed that the Board's decision was subject to the review standard of correctness. The review judge accepted this joint submission and ruled that the Board erred in incorporating the *Meiorin* test when defining what constitutes a *bona fide* pension plan. At paragraph 9 of his decision, now reported at (2005), 291 N.B.R. (2d) 92 (Q.B.), the review judge held:

With respect, this test does not easily fit into an analysis of the bona fides of a pension scheme. A "*bona fide* occupational scheme" relates, usually, to an individual such as in *Meiorin*. A pension scheme, on the other hand, relates to a group of people and individual characteristics must, of necessity, be somewhat subordinated to group requirements. The context and purpose of each are different.

[52] Having rejected the application of the *Meiorin* test, the review judge went on to deal with the application of the *bona fide* test articulated in *Zurich Insurance*. Potash Corporation argued that the full *Zurich Insurance* test had to be modified to exclude the "reasonableness" component. It pointed out that the Ontario legislation expressly provided that the discriminatory practice would have to meet the tests of "reasonableness" and "*bona fides*", while in New Brunswick, the *Human Rights Act* is silent as to a reasonableness requirement. The review judge noted that the same argument had been made in relation to mandatory retirement in British Columbia, but rejected by the Human Rights Council of that Province in *O'Neill v. Canadian Paperworkers Union* (1996), 28 C.H.R.R. D/24. The review judge accepted the reasoning in that case and imposed both the reasonableness and *bona fides* tests outlined in *Zurich Insurance*. The matter was remitted to the Board of Inquiry on that basis.

[53] The Commission exercised its right to appeal the review judge's refusal to interpret the term "*bona fide* pension plan" in accordance with the *Meiorin* test. Mr. Melrose elected not to participate in this appeal. Potash Corporation exercised its right to cross-appeal the review judge's

decision requiring employers to satisfy the reasonableness test articulated in *Zurich Insurance* when invoking s. 3(6)(a) of the *Human Rights Act*.

[54] This Court cannot sidestep the standard of review issue. Although the parties reached an accord as to the applicable standard, that consensus cannot be determinative. A pragmatic and functional analysis is required, lest the parties agree on the wrong standard. Moreover, I am cognizant of the Supreme Court's willingness to admonish courts that fail to carry out the pragmatic and functional analysis before settling on a review standard: see *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, *supra*, at para. 22. Admittedly, once it is acknowledged that we are dealing with the interpretation of human rights legislation and the application of Supreme Court jurisprudence, it is not difficult to make a cogent argument that correctness is the proper standard.

[55] The pragmatic and functional approach involves the consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact or mixed law and fact. It is also said that no one factor is dispositive: *Voice Construction Ltd.* at para. 16, citing *Puspanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982 at paras. 29-38; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226 at para. 26; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247 at para. 27 and *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 (CanLII), [2001] 2 S.C.R. 100 at para. 24.

[56] Subsection 21(1) of the *Human Rights Act* provides that all decisions of a Board of Inquiry are “final and binding”. This is regarded as a “weak” privative clause. Originally, the Supreme Court did not view such clauses as a privative clause. They were interpreted to mean that the tribunal decision was not subject to a statutory right of appeal. In time, however, the Supreme Court came to view final and binding clauses as a sign of a legislative intention to accord a modicum of deference to tribunal decisions: see *Alberta Union of Provincial Employees, Branch 63, Edmonton, et al. v. Board of Governors of Olds College*, [1982] 1 S.C.R.

923 and *Dayco (Canada) Ltd. v. CAW-Canada*, 1993 CanLII 144 (S.C.C.), [1993] 2 S.C.R. 230 per La Forest J. at para. 33.

[57] The weak privative clause is to be contrasted with a full privative clause. The latter prohibits judicial review of tribunal decisions, except perhaps on limited grounds such as excess of jurisdiction. However, as a matter of constitutional law, legislative bodies cannot totally immunize tribunal decisions from judicial review: see *Crevier v. Attorney General of Quebec et al.*, 1981 CanLII 30 (S.C.C.), [1981] 2 S.C.R. 220. That is why judicial review is available despite the clear intention of the legislature to oust all forms and manner of review. In the end, however, both types of privative clause indicate an intention that a tribunal's decisions are owed deference. The final and binding clause signifies that less deference is owed than in cases where the legislation provides for a full privative clause.

[58] To assess the relative expertise of a Board of Inquiry, one must turn to the pertinent provisions of the *Human Rights Act*. Under s. 20, if the Commission is unable to effect a settlement of a complaint, it may appoint a Board of Inquiry or refer the matter to the Labour and Employment Board, established under the *Labour and Employment Board Act*. If the latter option is chosen the Labour and Employment Board is deemed a Board of Inquiry. In the present case, the Commission opted to refer the matter to the Labour and Employment Board, which in turn appointed its Chairman to serve as the Board of Inquiry.

[59] As a general proposition, the jurisprudence of this Court establishes that the Labour and Employment Board is deemed to possess a relative expertise when it comes to interpreting either the *Industrial Relations Act* or the *Public Service Relations Act*: see *Syndicat canadien de la Fonction publique, section locale 1773 v. Shédiac (Ville)* 2005 NBCA 20 (CanLII), (2005), 280 N.B.R. (2d) 324 (C.A.) and *New Brunswick (Board of Management) v. Doucet-Jones* 2004 NBCA 65 (CanLII), (2004), 274 N.B.R. (2d) 237 (C.A.) respectively. The question we must address is whether the Labour and Employment Board, when acting as a Board of Inquiry under the *Human Rights Act*, can lay claim to the same type of expertise when it comes to the interpretation of that *Act*. The answer is an unequivocal “no”. The Supreme Court has consistently held that even specialized human rights tribunals have no greater expertise than courts when it comes to the area of human rights: see *Gould v. Yukon Order of*

*Pioneers*, 1996 CanLII 231 (S.C.C.), [1996] 1 S.C.R. 571 at paras. 3 and 46, *University of British Columbia v. Berg*, 1993 CanLII 89 (S.C.C.), [1993] 2 S.C.R. 353, *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (S.C.C.), [1993] 1 S.C.R. 554 and *Zurich Insurance*. While commentators have been critical of the Supreme Court's intransigence on this issue, the law remains clear: see *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28 (CanLII), [2003] 1 S.C.R. 476 at para. 85.

[60] Having regard to two of the four contextual factors, it is apparent that correctness is the proper review standard. The remaining two factors simply reinforce this conclusion. For example, had the issue involved a question of fact and not a question of law, deference would have been accorded the Board of Inquiry's determination because of the nature of the legal question under review: see *Ross v. New Brunswick School District No 15*, 1996 CanLII 237 (S.C.C.), [1996] 1 S.C.R. 825. But the issue before us is an interpretative one that raises a question of law. In these circumstances, correctness must be deemed the proper review standard.

[61] One final comment with respect to the deference issue. The fact that the Board of Inquiry was asked to interpret a statutory provision is not a sufficient basis for declaring that it lacks a relative expertise. It is true that courts are regularly called on to interpret statutes and, therefore, possess a relative expertise at least equal to any deemed expertise that an administrative tribunal might possess. However, under administrative law principles, the relative expertise of a tribunal often trumps that of reviewing courts when it comes to the tribunal's interpretation of its enabling legislation. For example, it is well accepted that most labour tribunals possess an interpretive expertise which is not trumped by that of a review court when it comes to the interpretation of their constitutive legislation. It is not a question as to which of the two interpretative bodies is better able to interpret the provisions of a tribunal's enabling statute. Rather, the issue of relative expertise must focus on the nature of the legislation and the provision requiring interpretation. Thus, for example, a review court may have to accord deference to a tribunal's interpretation of its enabling statute. If, however, the tribunal is called on to interpret another statute the same may not hold true: see *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (S.C.C.), [1989] 1 S.C.R. 1722 at page 1747.

[62] Accepting that correctness is the proper review standard, the first issue is whether the term “*bona fide*”, as found in s. 3(6)(a) of the *Human Rights Act*, should be interpreted in accordance with either the *Zurich Insurance* or *Meiorin* test. The Commission argues for the latter test on the basis that its application is consistent with interpretative principles applied in the human rights context. The Commission maintains that the Board’s interpretation is in keeping with the *Act’s* dominant purpose of achieving equality and eliminating discrimination based on age. In effect, the Commission is asking us to narrow the application of the exemption found in s. 3(6)(a), by reading in a more strident test for assessing whether a pension plan is *bona fide*. I agree that exceptions and defences in human rights legislation are to be strictly construed: see Ruth Sullivan, *Driedger on the Construction of Statutes* 4th ed. (Butterworths, 2002) at p. 376. However, we are not permitted to narrow the scope of s. 3(6)(a), by reading in the BFOQ test articulated in *Meiorin*, if that test undermines the very purpose for which that provision was adopted. A more detailed explanation is required. For ease of reference, Appendix “A” to these reasons provides the full text to the pertinent provisions of the *Human Rights Act*.

[63] Succinctly stated, s. 3(1)(a) of the *Human Rights Act* provides that no employer may refuse to employ or to continue to employ any person on a number of enumerated grounds, including age. The next relevant provision is s. 3(5). It states that notwithstanding s. 3(1), a limitation based on age is permitted if such limitation is based on a *bona fide* occupational qualification (BFOQ). Applying these two provisions to the issue of a mandatory retirement, and ignoring for the moment s. 3(6)(a), we can deduce the following. An employment policy that imposes mandatory retirement at age 65 contravenes s. 3(1). However, under s. 3(5) the employer is entitled to invoke the BFOQ defence. This understanding of the application of s. 3(1) and 3(5) is on all fours with the Supreme Court’s decision in *Ontario Human Rights Commission et al. v. Borough of Etobicoke*, 1982 CanLII 15 (S.C.C.), [1982] 1 S.C.R. 202, save in one respect. The BFOQ test articulated in *Etobicoke* was subsequently revised in *Meiorin*. I shall say more of this development below.

[64] To this point the interpretative analysis has focused entirely on ss. 3(1) and 3(5) of the *Human Rights Act*. It is now necessary to go one step further by introducing s. 3(6)(a) into the analysis. That provision states that s. 3(1) does not apply in cases of forced retirement pursuant to the terms of a *bona fide* pension plan. It necessarily follows that if s. 3(1) does not apply then neither can s. 3(5). Hence, s. 3(6)(a) has the effect of

relieving employers of the obligation to justify their mandatory retirement policy as a BFOQ under s. 3(5). This is true provided that the employer can establish that a mandatory retirement policy is pursuant to a *bona fide* pension plan. Yet, the interpretation that the Commission advances with respect to s. 3(6)(a) would have us read in the BFOQ test as articulated in *Meiorin*, thereby defeating the very purpose for which s. 3(6)(a) was added to the legislation.

[65] The fatal flaw in the Commission's interpretative argument can be tested from another perspective. In June of this year the legislature introduced Bill 62, *An Act to amend the Human Rights Act*, 2nd Sess., 55th Legislature, New Brunswick, 2004-2005, with a view to repealing s. 3(6)(a) of the *Human Rights Act*. If that amendment becomes law, employers in the Province will henceforth be required to justify their mandatory retirement policy as a BFOQ under s. 3(5), if they wish to avoid a finding of age discrimination under s. 3(1). However, if this Court were to accept the Commission's interpretative argument that s. 3(6)(a) includes a BFOQ component, there would be no need to repeal s. 3(6)(a). With or without the amendment, an employer would have to satisfy the BFOQ test articulated in *Meiorin*. In effect, the Commission is asking us to judicially repeal s. 3(6)(a) by adopting an interpretation that negates its obvious purpose. This is one more reason for refusing to read into s. 3(6)(a) a BFOQ test.

[66] In a nutshell, s. 3(6)(a) of the *Human Rights Act* was intended to displace the application of the BFOQ test laid down in s. 3(5) in cases involving age discrimination tied to mandatory retirement policies. In its place the employer must establish that mandatory retirement is pursuant to a *bona fide* pension plan. The interpretation that the Commission advances would have us reintroduce the BFOQ requirement into s. 3(6)(a), thereby defeating the very reason for its existence.

[67] The more difficult interpretative issue is tied to the cross-appeal. Potash Corporation argues that the review judge erred in incorporating the reasonableness test articulated in *Zurich Insurance*. I agree for two reasons. First, the Supreme Court went out of its way in *Zurich Insurance* to emphasize that differences exist between discrimination in the insurance and employment contexts. Second, if we were to read in the reasonableness test articulated in *Zurich Insurance*, we would be reintroducing a critical component of the BFOQ test articulated in

*Meiorin*, thereby, forcing the employer to justify why other practical alternatives to mandatory retirement were not considered or adopted. I shall deal with both points in the order stated.

[68] In arguing that the reasonableness test articulated in *Zurich Insurance* should apply in the employment context, the Commission fails to acknowledge the extent to which the Supreme Court in *Zurich Insurance* went out of its way to emphasize that a difference exists between the insurance and employment contexts. Writing for the majority, Justice Sopinka wrote, at para. 22:

While the words used in s. 21 are similar to those in the employment cases, they are used and applied in a different context. The insurance context is different from the employment context. The legislature has recognized that this is so by adopting special provisions in the Code relating to insurance. There are special exemptions for certain insurance practices. For example, employee group insurance plans are allowed to differentiate on the basis of age and sex, provided that an actuarial basis exists for the differentiation. See s. 24(2) (now s. 25(2)) of the Code, and s. 34(2) of the *Employment Standards Act*, R.S.O. 1980, c. 137 (now R.S.O. 1990, c. E.14, s. 33(2)) and Regulation 282 of the Act. It is an important principle of insurance practice that premiums charged to individual policy holders vary as much as possible in accordance with the degree of risk posed by the policy holder. In view of the fact that individualized assessment cannot be done, it is necessary to classify the degree of risk on the basis of groups who share characteristics which are material to the risk. It is inevitable that some will be placed in a group who do not share the average characteristics of that group. Rates developed on the basis of the average characteristics of this group will thus discriminate against them. The basic human rights principles referred to above, and applied in the employment cases, must take into account these differences when applied in the context of insurance.

[69] An inescapable difference between discrimination in the insurance and employment contexts is that under the Ontario legislation applicable to insurance contracts reasonableness is a statutorily prescribed test. Although this distinction is not determinative of the interpretative issue before us, neither should the distinction be dismissed summarily. The question is whether such a test should be implied as being necessary to carry out the intent of the legislature. In this case, the opposite is true. A reasonableness test undermines the objective of s. 3(6)(a) of the *Human Rights Act*. This takes me to my second reason for rejecting the Commission's interpretative argument.

[70] My second reason for rejecting the application of the reasonableness test articulated in *Zurich Insurance* is tied to its formulation. Note that in *Zurich Insurance*, a non-employment case, the reasonableness component of the statutory test for assessing the reasonableness of a commercial practice (insurance premiums determined according to age, sex and marital status) was formulated in terms of there being no practical alternative to the discriminatory practice. In effect, this formulation is the equivalent of the third criterion outlined in the *Meiorin* test: an employer must establish that it is impossible to accommodate individual employees without imposing undue hardship on the employer. I say this because a practical alternative to mandatory retirement is the possibility of accommodating individual employees who reach the retirement age. Accommodation might permit employees to continue with their employment subject perhaps to individualized testing, where appropriate, and subject to the employer not being exposed to undue hardship. In brief, once the reasonableness test is engaged, the issue refocuses on whether the accommodation of individual employees, who have reached age 65, is a practical alternative to the discriminatory practice of forced retirement. In my view, this is exactly the type of analysis that s. 3(6)(a) of the *Human Rights Act* seeks to avoid.

[71] The Commission's argument fails to acknowledge that the BFOQ defence has always had a reasonableness component. We begin with the Supreme Court's decision in *Etobicoke*. The issue in that case was whether mandatory retirement of firefighters at age 60 qualified as discrimination under the Ontario *Human Rights Code* and, if so, whether the employer could invoke the statutory defence that forced retirement qualified as a *bona fide* occupational qualification. At that time, the BFOQ test had both a subjective and objective component. The subjective

component was subsumed under the umbrella of *bona fides*. The objective component involved a determination as to whether mandatory retirement was reasonably necessary. The test is set out at page 208 of the Supreme Court's reasons:

[...] To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

[72] In time, the objective component of the BFOQ test, as it applied to forced retirement of certain types of employees (e.g. firefighters), required employers to conduct individualized testing as an alternative to enforcing a blanket discriminatory rule of forced retirement at a fixed age. For example, in *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, 1989 CanLII 18 (S.C.C.), [1989] 2 S.C.R. 1297, the Supreme Court upheld a tribunal ruling which required individualized testing of firefighters who were required to retire at age 60. Those who were physically capable of doing their job at that age would retain their employment. Those who failed the physical test could no longer allege discrimination. A failure on the part of an employer to show why it was impractical to test employees individually could lead to a finding of unjustified age discrimination. See also *Caldwell et al. v. Stuart et al.*, [1984] 2 S.C.R. 603, *Brossard (Town) v. Quebec (Commission des droits de la personne)*, 1988 CanLII 7 (S.C.C.), [1988] 2 S.C.R. 279, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (S.C.C.), [1990] 2 S.C.R. 489.

[73] It is also important to recall that prior to *Meiorin*, the law drew a distinction between direct and indirect (adverse effect) discrimination. Forced retirement at a fixed age qualified as direct discrimination because the impugned policy flew in the face of an enumerated and prohibited ground of discrimination. On the other hand, indirect discrimination arose in those cases where a facially neutral employment standard or rule discriminated against an employee in effect. For example, in *O'Malley*, indexed as *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al.*, 1985 CanLII 18 (S.C.C.), [1985] 2 S.C.R. 536, an employee challenged a work rule that required her to work on one of her religious days of observance (Saturday). The facially neutral work rule was challenged on the basis that it constituted adverse effect discrimination.

[74] The classification of discrimination as either direct or indirect was significant in two material respects. First, the BFOQ test did not apply to cases of indirect discrimination and the remedies differed depending on the classification of the discrimination. In cases of indirect discrimination, the Supreme Court developed another test that employers could invoke as a defence. The employer had to establish: (1) that there was a rational connection between the job and the particular standard, and (2) that the employer cannot further accommodate the claimant without incurring undue hardship. If the employer failed to discharge that burden then it failed to establish a defence to the charge of discrimination. So too did the remedies differ between a finding of direct and indirect discrimination. In cases of direct discrimination, the discriminatory rule was struck down unless the employer could satisfy the BFOQ test. In cases of indirect discrimination, the rule remained in effect but an exemption would be accorded to those employees who could be reasonably accommodated.

[75] The true precedential significance of *Meiorin* is that it abolished the unworkable legal distinction between direct and indirect discrimination. The tri-partite test, outlined at paragraph 48 of these reasons, covers both categories of discrimination and the remedies are merged. For our purposes, it is important to recognize that the reasonableness test first articulated in *Etobicoke*, as part of the BFOQ test for direct discrimination, would in time be reformulated and become part of the *Meiorin* test.

[76] In conclusion, we cannot read into s. 3(6)(a) of the *Human Rights Act*, the reasonableness test articulated in *Zurich Insurance* without reintroducing an essential component of the BFOQ test as articulated in

*Meiorin*. To avoid a finding of age discrimination, employers would have to establish that there is no reasonable alternative to mandatory retirement. Arguably, a reasonable alternative would be to accommodate individual employees on reaching the mandatory retirement age by allowing them to retain their employment for an extended period. This is true provided that the duty to accommodate individual employees would not cause the employer undue hardship. However, this is the very type of analysis that s. 3(6)(a) seeks to avoid.

[77] My conclusion is at odds with the reasoning advanced in *O'Neill v. Canadian Paperworkers Union* and adopted by the review judge. As well, the Commission has drawn our attention to several decisions of human rights tribunals in British Columbia that have come to the same conclusion. In partial response, let me point out that the legislation in that Province and New Brunswick differs in one material respect. In British Columbia, there is no equivalent to s. 3(5) of our *Human Rights Act* and, therefore, it is impossible to apply the jurisprudence of that Province to the New Brunswick context. While there may be ambiguity in the British Columbia legislation, none exists in this Province. Accordingly, I do not find the following tribunal decisions helpful: *Keshen v. Carrier Canada Ltd.*, (1989), 41 B.C.L.R. (2d) 121 (S.C.), *Gerlach v. Canada trust Co.* (1990), 14 C.H.R.R. D/2111, *Davenport v. University of British Columbia* (1990), 13 C.H.R.R. D/489, *McCabe* indexed as *British Columbia Transit v. British Columbia (Council of Human Rights)* 1991 CanLII 774 (BC C.A.), (1990), 81 D.L.R. (4th) 1 (B.C.C.A.) and *Harrison v. University of British Columbia*, (1986), 30 D.L.R. (4th) 206 (B.C.S.C.).

[78] As *O'Neill v. Canadian Paperworkers Union* found acceptance in the Court below, I would like to address one aspect of that decision. I begin with a recitation of the pertinent facts. Ms. O'Neill filed a discrimination complaint based on age and marital status after being denied a survivor benefit under her husband's pension plan. The pension plan provided for a survivor benefit only to spouses of employees who were eligible to retire (age 55) at the time of their death. Mr. O'Neill was 51 at the time of his death. As is true in New Brunswick, the *Human Rights Act* of British Columbia prohibits age discrimination and, hence, mandatory retirement, unless the forced retirement is tied to a *bona fide* pension plan. The Human Rights Council dismissed the human rights complaint after concluding that the age requirement of 55 years was based on a sound and accepted pension practice and no practical alternative was available if the objective of the plan was to be fully met. Before turning to the Council's reasons for adopting both a reasonableness and *bona fide*

test, I should point out that s. 3(6)(b) of the New Brunswick *Human Rights Act* states that s. 3(1) does not apply in cases where a pension plan contains a minimum service requirement, provided that the requirement is adopted under a *bona fide* pension plan. As is apparent, ss. 3(6)(a) and (b) pursue the same objective.

[79] In *O'Neill v. Canadian Paperworkers Union*, the Human Rights Council gave four reasons for reading in a reasonableness test. The review judge, at para 12 of his decision, quoted the following passages from *O'Neill*, at paras. 33-34, in support of his decision to adopt the full *Zurich Insurance* test:

The aim of a pension plan is to provide benefits to its members on an equitable basis. It is the nature of pension plans that rules of eligibility apply equally to all participants. Benefits cannot be determined with a view to an individual's needs or circumstances. Therefore, just as in the insurance context, it is somewhat artificial to apply the reasoning of the employment cases in which the availability and practicality of individualized testing as an alternative to a rule of general application is considered. These cases assume that people should be dealt with on an individual basis. Conversely, a pension plan must differentiate amongst its members based on defined criteria and characteristics. Such distinctions are not made as a matter of expediency because individualized assessment is impractical, but as a matter of implementing rational and legitimate plan objectives. Although the pension and insurance contexts are not completely analogous, in my view, the appropriate test to be applied in interpreting the words "operation of [a] bona fide ... pension plan" is that set out in *Zurich Insurance* Insurance. Moreover, the presence of special provisions relating to insurance was a factor the Court relied on in distinguishing it from the employment context. Section 8(3)(b) does the same thing in the pension context.

The Respondents argued that on the “bona fide” part of the test as set out in *Zurich Insurance* should apply to a proper interpretation of section 8(3)(b) of the *Act* because the word “reasonable” does not appear in the language of the exemption with respect to pension plans as it does in the *Code* provision interpreted in *Zurich Insurance*. I cannot accept this argument. First, as stated earlier, the language in the *Code* at the time of the *Etobicoke* decision did not use the word “reasonable”, but it was inferred by the Court. Second, exceptions to the protections provided by human rights legislation should be narrowly construed (*Zurich Insurance*, D/263 [S.C.R. 339]; *Brossard (Town) v. Québec (Commission des droits de la personne)*, 1988 CanLII 7 (S.C.C.), [1988] 2 S.C.R. 279, (1988), 10 C.H.R.R. D/5515 (S.C.C.)). Third, if only the “bona fide” part of the test as set out in *Zurich Insurance* were applied to the exemption for pension plans set out in section 8(3)(b) of the *Act* it would result in an exemption that was so broad as to be incompatible with human rights principles; it would mean that no objective component would be applied in the test for establishing whether the discrimination relates to the operation of a bona fide pension plan. Fourth, the Supreme Court of Canada has stated that differences in wording between provincial human rights statutes “should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature” (*Berg v. University of British Columbia*, 1993 CanLII 89 (S.C.C.), [1993] 2 S.C.R. 353, at 373, (1993), 79 B.C.L.R. (2d) 273 at 286).

In summary, the appropriate test to be applied in interpreting and applying the exemption set out in section 8(3)(b) of the *Act* relating to the operation of a bona fide pension plan is that set out in *Zurich Insurance*.

[80] In light of my earlier analysis it is unnecessary to deal with each of the reasons invoked in justification of an implied reasonableness test, save one. The Council reasoned that the *bona fide* test would have no

objective component if the reasonableness test were omitted. With great respect, I disagree. It is possible to inject an objective component into the *bona fides* test without reading in a reasonableness test. It is not simply a question of whether an employer honestly believes that its pension plan is a viable alternative to forced retirement and that the plan was not adopted for purposes of defeating protected rights. That belief has to be measured against an objective standard in the sense that the belief is reasonable in the circumstances of a particular case. For example, if the employer's pension plan could not be registered under the *Pensions Act* of New Brunswick, the objective component of the *bona fides* test might be difficult to satisfy. But this is a far cry from reading into s. 3(6)(a) of the *Human Rights Act* a reasonableness test as formulated in *Zurich Insurance*.

[81] Before closing, I must acknowledge that the Commission cited three New Brunswick Board of Inquiry decisions. For the sake of completeness, I shall briefly explain why they are of no significance to the present case. In *Charles Little v Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. D/1, Chairman Brian Bruce noted that the employer did not raise s. 3(6)(a) of the *Human Rights Act* as a defence to an allegation of age discrimination tied to a mandatory retirement policy. Rather the case was argued on the basis of whether the policy qualifies as a BFOQ under s. 3(5). In *Kuun v University of New Brunswick* (1983) 5 C.H.R.R. D/1901, Chairman William Goss, noted that s. 6(3) of our *Human Rights Act* is "highly unusual to say the least" and s. 3(6)(a) is "absolutely unique". He went on to find that the mandatory retirement policy in effect at the University was pursuant to a *bona fide* pension plan under s. 3(6)(a) and, therefore, s. 3(1) did not apply. In *Buggie v. City of Moncton* (1984), 5 C.H.R.R. D/2307, the Board Chairman, Scott MacGregor, found that the employee alleging age discrimination based on a mandatory retirement rule was not a member of a pension plan, let alone one that was *bona fide* within the meaning of s. 3(6)(a).

[82] I would dismiss the appeal, allow the cross-appeal and remit the matter to the Board of Inquiry on the basis that the complaint is to be dealt with in accordance with these reasons for judgment. The cost order granted below is set aside. The respondent is

entitled to costs of \$2,500 on the judicial review application and a total of \$2,500 on the appeal and cross-appeal.

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J.T. ROBERTSON, J.A.

I CONCUR:

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WALLACE S. TURNBULL, J.A.

**APPENDIX “A”**

*Human Rights Act,*

R.S.N.B. 1973, c. H-11

**3(1)** No employer, employers' organization or other person acting on behalf of an employer shall

(a) refuse to employ or continue to employ any person, or

(b) discriminate against any person in respect of employment or any term or condition of employment,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity.

[...]

**3(5)** Notwithstanding subsections (1), (2), (3) and (4), a limitation, specification or preference on the basis of race, colour, religion,

**ANNEXE « A »**

*Loi sur les droits de la personne,*

L.R.N.-B. 1973, c. H-11

**3(1)** Aucun employeur, aucune organisation patronale ni aucune autre personne agissant pour le compte d'un employeur ne doit

a) refuser d'employer ou de continuer d'employer une personne, ni

b) faire preuve de discrimination envers une personne en matière d'emploi ou quant aux modalités ou conditions d'emploi,

en raison de sa race, de sa couleur, de sa croyance, de son origine nationale, de son ascendance, de son lieu d'origine, de son âge, de son incapacité physique, de son incapacité mentale, de son état matrimonial, de son orientation sexuelle, de son sexe, de sa condition sociale ou de convictions ou d'activité politiques.

national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity shall be permitted if such limitation, specification or preference is based upon a *bona fide* occupational qualification as determined by the Commission.

**3(6)** The provisions of subsections (1), (2), (3) and (4) as to age do not apply to

(a) the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan;

(b) the operation of the terms or conditions of any *bona fide* retirement or pension plan that have the effect of a minimum service requirement; or

[...]

**3(5)** Nonobstant les paragraphes (1), (2), (3) et (4), une restriction, condition ou préférence reposant sur la race, la couleur, la croyance, l'origine nationale, l'ascendance, le lieu d'origine, l'âge, l'incapacité physique, l'incapacité mentale, l'état matrimonial, l'orientation sexuelle, le sexe, la condition sociale ou de convictions ou d'activité politiques est autorisée si elle se fonde sur des qualifications professionnelles réellement requises, selon ce que détermine la Commission.

**3(6)** Les dispositions des paragraphes (1), (2), (3) et (4) quant à l'âge ne s'étendent pas

a) à la cessation d'emploi ou au refus d'emploi en raison des modalités ou conditions d'un régime de retraite ou de pension effectif;

b) à l'application des modalités ou conditions d'un régime de retraite ou de pension effectif qui ont pour effet d'exiger un nombre minimal d'années de services; ni