

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND MANDATORY RETIREMENT OF ACADEMIC EMPLOYEES*

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ABSTRACT

Under the Canadian Constitution, education is a provincial rather than the federal government's responsibility. In the majority of Canadian universities, colleges, and schools, a mandatory retirement age of sixty-five for men and women is stipulated either by by-laws made under, or collective agreements facilitated by, provincial legislation. A majority of the provinces, in their individual rights or human rights acts/codes, while proscribing discrimination on the ground of, *inter alia*, age, provides an exception in that between certain ages the provisions against age discrimination do not apply.¹ One of the consequences is that compulsory retirement is not protected under human rights legislation. One of the principal ways the mandatory retirement of academics and others could be challenged was to use the equality provisions of the Canadian Charter of Rights and Freedoms. However, courts lower than the Supreme Court of Canada could not agree whether compulsory retirement at a certain age was, under the equality section of the Charter, discriminatory or not. It was left to the Supreme Court of Canada to decide that important question. This article examines these recent developments.

¹ For example, the British Columbia Human Rights Act defines age as between forty-five and sixty-five; and the Ontario Human Rights Code limits the definition of age between eighteen and sixty-five. Thus, discrimination outside these ages is permissible. The Canadian (Federal) Human Rights Act also provides a defense to a complaint of age discrimination of an employee who is forced to retire at the "normal age of retirement."

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The Canada Act, 1982 [1], which contains the Constitution Act, includes the Canadian Charter of Rights and Freedoms. The Charter is identical to the American Bill of Rights, particularly as it 1) entrenches fundamental rights and freedoms in a written Constitution;² 2) makes the Constitution itself, rather than legislative provisions or common law, the supreme law of Canada;³ 3) makes the judiciary responsible as the final arbiters for the application and interpretation of the fundamental civil rights and civil liberties provided for in the Constitution;⁴ and 4) makes the Charter applicable to the Parliament of Canada, the legislatures of the provinces (states) and the federal and provincial governments. The American doctrine of “state action” appears to have been avoided.

With regard to point 4 above, Section 32 (1) of the Charter provides that the Charter applies to: “a) the Parliament and government of Canada in respect of all matters within the authority of Parliament . . . ; and b) the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

The Supreme Court of Canada had previously decided that the Charter is essentially an instrument for checking the powers of government over individuals, and does not apply to transactions between private persons or organizations. From the early days of litigation, the Supreme Court has held to the view, despite criticisms, that the Charter is confined to governmental action and that private activity is excluded.⁵ For example, Dickson J. stated in *Hunter v. Southam Inc.*, “It

² Justice Jackson explained entrenchments:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond reach of majority and officials, to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no election [2, p. 638].

³ Section 52 of the Canadian Constitution is explicit about this and provides:

(1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

⁴ Section 24 says that anyone whose rights or freedoms are infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. This is in complete contrast to the British parliamentary system, whereby the principles of supremacy of legislature do not allow the courts to declare an act of Parliament, or any part thereof, unconstitutional, because in Britain there is no “written” constitution giving the judiciary that power.

⁵ The distinction between public and private activity, particularly under the American “state action” doctrine, has come under attack in the United States. What is happening in this respect in Canada goes against some Canadian and American writers’ opinions that private activity can be a source of greater violations of human rights. For example, Tribe wrote:

. . . where private power is the primary source of coercion and violence that oppressed individuals and group experience, it is hard to accept with equanimity a rigid legal distinction between state and society. The pervasive *system* of racial apartheid which existed in the South for a century after the Civil War, for example, thrived only because of the resonance of society and politics . . . [3].

is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action” [4,5].⁶

In one respect, the Canadian Charter diverges from the United States’ Bill of Rights. While it specifically guarantees rights and freedoms enshrined in it, these are qualified by Section 1, which says that the rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In discrimination cases, the relationship between Section 1 and Section 15 (the equality section) has become extremely important. The Supreme Court of Canada has set out the criteria to be used in assessing the validity of a limitation under section 1:⁷ 1) the objective of the limiting measure must be of sufficient importance to override a constitutionally protected right or freedom; and 2) once the sufficiently significant objective is recognized, the party imposing the limitation must show that the means chosen are reasonable and demonstrably justifiable. This can be stated to be the “proportionality test,” which has three components: 1) the measures must be rationally connected to the objectives; 2) the means should impair the right or freedom as little as possible; and 3) there must be some proportionality between the effects of the measures limiting the Charter right or freedom and the objective [7, 9].

However, the overriding consideration that the courts have to take into account is whether the restriction on a freedom or right is a “reasonable limit” to be imposed in the circumstance. As the Chief Justice of Canada pointed out, “[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line” [7].

It may be interesting to note that the attitude of the Supreme Court of Canada from the outset has been not to give the same kind of restrictive interpretation to the Charter as it did with the Canadian Bill of Rights, 1960.⁸ For example, Dickson J (later the Chief Justice of Canada), in an early case emphasized that the Charter should be construed by the “purposive approach,” that it was important to engage in broad analysis of the Charter’s provisions, keeping in mind the purpose of the Charter [4]. In a later case he again stressed that interpretations of the Charter’s provisions should be generous rather than legalistic [11].

⁶ The Supreme Court of Canada discussed this question fully in *R.W.D.S.U. v. Dolphin Delivery Ltd.* [6].

⁷ In *R. v. Edwards Books & Art Ltd* [7], Dickson C. J. C. opined that where the measures under attack were meant to promote or protect the interests of less advantaged people, a more flexible approach in the application of Section 1 is advisable. He said:

In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons [7, p. 49].

⁸ The Canadian Bill of Rights was not a constitutional document, and did not provide for entrenched civil rights or civil liberties. Laskin C. J. C. described the nature of the Bill of Rights, 1960, as “a halfway house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument [10, p. 443].

DISCRIMINATION

The provision with which we are concerned is the section dealing with *Equality Rights*. Section 15 provides:

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁹

As can be seen, discrimination is prohibited on the ground of “age,” which is an “enumerated” category. One of the tasks of courts has been to define the meaning of “discrimination.” The Supreme Court of Canada, in a case involving human rights legislation in an employment context, has already given some thought to the definition. For example, it described discrimination in the following terms [12, p. 332]:

It arises where an employer . . . adopts a rule or standard . . . which has a discriminating effect upon a prohibited ground on one employee or group of employees that it imposes, because of some special characteristic of the employee or group, obligation, penalties, or restrictive conditions not imposed on other members of the workforce.

In two cases preceding the four mandatory retirement cases, the Supreme Court of Canada provided guidelines for interpreting “discrimination” as used in Section 15 of the Charter. In *Andrews v. Law Society of British Columbia et al.* [13], the Court explained that in interpreting the section, the main concern must be the law’s impact on the individual or group concerned. As nearly as possible, the law must accord an equality of benefit and protection, and no more of the restrictions, penalties, or burdens upon one than the other. The ideal should be that a law binding on all should not have a more burdensome or less beneficial impact on one person than others, because of irrelevant personal differences. McIntyre J. offered the following definition of discrimination [13, p. 18]:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or

⁹ Subsection 2 appears to aim at avoiding the difficulties faced by the United States’ courts, so that any laws, programs, or activities designed to provide measures for those who were disadvantaged by previous discrimination could not be declared null and void under the principles of “reverse discrimination.” The subsection gives protection for, and makes constitutional, governmental affirmative action laws, programs, or activities.

group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.¹⁰

The Court laid down the steps to be taken in determining whether there is violation of Section 15 of the Charter or not; the first question that should be asked is whether the rule, in purpose or effect, distinguishes between different individuals or different classes of individuals. The Court rejected the contention of some academics and judges that discrimination exists in a case where there is any different treatment if similarity of situation can be proved. The Court said that once a finding of different treatment is established, the inquiry does not stop there, because not every different treatment is covered by Section 15 of the Charter. In an inquiry under Section 15, once different treatment is established, a second question should be asked: whether there is discrimination in the sense of stereotyping and prejudice.

In *R. v. Turpin*, Madam Justice Wilson set out the process for determining whether there has been discrimination on grounds relating to personal characteristics of the individual or group [14, p. 335]:

. . . it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context . . . it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.¹¹

MANDATORY RETIREMENT, THE CANADIAN CHARTER AND THE SUPREME COURT

The Supreme Court of Canada heard four consolidated appeals on mandatory retirement under the Canadian Charter and delivered the judgments on December 6, 1990. The decisions in the lower courts had been contradictory and inconsistent

¹⁰It becomes clear from *Andrews* that Section 15 not only protects from direct or intentional discrimination, but also protects from adverse impact discrimination.

¹¹According to the Supreme Court of Canada [15, p. 199]:
Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity self-worth and emotional well-being.

with each other. Courts of appeals in two provinces (states) disagreed with each other and came to opposite conclusions.¹² It did not surprise many to observe that the Supreme Court also could not give a unanimous verdict.¹³ The issue of mandatory retirement is extremely important to millions of Canadians, and the opinion of politicians, writers, academics, and judges is divided on the subject.¹⁴ Most of the important issues are discussed in the first case *McKinney v. University of Guelph* [18], which dealt with the compulsory retirement policies of Ontario universities. However, the other three cases, *Stoffman v. Vancouver General Hospital* [19], *Harrison v. University of British Columbia* [20], and *Douglas/Kwantlen Faculty Association v. Douglas College* [21], cannot be ignored, particularly *Harrison*, which dealt with British Columbia universities, and *Douglas*, which considered the position of colleges. In brief summary, the eventual outcome of the majority decision in these cases was that, in Canada, there is no constitutional hinderance to having a mandatory age of retirement, including one for university, college, and school employees. It is now proposed to examine the *ratio decidendi* of the Supreme Court's pronouncements under separate headings.

GOVERNMENT

While all the justices agreed that the Charter is confined to the government, there was a sharp division when it came to the meaning of "government" and the application of the principle. The majority's opinion is reflected in Justice La Forest's enunciation that the Charter applies to government in its narrowest sense; i.e., he accepted the doctrine of "constitutionalism," under which states are a necessary evil and the role of government should be strictly confined. In view of this, the majority decided that although certain self-regulating institutions and bodies may be subject to government regulation and funding, they do not form part of the government apparatus; similarly, when they establish mandatory retirement for their employees, either by regulations or collective agreements, they

¹²For developments before the Supreme Court's decisions, see [16, 17].

¹³A seven-judge court heard the appeals. It is interesting to note that, generally speaking, the two female justices gave the dissenting minority opinions.

¹⁴Sopinka J. said that the Supreme Court judges came to different conclusions in resolving the difficult legal and social problem of mandatory retirement because it is "an issue on which Canadians of goodwill are sharply divided," and the "division is reflected in the opinions of my colleagues. They also reflect the powerful arguments that can be marshalled on both sides of the question." [18, p. 696].

are not implementing government policy.¹⁵ Therefore, universities [18, 20] and hospitals [19] do not come under Charter scrutiny because they are not part of “government.” Public universities, despite the fact that some members¹⁶ of their governing councils are appointed by the government, and that they depend for their financial existence on, and have to submit financial reports to, the government, do not form part of “government.” Therefore, the impugned policies of mandatory retirement do not constitute government action, because statutes incorporating universities do not alter the traditional nature of the institution as a community of scholars and students enjoying substantial internal autonomy. La Forest J., for the majority, said [18, p. 642]:

The government has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources.

He accepted the following statement of the Ontario Court of Appeal, from which the appeal had been made to the Supreme Court of Canada [22, p. 216]:

The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within the legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.

The minority did not agree with this exposition of the law; and Wilson J. did not subscribe to the doctrine of “constitutionalism,” but instead highlighted and praised the beneficial side and role of the state, and showed how the Canadian society has accepted the concept of a welfare state. She compared the United States and Canadian systems of government and concluded that [18, p. 582]:

¹⁵Wilson J., in her dissent, decided that the state exercises a substantial, although sometimes indirect measure of control over universities in the area of funding, governing structures, policy, and decision-making processes, and that education at every level has been a traditional function of governments in Canada. Therefore, universities are part of government so far as the Charter application is concerned. However, L’Heureux-Dubé J., who agreed with Wilson J. on most points, agreed with the majority in saying that while universities cannot be considered to be wholly private in nature because they may perform certain public functions, the hiring and firing of employees, including compulsory retirement at a given and pre-determined age, cannot properly be included within the public functions categories. She added [18, p. 599]:

Canadian universities have always fiercely defended their independence. . . . The word “government,” as generally understood and on my view, never contemplated universities as they were and are currently constituted.

¹⁶The practice varies in different provinces: some have majority and some minority members appointed by the government, but, according to the Supreme Court, this makes no difference to the independence of the governing council.

Canadians have a somewhat different attitude to government and its role from our USA neighbours. Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of just Canadian society. The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security, to name but a few examples. It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.¹⁷

In Wilson's dissenting opinion, universities are broadly empowered to conduct their affairs through their enabling statutes. Universities perform an important public function that the government has decided to have performed. Thus, universities are part of government for the purpose of the Canadian Charter. Wilson also proposed criteria about entities that are not self-evidently part of the legislative, executive, or administrative branches of government. She favored an approach that asks the following questions in determining whether an entity is subject to the Charter under Section 32:

1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

In the hospital case, similar to the university cases, the majority decided that a public hospital is not a government instrumentality [19]. The hospital was established under a British Columbia statute, and was empowered by the statute to manage the property and affairs of the hospital and to pass by-laws for that purpose (one of the by-laws established a policy of mandatory retirement age). The by-laws had to be approved by the Minister of Health Services. The statute provided for the board of trustees, fourteen out of sixteen of whom were appointed

¹⁷Some writers, even in the United States, have commented that private discrimination can be more pernicious than public discrimination; and the impact of private discrimination, because of concentration of wealth and power in private hands, can be more injurious. For example, Chemerinsky wrote [23, p. 511]:

The need for court protection from private actions arguably is greater because democratic processes, no matter how imprecise a check, impose some accountability and limits on the government.

by the government. But the minority decided that the Charter does apply to such a hospital because it is a government entity; the provincial government exercises a substantial amount of control over the hospital in the areas of governing structure, policy, and funding.

In the fourth case, all the justices of the Supreme Court unanimously decided [26] that a provincial community college is subject to the Charter because it is a Crown agency [21]. The college had been created under the British Columbia Colleges and Institutes Act, and its affairs were managed and directed by a board of seven members—all of whom were appointed by government. The Minister of Education could establish policy or issue directives and approval all by-laws. It was decided that the position of community colleges is different from that of universities and hospitals because each college is a Crown agency, as it had been established by the government to implement government policy. The collective agreement had contained a provision for mandatory retirement at age sixty-five. It was decided that the fact that a Charter violation was contained in a collective agreement cannot insulate it from review by the courts. However, Sopinka J., in a slight dissent, said that a collective agreement is purely consensual conduct; thus, it cannot be described as “law” under Section 32, and cannot be subject to the Charter [21]. The British Columbia Supreme Court has decided that schools in that Province are subject to the Charter because of the purposes of the Schools Act of B. C. [28].

IS MANDATORY RETIREMENT “DISCRIMINATION?”

Many human rights¹⁸ or individual protection enactments under provincial jurisdiction, while giving protection in employment against discrimination on the grounds of “age,” create an exception after the age of sixty-five, thus making mandatory retirement permissible. (However, certain provinces in Canada, in line with the U.S. pattern, have abolished mandatory retirement.) As seen above, many collective agreements and by-laws provide for mandatory retirement. In *McKinney*, all the justices¹⁹ agreed on one point: the imposition of mandatory

¹⁸The Ontario Human Rights Code, which was the subject matter of *McKinney* litigation [18], provides in Section 9:

9. In Part I and in this part,

“age” means an age that is eighteen year or more, except in subsection 4(1) where “age” means an age that is eighteen year and more and less than sixty-five years.

Section 4(1) provides:

4(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offenses, marital status, family or handicap.

¹⁹Including La Forest, who wrote the major judgment of the majority of the Court. He had no hesitation in saying that the policy of mandatory retirement violates Section 15(1) of the Charter, provided the Charter applied to the universities—which he decided it did not.

retirement infringes section 15(1) of the Charter.²⁰ For example, Wilson J. explained that, in view of *Andrews v. Law Society of British Columbia*, the proper approach that should be taken is [13, p. 609]:

... the mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrebuttable presumption of prejudice. Rather it compels one to ask the question: Is there prejudice? Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue? Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity?

Wilson's answer to these questions was "clearly yes"; and she found Section 15(1) infringed because the imposition of mandatory retirement age is a distinction based solely on age and results in prejudice, as it reflects a stereotype of old age.

Similarly, L'Heureux-Dube' J. concluded that mandatory retirement overtly denies the equal protection and equal benefit of the Charter, and discriminates against individuals solely on the basis of age, constituting an arbitrary and artificial obstacle. This prevents persons aged sixty-five and over from the protection of equal treatment in employment.²¹ "Hence, the provision is inconsistent with the fundamental values enshrined within section 15(1); the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based on individual ability. The distinction is based on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual ability." [18, p. 682].²²

But there were vast and fundamental differences of interpretation and application of Section 1 of the Charter, both in the lower courts and among justices in the Supreme Court, on the crucial question of whether the discriminatory practice of

²⁰See *Dickason v. University of Alberta* [24] in which, following the Supreme Court's decisions in *McKinney* and *Harrison*, the trial judge's finding that University of Alberta's mandatory retirement policy, based on the Alberta Individual Rights Act, was unconstitutional, was overruled by the Alberta Court of Appeal on the grounds that the discriminatory provision in the legislation and the University's practice of mandatory retirement for lecturers/professors and librarians was justified under Section 1 of the Charter. See also *Ontario English Catholic Teachers Association et al. v. Essex County Roman Catholic Separate School Board* [25], in which, before the Supreme Court's decisions, the Ontario Divisional Court had decided that compulsory retirement of teachers was a reasonable limit on teachers' rights against discrimination on the grounds of age.

²¹She was not persuaded that even mandatory retirement can be justified, it can be reasonable to fix the cut-off age for any occupation or profession at sixty-five. "This is precisely what age discrimination is about. What then about federally appointed judges, whose retirement age is set at 75?" [18, p. 685].

²²She could not find any convincing evidence that the mandatory retirement scheme and tenure system are as intimately related as the majority of the Court suggested.

mandatory retirement is saved in case it constitutes “a reasonable limit as can be demonstrably justified in a free and democratic society.”²³

The majority decided that the mandatory retirement policies of universities are a reasonable limit, because their objectives are to maintain and enhance excellence by permitting flexibility in resource allocation and faculty renewal, and to preserve academic freedom and a collegial form of association by minimizing distinctive modes of performance evaluation. Not only are the objectives of pressing and substantial importance, the policies are rationally connected to the objective. For example, in La Forest’s opinion, mandatory retirement is intimately connected to the tenure system. He added [18, p. 650]:

Mandatory retirement not only supports the tenure system which undergirds the specific and necessary ambience of university life. It ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence. Universities need to be on the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new people. *In a closed system with limited resources*, this can only be achieved by departures of other people. Mandatory retirement achieves this in an orderly way that permits long-term planning both by the universities and the individual.

However, the minority decided that mandatory retirement is not justifiable under Section 1 of the Charter, because there is no convincing evidence that the mandatory retirement scheme and the tenure system are intimately linked. Peer evaluation does not pose a threat to academic freedom. It is wrong to presume that somehow, at age sixty-five, academics become incompetent. Compulsory and involuntary retirement at a certain age, without taking competence into account or evaluating worth, does not meet the proportionality test. There are better alternatives available; for example, voluntary retirement with strong incentives to retire is a viable and equally effective way of meeting the objective of faculty renewal. It is solely because of the government’s policy of economic restraint that appointment opportunities for younger academics are limited, not because older academics are not retiring.²⁴

²³In *R. v. Edwards Book & Art Ltd.*, Dickson, C. J. C. after examining the previous developments, summarized the test that should be applied in applying Section 1 of the Charter [7, p. 14]: Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a “pressing and substantial concern.” Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objectives; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgement of rights.

²⁴Wilson and L’Heureux-Dube’ JJ. were the only Justices who decided that Section 1 does not protect mandatory retirement.

CONCLUSIONS

Although some countries and some provinces in Canada have proscribed a mandatory retirement age,²⁵ strong arguments can be advanced both in favor of keeping or abolishing a compulsory retirement age. In favor of retention, it is said that a mandatory retirement age provides a fixed date for termination around which both the employer and the employee can plan; it reduces the need for individual monitoring and evaluation; it allows both parties to enter into lifelong compensation arrangements including pension plans; and younger qualified people have better chances of finding employment. Submissions made by employers' lawyers, which were based on such advantages of mandatory retirement age,²⁶ proved persuasive to the majority of justices of the Supreme Court of Canada, as well as many judges in the lower courts.

However, equally forceful arguments were made in court cases against mandatory retirement age. Employers' arguments were countered with strong reasons for not following them with an arbitrary fixed age of retirement or for pension and the minority of justices of the Supreme Court accepted these counterarguments. It was submitted on behalf of the retired employees that arguments based on fiscal restraint and financial convenience cannot justify taking away constitutionally-protected rights; there are clearly better alternatives available than mandatory retirement to achieve the objective sought. Designated segments of society cannot be excluded from the ambit provided by the Canadian Charter and human rights legislation, because mandatory retirement is inconsistent with the fundamental values accepted these days in a civilized, industrial society; a fixed cut-off age of retirement for everyone, irrespective of their ability, performance, or personal wishes is unjustifiable; a flexible age of retirement can serve employers, employees, and society much better than the present system of retiring people at age sixty-five. The traditional age of sixty-five was chosen at a time wholly different from today; medical science and job differentiation have drastically changed the circumstances from 1935 when, for social security purposes, sixty-five was chosen in the United States and every other country followed that arbitrary figure. There are painful financial effects of mandatory retirement, particularly for the poor and non-unionized (one group particularly affected is women, because the compensation, including pension, schemes are geared to long

²⁵In some countries, special provisions are made for academics to retire at a certain age, e.g., at seventy.

²⁶For example, La Forest J. said in *McKinney* [18, p. 648]:
The universities advance a combination of intertwined purposes to justify their policies of mandatory retirement which have been put into place by collective and other agreements and pension plans. The central objectives of these policies, they say, are intended: (1) to enhance and maintain their capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal; and (2) to preserve academic freedom and the collegial form of association by minimizing distinctive modes of performance evaluation.

and uninterrupted service). In other words, the negative effects of mandatory retirement significantly outweigh any alleged benefits associated with its continuance [26].

Because the majority of Justices came to the conclusion that mandatory retirement, particularly in universities in Canada, is not discrimination and does not violate the Canadian Charter's protections under age discrimination (one of the reasons being that mandatory retirement is intimately tied to the tenure system in universities), it is interesting to note that what the court said in relation to academics. The following statement in the Ontario Court of Appeal in *McKinney v. University of Guelph* is very illuminating [22, p. 246]:

The policy of tenure in universities is fundamental to the preservation of academic freedom. It involves a rigorous assessment by one's peers of academic performance after a probationary period of up to five years. Once tenure is granted, it provides a truly free and innovative learning and research environment. Faculty members can take unpopular positions without fear of loss of employment. It provides stability of employment, because once an academic is found worthy of tenure by his or her peers, he or she can be assured of keeping that position until death, or the normal age of retirement, unless there is termination for cause following a properly conducted hearing before one's peers. This is based usually on gross misconduct, incompetence, or persistent failure to discharge academic responsibilities. Collegial governance is also a safeguard of academic freedom. In addition to tenure, peer review is involved in promotions, merit increases, appointment to senior administrative posts in a department or faculty, and eligibility for research grants. Without mandatory retirement, the imposition of a stricter performance appraisal system might be required. It would be fraught with many difficulties, and would probably require an assessment by one's peers or outside experts. It could be unilaterally imposed by university administration because of the role of the faculty or faculty associations in the governance of the university.

La Forest J., on the appeal in a similar vein, said (and the majority of the Court agreed with this reasoning) [18, p. 649]:

[faculty members] must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas . . . mandatory retirement clearly supports the tenure system. [A different approach] would demand an alternative means of dismissal, likely requiring competency hearings and dismissal for cause. Such an approach would be difficult and costly and constitute a demeaning affront to individual dignity.²⁷

²⁷It is submitted that it would be considered by many American academics as incongruous or paradoxical to suggest that because they have no mandatory retirement policies, somehow their tenure and academic freedom are threatened [27].

However, Wilson and L'Heureux-Dube' JJ. disagreed with the conclusion of La Forest J. that tenure is a *quid pro quo* for, and justifies, mandatory retirement. Madam Justice L'Heureux-Dube' found it difficult [18, p. 648]:

to accept the proposition that abolition of mandatory retirement of university faculty and librarians would threaten tenure as a result of increased performance evaluations. In fact, performance evaluations of faculty are an integral ongoing part of university life, and it has never been suggested that this process threatens tenure, collegiality or academic freedom.

It is submitted that, at least on the question of tenure, the arguments of the minority appear to be stronger than the majority's reasons for connecting tenure and academic freedom to mandatory retirement. It would appear that academic freedom or tenure have not been infringed or watered down in jurisdictions, both in Canada and United States, where mandatory retirement either has been eliminated or increased to a higher age, e.g., seventy.²⁸

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5. See also *Operation Dismantel Inc. v. The Queen*, 1 S.C.R. 441 (1985); *Tremblay v. Daigle*, 2 S.C.R. 530 (1989); *R. v. Big M. Drug Mart Ltd.*, 1 S.C.R. 295 (1985); *Slaight Communications Inc. v. Davidson*, 1 S.C.R. 1038 (1989).
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²⁸See the 1986 amendments to the (U.S.) Age Discrimination in Employment Act, which will abolish mandatory retirement in 1993. The arguments advanced by the majority of the Supreme Court of Canada that tenure and mandatory retirement are intimately tied do not stand scrutiny in view of the American legislation [26].

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