

# Constitutional Choices: the Case of Mandatory Retirement

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The *Canadian Charter of Rights and Freedoms*<sup>1</sup> (hereinafter the Charter) has been described in the popular press as both a needed civilizing constraint on Canadian politics and as an unnecessary opportunity for judicial despotism. Charter values, being so very broad in character, can sometimes too readily be deployed to support strongly held and yet conflicting points of view on issues of profound policy significance.<sup>2</sup> Because an unelected judiciary has the final say in determining the Charter's meaning and offending legislation must give way, Charter determinations necessarily provoke strong emotion along with their fundamental policy implications. No better example is the Supreme Court of Canada's decisions on mandatory retirement.<sup>3</sup>

Prior to the advent of the Charter, the relationship of judging to social change was more difficult for the public to discern or even care about. Judge made law in the 20th century had, in terms of prominence, given way to *New Deal* public law enacted by our legislative bodies and administered by others. Judicial decision-making, rationalized by precedent and subordinated to such public laws, obscured from view the policy making judges actually engaged in.<sup>4</sup> While being a judge has always been respected, I doubt that in pre-Charter times the public was particularly interested in the identity of our judges or in how they were appointed. Judging, to the extent the public reflected on it, was seen, I suspect, as an arcane professional task. The Charter has changed all this and the issue of mandatory retirement graphically illustrates why.

Mandatory retirement has potential application to all workplaces and all workers in Canada. It is a matter having both profound economic and social policy implications. And because, at its most visible point of application, mandatory retirement isolates citizens who are among the most vulnerable in Canadian society, the topic is an exceptionally emotional one.

I first came in contact with mandatory retirement in the early 1970's in connection with another decision of the Supreme Court of Canada holding that the terms **retirement** and **discharge** were not to be equated and quashing the decision of a labour arbitrator who had claimed jurisdiction to review the termination of an employee by Bell Canada upon that employee arriving

at **the normal retirement age.**<sup>5</sup> While I was initially concerned about the administrative law implications of the decision, I soon concluded that the more fundamental issue was our treatment of the aged in modern society. From this perspective, Bell Canada's policy and the Supreme Court of Canada's response were just the tip of the iceberg and this iceberg struck me as fundamentally discriminatory. Public policy had come to embrace the removal of people from their livelihood simply because of their age and regardless of their capacity to continue to perform their duties and responsibilities. In this respect I wrote:

*Unfortunately today, as in the past, older workers are stereotyped by the assumptions that they are less productive, they cannot easily be retained, or that they are inflexible [...] Even present day public policy evidences this invidious discrimination [...] These unfounded societal biases place older persons on inadequate fixed incomes [...] (which in turn forces them to give up many of the comforts of modern day life at a very inopportune time, and to make soul-destroying claims upon relatives). Furthermore, for many older people, the loss of identity associated with compulsory retirement may present a stark social reality. This may be so if one's life revolves about one's job, a revolution that suddenly and unnaturally stops at age 66. [I]t is evident that an enlightened policy objective for a modern industrial society should be the **retention** of older workers in the work force and not their enforced attrition.*<sup>6</sup>

My next professional contact with mandatory retirement was after I went into practice and York University retained me to defend it against a Charter challenge to its mandatory retirement policy and to subsection 9(1)(a) of the Ontario *Human Rights Code 1981*,<sup>7</sup> (hereinafter the Code) which precludes attack of age based discrimination in employment by someone 65 years of age or older. Subsection 9(1)(a) of the Code does this by defining **age** for the purpose of employment discrimination in employment under section 4(1) of the Code as "eighteen years or more and less than sixty-five years". Thus, the Code entirely precludes an individual aged 65 or over from complaining about age discrimination in employment even where age does not constitute a reasonable and *bona fide* occupational qualification pursuant to subsection 10(1)(a).

## **I. ICEBERG OR ICE CREAM? THE MANY FACES OF MANDATORY RETIREMENT**

On its face, York's policy was as discriminatory as Bell Canada's and yet I had been a faculty member at York for many years and its faculty was unionized. I knew this university, like others in Canada, to be committed to equalitarian values and its President was one of Canada's most distinguished and enlightened labour law scholars. That York would intentionally discriminate and that its faculty association would be a party to this discrimination by embodying the offending policy in its collective agreement seemed to be most unlikely. There must, I thought, be an explanation for mandatory retirement that could compete with my earlier immediate and emotional response. Indeed, to successfully defend this case, such a justification was mandatory.

The first thing that struck me this time about the topic was that no law of Ontario actually requires the mandatory retirement of workers at age 65. Subsection 9(1)(a) of the Code simply precludes the challenge to such arrangements should they be agreed to by workers and their employers. Of course, one's immediate response to this **freedom to contract** perspective may be one of suspicion given the overwhelming bargaining power employers can have in relation to individual employees. In fact, in the midst of our litigation, those parties changed the normal age of retirement to age 71 through collective bargaining. Moreover, York's experience is not unrepresentative of the workforce as a whole.

The most powerful trade unions in Canada are in favour of being able to negotiate mandatory retirement provisions into the pension plans contained in their collective agreements and the current trend is to demand an earlier departure date to age 65, not a later one. The labour movement's opposition on the possible abolition of mandatory retirement is reflected in Canadian Labour Congress Resolution No. 377 passed in 1980 and confirmed in 1982 which reads as follows:

*Whereas the organized labour movement has fought hard and long legislative battles to establish the mandatory retirement age of 65 years; whereas the labour movement has to press for a lowering of the retirement age with adequate pensions in order that workers may enjoy a few years of leisure in good health; whereas a mandatory retirement age provides*

*employment for Canada's youth entering the labour market for the first time; whereas there has been recent discussion, and especially Senator David Croll's report, expressing some desire to end mandatory retirement age and encourage a system of voluntary retirement; be it resolved that the Canadian Labour Congress is opposed to the erosion of the mandatory retirement system and that the current permissive legal framework be maintained so that the unions that wish to accept mandatory retirement are free to do so and those that wish to eliminate it can do so through collective bargaining.<sup>8</sup>*

This concern of organized labour, and one I commenced my argument with at all three judicial levels, can be even better appreciated by looking at the widespread application of mandatory retirement in our labour markets and its relationship to pension plans and our social or public security arrangements. About one half of the Canadian workforce occupy jobs subject to mandatory retirement and about two-thirds of collective agreements in Canada contain mandatory retirement provisions which trigger at the age of 65.<sup>9</sup> Mandatory retirement, therefore, is an integral feature of pension plans. This data also confirms what we know - that 65 has become generally accepted as the **normal** age of retirement throughout Canada. Mandatory retirement is also integrally related to our public or social security plans. In 1927, public security plans began with the *Old Age Pensions Act*<sup>10</sup> which adopted 70 as the age of entitlement. This threshold was lowered to 65 in the 1960's. Other programmes, such as Old Age Security, Guaranteed Income Supplement and the Canada and Quebec Pension Plans also came to provide that retirement benefits were to be paid beginning at age 65. Accordingly, not only is mandatory retirement at age 65 pervasive but an even more omnipresent social security system is premised on the identical age-based entitlement criteria.

In thinking about **age** against this backdrop, one also sees a distinction between aging and the other enumerated grounds in section 15 of the Charter such as race, sex or colour.<sup>11</sup> These latter characteristics are immutable whereas we hope everyone will progress to old age. It therefore seems counter-intuitive that we would pass laws to discriminate against ourselves? Age-based regulatory distinctions are a common feature of Canadian life as illustrated by age restrictions on voting, drinking alcohol, driving, entry into the workforce and, as we have just seen, access to social security benefits to name only a few examples. Each one of these age-based

distinctions seems to be supported by compelling public policy and constitute real benefits both to those groups isolated and to society at large. The content of the resolution of the Canadian Labour Congress is a strong indication that mandatory retirement might too have an equally cogent policy basis.

It is also significant that the Constitution itself provides for the mandatory retirement of senators as well as superior court justices in the provinces of Ontario, Quebec, Nova Scotia and New Brunswick.<sup>12</sup> Is this not some evidence that an age cap in and of itself is not unconstitutional? And if the issue is really where do you draw the line in providing for a cap, can it be said that age 65 is so unreasonable as to be unconstitutional?

Further support for a more benevolent view of mandatory retirement is suggested by its pervasive presence throughout the world. A majority of acknowledged free and democratic societies, which includes Great Britain, Ireland, West Germany, Japan, Norway, Italy and Australia, have established either by legislation or practice that an individual may be required to retire from employment at a particular age.<sup>13</sup> Surely invidious discrimination is not being inflicted on the aged across this range of free societies.

What then are the express policy justifications given by the Ontario government for the Code's age cap? In 1981, the Ontario *Human Rights Code, 1981* was overhauled. Prior to that and since 1966, age protections in employment had been limited to between 40 and 65 years of age. This policy emphasized the documented plight of middle aged workers who, when they lost their jobs, experienced great difficulty in being hired elsewhere. These workers were known to be discriminated against because employers considered them **more expensive** to employ having regard to fringe benefit and training costs. By the 1980's, however, youth employment had, as well, become a serious factor with unemployment rates double those of older workers and so the *Human Rights Code, 1981* employment protections were extended to the ages of 18 to 65. Throughout the debate of this legislation, great concern was also expressed about the perplexing problem of not affording equal protection in the employment sector to those over age 65.

Unfortunately, in the end other considerations predominated. After voicing his concerns over mandatory retirement, the then Minister of Labour, the Honourable Mr. Robert Elgie explained the policy behind maintaining the 65 age cap in these terms:

*On the other hand, I can appreciate the views of those employers who fear that such a change might result in their delayed retirement and delayed benefits, especially for those older workers who wish to take advantage of what they have considered for years to be the normal age of retirement.*

*We also have to look at the labour market ramifications of extending the definition of age under the code and the effect it might have on younger persons entering the labour force. The rates of unemployment there are chronically the highest.*

[...]

*emotionally, we all want to do that [raise the age of mandatory retirement], but in doing so we must make sure we do not deprive people of certain rights they expect, and rightfully expect, when they retire.*

*We should not rush head long into that; we should recognize that we must not deprive people of certain benefits they have come to expect following retirement, and we must be sure that we do not interfere with hiring and personnel practices, and with the problem of youth unemployment, by acting very hastily over an issue that we have strong emotional feelings about.*

[...]

*One cannot address this issue without thoughtful consideration of the real issues - the demographic issues, youth unemployment issues, pension benefits and the changes that may be suddenly thrown on people who had not planned it in that way. Those are things that have to be considered. [...] Let us not pretend that there is any disagreement about the principle, and that is what we are going to address in the study.<sup>14</sup>*

Thus, the government only reluctantly and with much anguish decided to maintain the age 65 cap but committed itself to make further studies of the ramifications of raising the age limit. It is important that Ontario's policy stance was expressed with ambivalence and in terms of the implications of moving too quickly. It was not so much a question of never revising the age cap upwards as it was of better understanding the labour market and pension implications if the

institution of mandatory retirement was suddenly abolished. Hence, Ontario's policy view was that it should proceed cautiously and that further study was merited. If the Charter is not able to accommodate reasonable legislative caution, there is the risk that governments will not act at all in relieving against private conduct where the implications of such government action are not fully understood.

But as widespread as mandatory retirement was in 1981 and is now, several other governments in both Canada and elsewhere have chosen a different policy balance, proceeding less cautiously.<sup>15</sup> The provinces of Manitoba, Quebec and Alberta have enacted legislation to provide protection to employees beyond the age of 64 from discrimination because of age in employment, thereby protecting employees against mandatory retirement.<sup>16</sup> The federal government has eliminated mandatory retirement for its own employees and announced that the *Canadian Human Rights Act*<sup>17</sup> will be amended to abolish mandatory retirement in the federal private sector.<sup>18</sup> In the United States, Congress in 1978 extended protection against employment discrimination to age 70, and in 1986 removed the age 70 cap on age discrimination in employment altogether, with a transitional provision for university faculty which expires in 1993. The plaintiffs pointed to this experience as evidence that Ontario's policy was not justified.

However, the repeal or modification of mandatory retirement in all of these other jurisdictions had been by legislative action. Constitutional challenges to mandatory retirement at age 65 in the United States had been unsuccessful despite the provisions of the Fifth Amendment and the *equal protection* clause of the Fourteenth Amendment respectively.<sup>19</sup> In particular, mandatory retirement of university faculty in the United States had been consistently held not to violate the *equal protection* provisions of the Fourteenth Amendment to the Bill of Rights of the United States.<sup>20</sup> The reasoning of the American courts reflect the types of concern set out in Dr. Elgie's comments reproduced above. Admittedly, the U.S. courts employ a **minimal scrutiny** standard of judicial review in these kind of cases, but the standard itself underlies the U.S. judiciary's unwillingness to be drawn into important public policy debates where rational justifications exist for widely divergent policy outcomes.<sup>21</sup> Are Canadian courts better equipped

than their American counterparts and, thus able to play a more interventionist role in such cases? Does our Constitution demand that they behave differently? The U.S. Constitution does not have specifically enumerated grounds and the *Oakes* test<sup>22</sup> appears severe. On the other hand, there has been increasing evidence of judicial reluctance in Canada to **second guess** governments where there are equally compelling yet conflicting social science premises.<sup>23</sup>

Finally, I was relieved to see that **ability to perform** was not the justification for mandatory retirement policy save in the peripheral sense that we all must die at some time; that before we die of old age we decline in both intellectual and physical ability; and that Canadians see a value in ceasing active employment before they die. There is evidence that our intellectual decline commences somewhere around the age of 60, but the process is relatively slow and insufficient in any general sense to justify mandatory retirement as a *bona fide* occupational requirement in the way such requirements are administered under human rights legislation. From all of the above, mandatory retirement seemed to be based on general social and economic grounds bearing some kinship to equality values. It thus became the position of the defendants that it was at least reasonable to believe workers generally and older workers in particular received significant benefits from mandatory retirement and that its abolition by judicial fiat might put these benefits in jeopardy to the detriment of all workers.

## II. LITIGATING SOCIAL SCIENCE THEORY

Against this general background, the litigants in the Ontario university actions sought expert testimony. The defendant universities and the Attorney General of Ontario retained demographers, economists, industrial relations scholars, university administrators and other university based scholars of varied background to elucidate the justification for mandatory retirement and the adverse implications of its judicial repeal. The plaintiffs did likewise but with an obvious obverse purpose. The resulting testimony, on agreement, was tendered by way of affidavit and transcripts of cross-examinations on these affidavits. Thousands of pages of documents and testimony then became the subject of three weeks of oral argument before Mr.

Justice Gray in the Ontario Supreme Court.<sup>24</sup> There were many authoritative witnesses produced by the parties to support their positions and, given the nature of the social sciences, there were compelling socio-economic arguments in support of and against mandatory retirement. While I cannot do justice to them all in a paper of this nature, I think it is useful to highlight some of the evidence and arguments. In doing this, I caution that my account will be influenced by my involvement as one of the advocates. I, therefore, also recommend a thorough reading of the well reasoned judgements delivered at all three levels of court proceedings.

In support of their position the defendants relied heavily on the work of Professors Gunderson and Pesando which emphasized that mandatory retirement cannot be looked at in isolation.<sup>25</sup> In the view of these scholars, the repercussions of abolishing mandatory retirement would be felt "in all dimensions of the personnel function including hiring, training, dismissals, monitoring and evaluation, and compensation. In this respect, they wrote:

*In short, a number of issues regarding the design of occupational pension plans would have to be addressed if mandatory retirement were not permitted. So, too, would the wage policy followed by many employers, especially when the pension benefit is linked to the employee's earnings. The use of the occupational pension plan as a vehicle for deferring a portion of the employee's total compensation of the employee's later work years may be reduced. As before, not permitting mandatory retirement is likely to require compensating adjustments elsewhere in the compensation package and in the set of work rules that govern the workplace.*<sup>26</sup>

Hundreds of pages of expert testimony were devoted to the inter-relationships of mandatory retirement to a host of other employment practices which benefit workers throughout their active employment. The testimony suggested it was both unfair and unwise to limit judicial scrutiny to the moment of retirement without regard to offsetting advantages and future adverse consequences to both older workers and other persons in equally vulnerable positions.<sup>27</sup>

In some respects, the university work setting was the best possible example in support of such theory. There clearly existed a deferred compensation scheme with older faculty earning up

to two and one-half times more than their junior counterparts on condition this compensation would end at age 65.<sup>28</sup> The pensions to be paid to faculty were directly related to these high levels of earnings in their final years of employment. Older faculty had benefitted from minimal monitoring of performance after receiving tenure and their final promotion but again a condition they depart at age 65 through the **dignity** of retirement in contrast to the **ignominy** of dismissal.<sup>29</sup> Their departure by mandatory retirement freed up substantial resources in a manner that could be planned on and used in whole or in part to reinvigorate these strategically important work environments and, as well, to permit the hiring of women, young scholars generally and members of minority groups.<sup>30</sup> Representative of this argument is paragraph 91 of the factum of the universities which reads:

*A number of consequences will likely arise from the abolition of mandatory retirement. At the hiring stage, the elimination of mandatory retirement could reduce the employment opportunities of potential new recruits, including youth, women and members of minority groups. Employers may become very reluctant to hire middle-aged workers in the absence of a known age at which their existing contractual arrangement must end. Promotion opportunities may also decline if older workers do not vacate jobs for younger workers. These adjustments could be very important for at least specific sectors like universities where only a limited number of new openings are available. There are no reliable data or studies demonstrating that the impact of forbidding mandatory retirement will be minimal.<sup>31</sup>*

In the view of the experts called by the defendants, the plaintiffs' claim for the abolition of mandatory retirement had put in jeopardy tenure systems, academic freedom, academic excellence, the dignified treatment of older workers, compensation systems, pensions plans and the hiring of equally vulnerable persons but who, unlike retirees, had no access to social security support systems. Further, this claim to **a right to work** by one of our most privileged groups of workers - university professors - carried with it the risk of being transformed for the less fortunate into **an obligation to work** past 65 should the age of entitlement to our public security benefits be revised upwards as it has in the United States.<sup>32</sup> In 1984 the United States government announced that commencing in 1985 the age of entitlement to social security would be raised one month each year until it reached a new threshold of sixty-seven years of age. Thus, workers whose wages are close to the annual levels of social security and who therefore retire as soon as they reach the age of

social security entitlement now are required to work two more years before they can access these public retirement funds.

Witnesses for the plaintiffs, however, were equally adept at conveying their expert views. They questioned the alleged pervasive presence of deferred compensation. They emphasized the economic plight of the aged and the interrupted work histories of women for whom mandatory retirement at age 65 was particularly unfair.<sup>33</sup> They denied that tenure and monitoring depended on mandatory retirement and asserted that older workers could and should withstand the scrutiny of their employers until they voluntarily leave the workforce.<sup>34</sup> They pointed to the experience of abolishing mandatory retirement in several jurisdictions, both in Canada and the United States, where none of the concerns raised by the opposing experts had occurred.<sup>35</sup> Attention was also drawn to the small number of employees who would likely stay on beyond age 65 in support of their argument that new hirings would not be adversely affected.<sup>36</sup>

The experts supporting the defendants replied with equal force. It was contended by them and agreed to by several of the plaintiffs' witnesses that it would take fifteen to twenty years to assess the actual impact of abolishing mandatory retirement in those jurisdictions which had done so.<sup>37</sup> The recent retirement rates in those jurisdictions were also characterized as unrepresentative in that, for several years following abolition of mandatory retirement, workers would likely retire as they had planned.<sup>38</sup> True retirement rates would therefore not reveal themselves for several years. It was also pointed out that the **claw-back** feature of social security in the United States was a real deterrent to continuing to work beyond the normal age of retirement in that jurisdiction and this feature was foreign to Canada's social security arrangements.<sup>39</sup> Alternatively, experiences such as that of York University were pointed to where all the professors who would have otherwise been required to retire at age 65 stayed on when that provision in York's collective agreement was modified through collective bargaining.

### **III. HYPOTHETICAL OVERBREADTH**

By the time the case arrived at the Supreme Court of Canada, the plaintiffs were stressing the alleged overbreadth of subsection 9(1)(a) of the Code as much if not more than they were directly attacking their own **forced** retirements. For example, even though they had been occupying highly paid jobs and were being retired on the consent of their bargaining agents pursuant to provisions in otherwise adequate pension plans, they pointed to the possibility of subsection 9(1)(a) permitting the forced retirement of an employee with no pension plan or pursuant to an inadequate pension.<sup>40</sup> They argued that such employees would likely be the most vulnerable and the most in need of legislative protection. However, subsection 9(1)(a) of the Code was not limited to the retirement of employees subject to adequate pension plans.

Similarly, they contended that the Code potentially shielded more than just retirement in that an older worker who was not retired was prevented from complaining about other forms of discriminatory treatment.<sup>41</sup> As an example, counsel for the plaintiffs suggested that an employer could turn off all the heat in the offices of only its older workers and they would have no recourse.

The overbreadth argument presented problems for both the plaintiffs and the defendants. For the plaintiffs to vigorously pursue the argument was to impliedly concede that the defendants had a strong case insofar as mandatory retirement and pension plans went hand in hand. Thus, it highlighted that they were asking our courts to put in jeopardy all these pension plans in order to protect less advantaged employees who did not have pension plans and **might** be retired. I say **might** because there was little or no evidence that employees without pension plans were in fact compulsorily retired. Indeed, as pointed out above, the least advantaged workers more likely seek the shelter of social security support as soon as it is available to them given the relatively low wages they would otherwise continue to receive.

But the need to say **might** also illustrates the defendants difficulty in having to respond to a hypothetical. It was difficult to deny that an employee without pension might be required to retire or that older workers might experience other forms of employment discrimination. For the defendants' defense to be properly appreciated, it was necessary to look at a particular fact

situation to assess the justification for the act complained of. For example, where an employee is retired without pension, the presence or absence of a deferred compensation system would be highly relevant. Labour economists retained by the universities thought it unlikely that low wage employees not subject to deferred compensation would be subject to mandatory retirement for the reasons just mentioned. However, the plaintiffs' attack on the possible overbreadth of subsection 9(1)(a) was not based on any specific fact situation that could be critically examined. Their own facts were entirely remote from the hypothetical that supported their overbreadth argument. Rather, the worst possible facts were simply hypothesized by the plaintiffs like the example of turning off the heat for older workers.

In general response to the argument that the Code might permit discriminatory treatment of older workers other than mandatory retirement, the defendants argued there would still be a need to accommodate or moderate the adverse affects of these employees remaining in an employer's employ. If jobs are to open up and many of the features of deferred compensation maintained, there may continue to be a need to alter the terms and conditions of employment offered to the post 65 workers to achieve these ends. For example, in a university environment this might entail smaller work loads, proportionately smaller salaries and reduced access to scarce office accommodation and research facilities in order to preserve deferred compensation schemes and to open up opportunities for new faculty be they women, members of minority groups or young scholars generally. It was also argued that it was impractical for the government to specify all the conceivable justifications for mandatory retirement or other distinctions in employment past age 65 and all the conceivable industries and occupations where such distinctions would be *prima facie* valid in order to provide the requisite regulatory certainty for existing employment patterns. Indeed, no government had followed that approach. Instead, it had been an **all or nothing** policy debate with a uniform age cap still the predominate approach in Canada and throughout the Western world. Finally, and alternatively, the defendants argued that the Ontario Court of Appeal's **valid as applied** approach best responded to the hypothetical concerns reflected in the plaintiffs' overbreadth argument. The "zero sum" nature of facial validity or invalidity, it was

suggested, may be too blunt an instrument to do justice to the competing arguments and interests involved in cases of this magnitude.<sup>42</sup>

#### IV. CHARTER CHOICES WHERE REASONABLE DIFFERENCES

The compassion and rational analysis which characterizes both sides of the mandatory retirement issue are well captured in the masterful judgements of Mr. Justice La Forest for the majority and Justices Wilson and L'Heureux-Dubé in dissent. This division of opinion on the Supreme Court of Canada reflected the division which had existed in the lower courts across the country and, in turn, the division in expert and public policy opinion on the topic as Mr. Justice Sopinka in his reasons was prompted to observe:

*I have had the advantage of reading the reasons of my colleagues Justices La Forest, Wilson and L'Heureux-Dubé. They have arrived at different conclusions in resolving the difficult legal and social problem which is the main subject of these appeals. The issue of mandatory retirement is a most important one for our country and will affect the lives of millions of Canadians. It is an issue on which Canadians of good will are sharply divided. This 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. In these circumstances, I feel obliged to state my reasons, albeit briefly, as to why I share the opinion of my colleague La Forest J. that mandatory retirement is not unconstitutional.<sup>43</sup>*

His Lordship went on to explain why he concurred with Mr. Justice La Forest's conclusions and with his characterization of the constitutional standard being "whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives". In this respect Justice Sopinka wrote:

*The current state of affairs in the country, about a ruling from this court that mandatory retirement is constitutionally impermissible, is the following. The federal government and several provinces have legislated against it. Others have declined to do so. These decisions have been made by means of the customary democratic process and no doubt this process*

*will continue unless arrested by a decision of this Court. Furthermore, employers and employees through the collective bargaining process can determine for themselves whether there should be a mandatory retirement age and what it should be. They have done so in the past, and the position taken by organized labour on this issue indicates that they wish this process to continue. A ruling that mandatory retirement is constitutionally invalid would impose on the whole country a regime not forged through the democratic process but by the heavy hand of the law. Ironically, the Charter would be used to restrict the freedom of many in order to promote the interests of the few. While some limitations on the rights of others is inherent in recognizing the rights and freedoms of individuals, the nature and extent of the limitation, in this case, would be quite unwarranted. I would therefore dispose of the appeal as proposed by La Forest J.<sup>44</sup>*

The majority's disposition, I suggest, emphasizes an important view of institutional comity between courts and legislative bodies in dealing with issues on which there is a fundamental yet reasonable difference in public policy opinion grounded in contemporary social and economic thought.<sup>45</sup> Such issues, the majority is telling us, are properly the domain of the political process provided that due consideration has reasonably been given to opposing Charter interests. It is also important to appreciate, however, that this judicial deference is highly discretionary and therefore subject to pragmatic considerations. For example, in this particular case there had been widespread and long standing reliance throughout Canada on the permissibility of mandatory retirement. This prompted Mr. Justice La Forest to say it had become "part of the very fabric of the organization of the labour market in this country."<sup>46</sup> Mandatory retirement was not mandated by statute it was simply permitted. The concept carried with it substantial benefits as well as burdens for the older worker. Its abolition could potentially affect other employees equally in need and who too might make section 15 Charter claims. And, importantly, legislative and negotiated changes to the age cap were **in the wind** and, thus, reasonably available to those who wished the repeal of mandatory retirement. Against this confluence of pragmatic factors, a deferential standard of **reasonableness** came easier to the judicial lips. However, it is not a standard, in the emotional context of Charter values, one can take for granted. The mandatory retirement cases do not, therefore, provide as much guidance as we might like and highlight the somewhat *ad hoc* nature of Charter litigation.

## CONCLUSION

Mandatory retirement illustrates the challenge of applying very general Charter values in a complex and market oriented democratic society. Distinctions and even **discriminatory** distinctions are common to much of our regulatory structures. Whether such laws offend our Charter is something over which there can be honest differences of opinion and this is increasingly so in a culturally and morally diverse country like Canada.

Throughout the litigation I found it difficult to disagree with several of the concerns expressed by witnesses supporting the plaintiffs' case but it is debatable whether judicial repeal of mandatory retirement would have adequately responded to these concerns. For example, might not mandatory private pensions plans; mandatory probability of private plans; adequate day care; and social security contributions for women who work in the home caring for our children be better responses to the interrupted work histories of many women. The courts are not only institutionally hampered in making informed judgements where social science opinion points in different directions, the courts will seldom have jurisdiction to provide comprehensive solutions.

But be all this as it may, I want to end on a more doubtful note by revealing my most recent contact with mandatory retirement. I am now an aging university professor who is subject to mandatory retirement along with a number of other very resentful colleagues. As I listen to their concerns over the approaching moment of retirement and see my own fate now only too well, I am becoming less enamoured with somewhat abstract justifications like deferred compensation and more attracted to the compassion and scepticism evident in the opinions of the dissenting Supreme Court justices.<sup>47</sup> For those who have always believed there to be the need for greater judicial activism in cases like mandatory retirement, I suspect there is some small measure of delight in my plight.

## FOOTNOTES

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. See the range of perspectives in a labour law context found in *Labour Law Under the Charter*, Proceedings of a Conference sponsored by Industrial Relations Centre/School of Industrial Relations and Faculty of Law, Queen's University at Kingston 24-26 September 1987. The proceedings constitute a special 1988 volume of the *Queen's Law Journal*.
3. *McKinney v. University of Guelph* (1991), 76 D.L.R. (4th) 545.
4. See for example J. M. Feinman & P. Gabel, "Contract Law as Ideology", in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1990).
5. *Bell Canada v. Office and Professional Employees' Union*, [1974] S.C.R. 335.
6. G. W. Adams, "Bell Canada and the Older Worker: Who will Review the Judges?" (1974) 12 Osgoode Hall L.J. 389 at 392-393.
7. *Human Rights Code, 1981*, S.O. 1981, c. 53, R.S.O. 1990, c. H.19.
8. *Supra* note 3 at 671-672.
9. *Ibid.* at 658.
10. *Old Age Pensions Act 1927*, S.C. 1927, c. 35.
11. W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. B. Rev. 242 at 255.
12. *Be Gerol and A.G. of Canada* (1985), 53 O.R. (2d) 275; *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3, ss. 29(2) and 99(2).
13. *Employment Protection (Consolidated) Act* (U.K.), 1978, c. 44, s. 64 (10)(b); *Encyclopedia of Labour Relations Law*, vol. 2 (London: Sweet & Maxwell, 1972) at para. 1868; *Unfair Dismissals Act* (Ire.), 1977, No. 1 s. 2(1)(6); *Redundancy Payment Act* (Ire.), 1973 No. 11, s. 3(1); B. Hepple, *International Encyclopedia For Labour Law and Industrial Relations*, vol. 6, (Netherlands: Kluwer, 1987) at para. 44, 269, 270 and 284); B. Hepple, *International Encyclopedia For Labour Law and Industrial Relations*, vol. 5 (Netherlands: Kluwer, 1985) at para. 362-364); T. Sodei, *A Description of Mandatory Retirement in Japan, Aging and Work* (Japan, 1981); M. Osako, *How Japanese Firms Cope With Effects of an Aging Labour Force, Aging and Work*, vol. 5,

- No. 1, (1982); Ginsberg, "Flexible and Partial Retirement for Norwegian and Swedish Workers" (October 1985) *Monthly Labour Review* 34; *Act To Issue Rules For Dismissal of Individual Employees*, 1966, No. 604, s. 11; *Commonwealth Employees (Redeployment and Retirement) Act* (Aust.), 1979, No. 52, s. 22.
14. See *supra* note 3 at 662-663. Mr. Justice La Forest's judgement contains an exhaustive review of all the material emphasized by the litigants before the Court. Indeed, it stands as the most comprehensive judicial writing on the topic of mandatory retirement to-date.
  15. *Ibid.* at 694 and 690. The judgement of Madame Justice L'Heureux-Dubé engages La Forest J. point by point. Madame Justice Wilson also had serious reservations that a contracting out of equality rights should ever be permitted, at 619.
  16. M. E. Atheson & L. Sullivan "Passage to Retirement: Age Discrimination and the Charter" in A. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 231-239.
  17. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.
  18. Government of Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Justice, 1985).
  19. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 99 S.Ct. 939 (1979). Such distinctions have not been regarded as **invidious** because age is something which cuts across racial, religious and economic lines. See *Weiss v. Walsh*, 324 F. Supp. 75 at 77 (N.Y. Dist. Ct. 1971), *aff'd* 461 F.2d 486 (2d Cir. 1972) cert. denied 409 U.S. 1129 and 410 U.S. 970.
  20. *Mittelstaedt v. The Board of Trustees of the University of Arkansas*, 487 F. Supp. 960 at 964-965 (E.D. Ark. W.D. 1980); *Palmer v. Ticcione*, 576 F.2d 459 (2nd Cir. 1970) cert. denied 440 U.S. 945; *Lamb v. Scripps*, 627 F.2d 1015 (9th Cir. 1980); *Klain v. Pennsylvania State University*, 434 F. Supp. 571 (M.O. Penn. 1977), *aff'd* 577 F.2d 726; O.M. Reuhassen, "Age as a Criterion for the Retirement of Tenured Faculty" (1986) *The Record* 16.
  21. L. H. Tribe, *American Constitutional Law*, 2d ed. (New York: Foundation Press, 1988). See also L. H. Tribe, *Constitutional Choices* (New York: Foundation Press, 1985).
  22. *R. v. Oakes* (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103.
  23. *R. v. Edwards Books and Art Ltd.* (1986), 35 D.L.R. (4th) 1 at 41 (S.C.C.); *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 at 41 (S.C.C.); *Irwin Toy Ltd. v. Quebec (Attorney-General)* (1989), 58 D.L.R. (4th) 577 at 626 (S.C.C.).

24. *McKinney v. University of Guelph (1987)*, 32 D.L.R. (4th) 65 (Ont. H.C.J.(1988), 46 D.L.R. (4th) 193 (Ont. C.A.).
25. *Supra* note 3 at 667-668.
26. *Ibid.* at 668.
27. *Ibid.*
28. *Ibid.* at 658.
29. *Ibid.*
30. *Ibid.*
31. I have reproduced this passage because there is some suggestion in Madame Justice Wilson's judgement that this justification of mandatory retirement could be relevant. *Ibid.* at 617.
32. *Ibid.* at 670.
33. *Ibid.* at 627.
34. *Ibid.* at 683.
35. *Ibid.* at 684.
36. *Ibid.* at 686.
37. *Ibid.* at 669.
38. *Ibid.*
39. *Ibid.* The defendants also noted that even a 0.4 impact of abolition would represent approximately 20,000 persons annually. Moreover, if these persons were disproportionately young people, their rate of unemployment would be significantly increased above an already high rate of 13.2% (for 1985).
40. *Ibid.* at 626-627.
41. *Ibid.*
42. C. Rogerson, "The Individual Search for Appropriate Remedies Under the Charter" in Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1986) at 223-305.
43. *Supra* note 3 at 696.

44. *Ibid.* at 698.
45. See generally P.W. Buddhist, "Proof of Facts in Constitutional Cases" (1976) U.T.L.J. 386 at 396-397.
46. *Ibid.* at 658. However, see Madame Justice L'Heureux-Dubé's response at 688 and particularly 689 where she thought, on examination, that "the fabric [came] apart at the seams."
47. It is interesting that the dissenting justices were female. A similar gender split can be found in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085. There is a growing scholarship considering whether there is a distinctly feminine way of looking at the world. See for example: C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982); S. Sherry, "The Gender of Judges" (1986) 4 *Law and Inequality* 159; Madame Justice B. Wilson, "Will Women Judges Really Make a Difference?" (Fourth Annual Barbara Bitcherman Memorial Lecture, Osgoode Hall Law School, 8 February 1990).