

An Insider's View of the Mandatory Retirement Cases

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I come to the issue of mandatory retirement - or more accurately, to a discussion of the four mandatory retirement cases decided by the Supreme Court of Canada last December - wearing not one, not two, but three different hats. As a member of a university faculty, I was directly affected by the Court's decisions in the *McKinney*¹ & the *Harrison & Connell*² cases upholding the validity of mandatory retirement in the university setting. Not only do I now know that my career as a professor is not going to extend beyond the year 2014, I can anticipate the departure of a number of my colleagues, some highly esteemed, some not, in the next several years. As someone who teaches and writes in the field of constitutional law, I have an academic interest in these decisions as well. On the level of doctrine and judicial attitudes towards the Charter, these are clearly amongst the most important decisions the Court has rendered to this point. We now have much clearer guidance than we had before on the scope of the Charter's application, we have new developments on the manner in which section 15 and section 1 are to be applied and we have some tentative views of the vexing question of whether or not section 15 rights can be waived. We also have a very clear indication of just how far the Court has retreated from the position of confident judicial activism that marked its early contacts with the Charter. And finally, as one of the lawyers involved in the litigation of these cases, I know things about them that those who have nothing but the decisions themselves to go on do not. In particular, I know how the two cases in which I participated directly, *Harrison v. University of British Columbia* and *Stoffman v. Vancouver General Hospital*³, were argued, and why they were argued that way. I have decided for the purpose of this presentation to jettison the first and second of these hats and to speak to you wearing the third. It is not that I have nothing to say about these decisions from the perspectives of faculty member and constitutional scholar - on the contrary, I have a good deal to say from both of them, especially the second. Given the short length of time I have at my disposal, however, I thought it advisable to limit myself to one hat, and given what I understood about the approaches to the issue of mandatory retirement that my colleagues on this panel would be taking, it seemed to me that the best one to wear was that of the participating lawyer.

One of my purposes in looking at the mandatory retirement cases from the inside, is to extract from my involvement in them some general observations about the litigation of Charter

cases. I begin, however, by chronicling the story of the two cases in which I was directly involved, with emphasis on the evolution of our thinking about them from the fall of 1985, when the first of our clients, John Connell, came to see me, until the spring of 1989, when we argued them before the Supreme Court of Canada. I tell this story in part because I think that you will find it to be of sufficient interest in its own right to warrant being told, but also because it provides both the raw material for, and the context within which to consider the observations I want to make about Charter litigation.

I. STAGE ONE: THE TRIAL

The story of these two cases - *Harrison & Connell*⁴ and *Stoffman*⁵ - begins, as the story of a great many cases does, with a bit of procedural wrangling. *Harrison & Connell*, the case that first engaged our interest, in fact started as two different cases. Dr. Cam Harrison, a mandatorily retired faculty member represented by Drew Schroeder, another Vancouver lawyer, commenced an action against U.B.C. by writ of summons. John Connell, our client, who was not a faculty member at all but an administrative assistant in the Registrar's Office, commenced his action by way of petition with affidavits in support. To a certain extent, the use of these two different procedures reflected the very different financial circumstances of these two individuals. Dr. Harrison, who was a carefully chosen representative of a number of recently retired U.B.C. professors and had the backing of both the U.B.C. Faculty Association and the Canadian Association of University Teachers, had no reason to be concerned about the cost of extensive discoveries and a lengthy trial. John Connell, who was representing no one but himself and who had no institutional support of any kind, had every reason to be concerned about that cost.

The disparity in financial resources was not the sole reason for the different procedures. We had wanted both to expedite matters as much as possible - our client was, after all, getting on in years - and to make the issue appear as simple and straightforward as possible. Moreover, we saw real advantages in keeping Mr. Connell's case separate from that of Dr. Harrison because the arguments against mandatory retirement were much stronger in his case than Dr. Harrison's, we

thought, and we did not want the special circumstances of his case lost sight of, as we feared they would be if the two cases were dealt with together. Those special circumstances - special in the sense that they served to distinguish him from a faculty member - included the fact that, because his salary was significantly lower than that of a retiring faculty member, his pension income would be significantly lower as well; the fact that he was not the beneficiary of either tenure or a system of deferred compensation of the kind in place for faculty members; the fact that U.B.C.'s mandatory retirement policy had been presented to him as a condition of his employment when he took up his position rather than, as in the case of faculty members, a product of collective bargaining between the two parties with relatively equal bargaining strength; and the fact that the "need for new blood" argument upon which the university would be relying heavily in defending the policy in the faculty context had no real application in the context of the kind of administrative work performed by Mr. Connell.

In the result, the trial judge assigned to the two cases acceded to the university's request to consolidate them and they were dealt with together. And our fears about Mr. Connell's circumstances getting lost were, in fact, vindicated. From the trial on, and in spite of our best efforts to convince the courts otherwise, the case was seen to be about the mandatory retirement of faculty members.

The challenge that we launched against U.B.C.'s mandatory retirement policy was double-pronged. We attacked the policy directly, contending that U.B.C. itself had violated section 15 of the Charter when it mandatorily retired Mr. Connell. We also challenged it indirectly, by claiming that the immunity the policy had been given under the *British Columbia Human Rights Act*⁶ was inconsistent with section 15. That claim was based on the fact that the immunity derived from a definition of "age" in the Act that served to extend the protection against age discrimination in employment afforded by section 8 only to those between 45 and 65. A successful claim along these lines would not, of course, have resulted in U.B.C.'s policy being declared invalid, it would simply have permitted Mr. Connell to file a complaint under section 8 of the Act and have that complaint processed in accordance with the Act's provisions, leading ultimately, it was anticipated,

to a hearing before a member of the B.C. Human Rights Council on the reasonableness of the policy as applied to him. In this respect, therefore, the indirect attack was a good deal less appealing to Mr. Connell than the direct attack. The latter, if successful, would produce immediate tangible benefits to him, the former would not.

Because of this important difference, the two lines of attack were naturally predisposed to favour the direct over the indirect line in putting the case together. But we also thought, in these early days, that we had a far better chance of winning with this line of attack. Mandatory retirement was seen then as a relatively easy issue to dispose of under the Charter, with a few exceptions: airline pilots, firefighters and possibly university professors. It was a clear example of unjustifiable age discrimination. It may sound odd now, but it never occurred to us then that the Charter would not be held to apply to universities like U.B.C.; we took it as almost a given fact that it would be. In part, this optimism was based on the facts that state universities had been held by the U. S. Supreme Court to be governed by the *Bill of Rights* and that Canadian commentators like Peter Hogg seemed to have little doubt that the Charter would be held to apply to their Canadian counterparts. It was also based on the enthusiasm with which the Supreme Court of Canada had greeted the Charter. The sense one had in those days - the days of *R. v. Big M. Drug Mart*,⁷ *Hunter v. Southam*,⁸ *Reference re Section 94(2)*⁹ and *Oakes*¹⁰ - was that the Court would have little difficulty extending the application of this new and powerful tool for the protection of individual and minority rights to an entity like U.B.C., which had such close ties to the provincial government and performed such an important public function. The fact that some lower courts had gone so far as to hold that the Charter applied directly to private actors added to the feeling of optimism we had on this score.

We were also of the view, even then, that the courts might have some difficulty with our request to alter the definition of "age" in the *Human Rights Act*. Although in a purely formal sense, all that we were asking them to do was remove a few words, in substance it was clear that we were asking them to extend rather than cut back the scope of legislation and that was something that we suspected many judges would be reluctant to do. Moreover, the indirect attack appeared to call

for argument about the merits of mandatory retirement not only in the university setting, but in all settings. If it was, as we thought, a tricky enough issue in our setting, at least in the case of faculty, it was going to be even trickier when it had to be dealt with, as it were, at large. Finally, we had become convinced that the Supreme Court of Canada was not going to be able to sustain the activist rhetoric and results of its early judgments. The legitimacy issue, which the Court had steadfastly refused to acknowledge as an issue in a number of those judgments, would eventually force itself onto the Court's agenda, and when it did, it seemed to us inevitable that the Court would recognize the need to retreat from its early activism at least to some degree. And, if that were so, it was our view that a challenge to legislation of the kind that Mr. Connell was bringing would be seen to be an occasion for such a retreat. This judgment was based on a number of considerations, including the polycentric nature of the issue of mandatory retirement, the fact that organized labour wanted to retain it, the fact that in many instances it was a product of free collective bargaining and the fact that it fell into the realm of social and economic policy.

These misgivings about the indirect line of attack were reinforced by Chief Justice McEachern's decision to assign Mr. Justice Taylor to our case. We knew him to be thoughtful, erudite, fair-minded and a pleasure to appear before as, in fact, he was. We also know that he had a very strong commitment to the common law tradition, of which the doctrine of parliamentary supremacy is, of course, a cardinal tenet. For him, more so we thought than many other judges, the Charter would be seen to be an unwelcome intruder into the Canadian legal system, to be avoided whenever possible and read narrowly when not. His dismissal of the claim in *Andrews v. The Law Society of British Columbia*¹¹ in early 1986 lent credence to these speculations.

Justice Taylor delivered his judgment in the *U.B.C.* case on the same day in July, 1986 on which he delivered his judgment in the *V.G.H.* case, a case in which at that stage we were not involved. Surprisingly, at least to us, he decided the two cases differently: he ruled against Dr. Harrison and Mr. Connell but in favour of the doctors whose admitting privileges at V.G.H. had been terminated. The Charter applied directly to *V.G.H.*, he held, and the hospital's policy of terminating admitting privileges at the age of 65 was said to be unconstitutional. The Charter did

not, however, apply to *U.B.C.* and hence there was no possibility of a direct attack on the university's policy under it. The indirect line of attack he dismissed primarily on the ground that the courts are ill-suited to the resolution of complex social and economic issues like mandatory retirement. In fact, the bulk of his analysis of the arguments we had made in support of this line of attack was directed to the question of the proper scope of judicial review under the Charter rather than to the issue of the merits of mandatory retirement.

In one sense then, our view of Mr. Connell's case had been vindicated. The indirect line of attack was problematic in precisely the way in which we thought it would be. The legitimacy issue was, in fact, alive and well in spite of the Supreme Court of Canada's early efforts to inter it and this was just the sort of case in which it was going to be raised. In another sense, of course, our view of the case had not been vindicated. Our confidence in believing that the Charter would be held to apply to *U.B.C.* had clearly been ill-founded. The close connection between it and the provincial government - a connection evident in areas like university governance, funding and policy direction - and the public were not enough to constitute it "government" for the purposes of the Charter, even with the help of American doctrine and the support of eminent academics like Peter Hogg. Here too, it appeared, we were up against concerns about the Charter altering the legal landscape and taking the courts into areas in which they felt uncomfortable.

II. STAGE TWO: ON TO THE COURT OF APPEAL

Not long after the judgments in these two cases came down, and just as we were gearing up to draft our factum for the appeal in the *U.B.C.* case, we were retained by the doctors in the *V.G.H.* to handle their side of the appeal in that case too. We had already spent a good deal of time thinking about that case, trying to understand why it had been decided differently from ours. The view we eventually came to - and this was reflected in the way in which we approached it in argument before both the British Columbia Court of Appeal and the Supreme Court of Canada was that it was, or at least could be said to be, materially different in several respects from the *U.B.C.* case. On the applicability issue, the fact that the hospital's policy had not come into effect until it had received, as by statute it had to receive, the approval of the provincial Minister of Health

made it difficult not to conclude that the policy was "governmental" in character. Moreover, the connection between the provincial government and the hospital in other respects was closer than that between the government and U.B.C., particularly in terms of the ability of the provincial government to influence the manner in which the hospital was run. On the merits, there was the fact that, at least in the eyes of Mr. Justice Taylor, the hospital had been unable to produce a satisfactory evidentiary record in support of its policy, which was of very recent origin, was justifiable. There was also the fact that the policy was not a product, as it has been at least in the case of the faculty at U.B.C., of collective bargaining. In no sense, therefore, could the doctors in the *V.G.H.* case be said to have consented to its imposition. Finally, although this was a difference more of form than of substance, the doctors had not really been mandatorily retired - they had been denied access to a public facility. If it was mandatory retirement as such that judges like Mr. Justice Taylor were wary of tackling the *V.G.H.* case did not require them to tackle it.

For these and other reasons, we were confident that we could persuade the British Columbia Court of Appeal to uphold the trial decision in the *V.G.H.* case. Persuading the Court of Appeal to allow our appeal in the *U.B.C.* case was, we believed, going to be a good deal more difficult. It was apparent that it could no longer be assumed that we were going to be able to get to the merits of the direct line of attack. Even if we did, there was no guarantee that we would be successful. Mr. Justice Taylor made it clear that, even if the Charter had been applicable to the university's mandatory retirement policy, he would have rejected that line of attack in part because, as he put it, "[t]he question of whether, when and how the community should be asked to bear the cost of abolition of mandatory retirement is [...] not a constitutional question but a legislative question properly for Parliament and the provincial legislature to decide"¹³ but also, again to use his words,

because the retirement scheme has always been well understood as a term of contracts of employment of these complaints, because it is combined with reasonable pension arrangements under a plan to which employer and employee contribute, because it is effective at an age when other extensive benefits become available, because it serves reasonable employment objectives of the employer and, most particularly, because its abolition must ultimately have a potentially more severe impact on other people less

*fortunately situated and whose interest must be balanced with those of the complainants in assessing the "reasonableness" of the scheme.*¹⁴

Recognition that there were problems with the direct line of attack did not, needless to say, lead us to abandon it. We knew that we had plausible if not compelling arguments to make in response to Justice Taylor's handling of it, and we set about the task of making them. However, it did encourage us to rethink our attitude towards the indirect line of attack. In particular, it encouraged us to see if we might not be able to construct that line of attack in such a way as to meet the concerns that Justice Taylor had expressed about the courts being asked to resolve a major issue of social and economic policy like mandatory retirement. If we could, we thought, that line of attack could be given more prominence than it had been given at the trial, perhaps even to the point of supplanting the direct line of attack as the centrepiece of the challenge.

It is important at this juncture to note that, by the time we came to draft the factum in the *U.B.C.* case, the legitimacy issue - the issue of the proper scope of judicial review - had become a live issue not only for Justice Taylor but for the Supreme Court of Canada as well. This had become clear at least by late 1986 when the Court rendered its decision in *Edwards Books*.¹⁵ Both Chief Justice Dickson and Justice La Forest in their respective judgments explicitly endorsed the need for the judiciary to exercise restraint in the application of s. 1 of the Charter in at least some cases. Similar sensitivity to the issue had also been demonstrated by Justices Le Dain and McIntyre in *Ref. re Public Service Employee Relations Act (Alta.)*,¹⁶ one of the three "right to strike" cases decided by the Court some four months later in the spring of 1987, this time in the context of defining the content of a Charter right.

In one sense, this change of course on the part of the Supreme Court of Canada could be said to have been disadvantageous to us. For as long as the Court refused to acknowledge that the issue of the proper scope of judicial review was worth discussing, judgments like those of Justice Taylor could be said to have been inherently suspect and could be attacked on that basis. In another sense, however, it served our interests. By bringing the issue out into the open, the

Supreme Court made it a legitimate and proper subject for legal argumentation. Lawyers seeking to overcome an inclination, real or perceived, on the part of a court to exercise restraint and leave the *status quo* intact were no longer obliged to trust in the force of their arguments on the merits of the challenge they were bringing; they could, openly and systematically, make submissions on the question of whether or not the inclination was one on which the Court should act. In our case, we needed no added impetus to include such submissions in our factum; we were convinced that the issue of the proper scope of judicial review lay at the heart of Mr. Connell's challenge and we were determined to address it. But at least we knew that our submissions would have to be taken seriously.

The submissions that we made to the Court of Appeal in our attempt to get around Justice Taylor's concerns can be summarized as follows:

1. the definition of "age" in the *Human Rights Act* had the effect of immunizing not only mandatory retirement policies, but all forms of age discrimination suffered by persons 65 and over;
2. to accede to the challenge of that definition would not be to ban mandatory retirement in British Columbia, because employers against whom complaints were filed under the Act by persons who were mandatorily retired would be able to argue - and some no doubt succeed in arguing - that their policy was justified under the "*bona fide* occupational requirement" provision in section 8 of the Act;
3. by acceding to the challenge, the courts would be absolved from responsibility for having to resolve the issue of mandatory retirement themselves - that responsibility would be passed on to a body with special expertise in the area of discrimination, in the British Columbia Human Rights Council, with the issue being addressed, as it should be, on a case by case basis;
4. given the fact that various jurisdictions in Canada and elsewhere had already decided to abolish mandatory retirement by legislative amendment, it could not be said that the courts were being asked to do anything revolutionary in this case - on the contrary, they were simply being asked to bring British Columbia into line with a clearly developing trend; and
5. unlike in *Edwards Books*, there was nothing in the legislative history of section 8 or the definition of "age" in the Act to suggest that the government's decision to cut

off protection at the age of 65 had been a sincere and genuine attempt to strike a balance between the various competing interests in this area - on the contrary, the impression one got from looking at that history was that the government simply assumed that mandatory retirement was a good thing.

We were looking to do a number of things with these submissions. One, which for us was the most important, was to make it clear that the Court of Appeal was not required in order to side with us to declare that mandatory retirement *per se* was unconstitutional. In fact, it would be open to the Court of Appeal to side with us without saying anything about mandatory retirement at all; it would do this by finding the fatal flaw in the legislation to be the fact that it immunized from challenge much more than mandatory retirement. Another was to reassure the Court of Appeal that the courts would not be inundated by further claims of age discrimination by persons mandatorily retired if it ruled in our favour - such claims would go elsewhere, to human rights tribunals. Still another was to embolden the Court of Appeal, if it were inclined to take on the issue of mandatory retirement and rule against it, to do that.

Argument before the Court of Appeal in both the *V.G.H.* and *U.B.C.* cases took place in September of 1987. The panel assigned to hear them - and the *Douglas College*¹⁷ case, in which we were not involved - consisted of Justices Hinkson, Macfarlane and McLachlin. Unlike Justice Taylor, who had been quite active during argument at trial, these judges remained passive throughout, and we therefore had very little to go on in predicting the outcome beyond our general impressions of the attitudes that these judges would be likely to bring to bear on the issues raised. Even on that score, we were obliged to do a lot of speculating. We knew that Justice McLachlin had evidenced some enthusiasm for the Charter, which gave us cause for some optimism, but we were concerned that her previous experience as a university professor would make her more receptive than she would otherwise have been to the kinds of arguments that *U.B.C.* would be advancing in support of its policy. We believed that Justice Hinkson, who by and large we took to be of conservative disposition, would be reluctant to tamper with the *status quo*. We knew almost nothing about Justice Macfarlane that would help us to predict his thinking.

In the result, our instincts about the cases proved to be quite reliable. The Court of Appeal upheld the trial decision in the *V.G.H.* case, and for essentially the same reasons. In the *U.B.C.* case, the Court of Appeal agreed with Justice Taylor that the Charter did not apply directly to the university's mandatory retirement policy or, as the judgment preferred to put it, to the contracts of employment the university had with the plaintiffs. The question of whether the policy violated section 15(1) of the Charter was not addressed. The Court of Appeal did, however, overrule Justice Taylor on his treatment of the indirect line of attack. It found the definition of "age", at least insofar as it applied to section 8, to be in violation of section 15(1) and not capable of justification under the *Oakes* test for section 1.

Interestingly, there was nothing in the Court of Appeal's judgment on the issue of the proper scope of judicial review. The Court did appear to be sensitive to the fact that there was more at issue in the case than mandatory retirement. But there was no mention of any of the other points we had raised in argument to support the claim that this was an appropriate case for judicial intervention. The sense one gets from reading the judgment is that this was just another case, one for which there was a body of well-established rules and principles that the Court had simply to apply in an orderly and systematic fashion in order to resolve. Whether or not this was an accurate reflection of the Court's thinking we could not tell.

III. STAGE THREE: THE SUPREME COURT OF CANADA

The last and concluding chapter in the story concerns the appeals to the Supreme Court of Canada. It surprised us somewhat that the hospital would appeal - it had been soundly beaten in both rounds to that point, and given the unfavourable evidentiary record with which it had been saddled, it appeared to be a forgone conclusion that it would lose at the Supreme Court of Canada level too. There was nothing in the Court of Appeal's judgment in the case to suggest to us that we had to rethink our approach to it. Our factum in that case therefore bore a very close resemblance to the factum we had used in the Court of Appeal.

The same was true, at least in a general sense, of the relationship between our factums in the *U.B.C.* case in the Supreme Court of Canada and the factum we had used in the Court of Appeal. Because this was going to be the Supreme Court's first real opportunity to define what the word "government" meant for the purposes of determining the scope of the Charter's application, we thought it advisable to try to develop a reasonably comprehensive approach to that question, one that was grounded in the existing jurisprudence and yet took account of the multiplicity of instruments through which modern governments implement public policy. We took care in developing our approach which, incidentally, found favour in a somewhat altered form with Justice Wilson and two of her colleagues, to ensure that it would not extend the Charter's reach too far; we knew from *Dolphin Delivery*¹⁸ that the Court would be reluctant to adopt an approach that saw the Charter apply to a great many entities not part of government in the strict sense. At the same time, we had to develop an approach that would catch entities like U.B.C. and V.G.H.

We also thought it advisable to expand on the submissions we made before the Court of Appeal on the issue of the proper scope of judicial review. The Supreme Court of Canada underwent a number of changes in the late 1980's, with first Justice Chouinard and then Justices Estey, Le Dain, Beetz and McIntyre leaving, and Justices L'Heureux-Dubé, Sopinka, Cory, Gonthier and McLachlin arriving to take their places. We had a sense of what a few of these judges thought about the Charter, but we knew very little about the others. Nevertheless, of one thing we were certain. That was that by now there was a spectrum of views on the Court about the extent to which it was appropriate for judges to check the exercise of governmental power under that instrument. This was especially true outside the realm of criminal law. Some judges, Justice La Forest for example, clearly had very serious reservations about judges second-guessing the decisions of democratically elected representatives outside that realm. Others, Justice Wilson being perhaps the only one at this stage, had very few. In the middle were those judges, and they included then Chief Justice Dickson and current Chief Justice Lamer, who appeared to wax and wane on the issue, sometimes siding with the advocates of restraint and sometimes with the advocates of activism.

Our view was that if we were going to be successful in the *U.B.C.* case, we were going to have to win over the middle group. We thought it highly unlikely, in fact, to be honest, virtually impossible, that judges like Justice La Forest would side with us; mandatory retirement was, in our view, precisely the kind of issue that they would want to stay away from. Justice Wilson, by contrast, we thought would be on our side almost regardless of what we said. What we said could, we thought, influence the outcome insofar as the middle group was concerned, particularly if it served to assuage their concerns about the Court intervening in this particular area. In order to do that, we thought, it was important to make our submissions on that part of the case as comprehensive and clear as possible.

Some adjustments were also made to the doctrinal aspects of the argument to take account of the Supreme Court of Canada's judgment in *Andrews v. Law Society of British Columbia*.¹⁹ That judgment imposed on section 15 cases a significantly different analytical framework than most of the country's lower courts, including the courts of British Columbia that had dealt with our two cases, had been using. However, it was our view that the change in framework had no substantive impact on the arguments we had been making in these cases, so those arguments remained essentially unchanged.

Our two cases were argued along with two others, the *Douglas College*²⁰ case and *McKinney v. University of Guelph*,²¹ the Ontario counterpart to our *U.B.C.* case, in mid-May of 1989 before a panel of seven judges. (Justice McLachlin, who had just been appointed to the Court, could not sit because of her prior involvement with the three cases from British Columbia; Justice Lamer was the other member of the Court who did not sit). There were very few questions from the bench, and only one or two of these - they came from Justices La Forest and Sopinka - could be said to have been difficult ones. There was, therefore, very little indication as to how the various judges were thinking. The only hint we were able to pick up came from Chief Justice Dickson, who seemed to find George Adams' argument about the importance of mandatory retirement to organized labour very appealing. We attempted to counter the effect of his argument by reminding the Court of the high percentage of Canadian employees who were not members of

trade unions and who were therefore unlikely to have adequate, if any, pension plans to fall back on in their retirement years. We could not tell at the time whether that response had its desired effect.

The outcome of our two cases is now well known. We lost them both, the *U.B.C.* case by a margin of five to two and the *V.G.H.* case by a margin of four to three. The latter result was, of course, the more surprising, particularly given the fact that we lost not only on the merits but on the applicability issue as well. We also lost on both the merits and the applicability issue in the *U.B.C.* case, but that happened before, so although it was disappointing, it cannot be said to have been all that surprising. Our readings of the various judges had been accurate. Justice La Forest, the strongest and I might add, most articulate advocate of restraint, wrote the majority reasons dismissing our challenge, and Justice Wilson, the strongest and again I might add most articulate, advocate of activism, dissented. We lost because we were unable to persuade enough of the group in the middle that this was an appropriate case for judicial intervention.

IV. REFLECTIONS

I turn now to the observations about litigating Charter cases that flow from my involvement in *Harrison & Connell* and *Stoffman*. None of them should come as a surprise at this stage because they all have their origins in the story that has just been told.

The first observation is that lawyers contemplating the launching of a Charter challenge nowadays have to recognize that the judicial mood has changed quite dramatically from the halcyon days of the mid-1980's. The enthusiasm that the Supreme Court of Canada then seemed to be evincing for its new role under the Charter has been replaced by a strong dose of caution. This observation is, of course, based on more than my personal experience with the mandatory retirement cases; it is based on a careful reading of the Court's accumulated Charter decisions from *Skapinker*²² down to the present. But this caution is clearly reflected in the mandatory retirement

cases. And it is reflected there not only in the majority's treatment of the issue on the merits, but in the majority's narrow view of the scope of the Charter's application. It is no coincidence, I think, that that narrow view is articulated by a member of the Court who has shown himself to be a strong proponent of judicial restraint in his treatment of the merits of Charter challenges.

The second observation flows directly from the first. If it is the case that the Supreme Court of Canada is no longer as activist under the Charter as it once was, it is also the case that the philosophy of judicial restraint is more apparent in some areas than others. The reason this is so, I think, is that the concerns underlying a philosophy of judicial restraint can vary in their intensity both from jurisdiction to jurisdiction and from case to case. Lawyers thinking of using the Charter on behalf of their clients must be sensitive to these differences.

At the risk of oversimplifying what is clearly a complex question of constitutional theory, I think the concerns underlying a philosophy of judicial restraint are essentially two. One is that judicial review, at least of legislation (as distinct from executive action), poses problems for democratic theory, not simply because it is inconsistent with the important principle of majority rule, but because it saps the strength of the democratic process. The other is that courts are ill-equipped to handle a great many of the issues to which a document like the Charter gives rise, in part because judges lack expertise in many of the areas into which the Charter takes them and in part because the adversarial process is ill-suited to the resolution of what have come to be called polycentric issues (that is, issues that engage the interests of a broad range of individuals and groups within society), a description that clearly fits the issues raised in many Charter cases. Of these two concerns, the former, that are grounded in democratic theory, clearly has the upper hand amongst proponents of judicial restraint in the United States. To this point at least in Canada, it seems equally clearly to be the latter, that grounded in relative institutional competence, has predominated, especially amongst judges.

What this means for lawyers litigating Charter cases is that, as a general rule, the answer to the question of whether the legitimacy issue must be considered lies in the relevance of the

concern about relative institutional competence to the particular case being brought. If the Charter issue is likely to be perceived as engaging the interests of a broad range of individuals and groups in society, and as requiring judges to make decisions in areas in which they have little experience or expertise, both of which were true of the issue raised in the mandatory retirement cases, then that concern is going to be relevant and the legitimacy issue has to be grappled with. If the issue raises neither of these problems - as is generally true of cases involving the application of the provisions of the legal rights category of the Charter, particularly in the realms of substantive criminal law and criminal procedure - the legitimacy issue can be ignored. In such cases, one can safely go straight to the merits of the challenge.

Of course, it is one thing to conclude that a particular issue is likely to be relevant to the outcome of a case, quite another to know how to act on that conclusion. At this point, a couple of questions must be posed. The first is whether in cases in which counsel bringing the challenge are of the view that the legitimacy issue is going to figure in the outcome, they should address it openly and systematically in their argument. The second, which is related in an indirect sense to the first, is how one goes about addressing the issue in those cases in which it is considered to be necessary or at least appropriate to do so.

I remain of the view that we were right in the mandatory retirement case to have taken up the legitimacy issue and devoted a good deal of time and energy to it in our argument. We had no doubt, given the sharp turn in the Charter jurisprudence emanating from the Supreme Court of Canada that began in the latter half of 1986, that the issue was going to be of critical importance to a good number of the judges sitting on our cases. Not to have dealt with it would have left those judges with the impression that the concerns they had - certainly about relative institutional competence and possibly also about democratic theory - were not only valid, but unanswerable. If we were going to move them, we had to try to show them that those concerns could be answered, and how.

There is, however, a downside to this approach and it is one that Drew Schroeder, counsel for Dr. Harrison, considered important enough to warrant limiting his argument to the merits of the issue of mandatory retirement. Extensive argument on the legitimacy issue is bound to distract the court from the "real" issue in the case, the question of whether someone's constitutional rights have been violated and, if so, whether such violation can be justified. There is a risk that the substantive issue will be consumed by the procedural one, and that the case will be seen to be more about who should decide than what the right decision is. There is also the risk that, by giving extended treatment to the legitimacy issue, you will reinforce the tendency to judicial restraint. This risk will be particularly real if the arguments made in support of judicial intervention are poorly made.

So, the question of whether or not counsel should address the legitimacy issue in argument can fairly be said to be an open one. The same can be said, I think, of the question of how, if the issue is addressed, it is best to approach it. The difficulty here is that arguments addressed to the legitimacy issue do not fit easily within the analytical framework the Supreme Court has established for Charter cases. Although the Court has invoked calls for judicial restraint on a number of occasions in the last few years, those calls have seldom found expression in the formal doctrine the Court has generated. In fact, the only body of doctrine in which they have found expression is that surrounding the minimal impairment requirement of the *Oakes*²³ test. I refer here to the distinction, first articulated in *Irwin Toy Ltd.*,²⁴ between cases in which that requirement should be applied in its original form and cases in which it should be applied in a much less vigorous form. The line that separates the two groups of cases has yet to be clearly drawn - as the judgments of La Forest J. and Wilson J. in *McKinney* make clear - but at least the debate about where to draw it is taking place at the level of formal doctrine. Insofar as the other elements of the analytical framework are concerned, the concerns about judicial activism tend to function at a subdoctrinal level.

The fact that arguments about the legitimacy issue are difficult to make at the level of formal doctrine creates something of a problem for counsel, particularly if he or she feels

uncomfortable working outside the boundaries of formal doctrine. On the other hand, there are advantages to working beyond those boundaries. Formal doctrine, by its very nature, imposes constraints on the kinds of issues that can be raised and the kinds of arguments that can be made; it defines what is relevant and appropriate for consideration and what is not. To the extent that one can work outside formal doctrine, one frees oneself of these constraints. These constraints, it should be noted, are both procedural and substantive; they operate both to limit the range of issues to be addressed and to structure the way in which one makes arguments about those issues that can be addressed. To avoid those constraints is therefore to free oneself both to raise issues that might otherwise be off limits and to construct one's approach to all of the issues in the manner that best serves one's client's position.

For us, the question of whether to work within or without the formal doctrine in this area was an academic issue. The decision in *Irwin Toy* came down long after we had drafted our factums for the Supreme Court of Canada and only a couple of weeks before oral argument took place. We had looked at the judgment, but not particularly closely since it dealt with an issue far removed from mandatory retirement and there was no sense then, at least on our part, that it would take on the significance it clearly now has. Our view was that if we were going to speak to the legitimacy issue - and we had decided that we were -we would have to do so outside the confines of formal doctrine. In effect, for us, there was no other way to do it.

Were we to be arguing the mandatory retirement cases now, what would we do? I suspect that we would work within the formal doctrine to the extent that we could. But I'm almost certain that we would work without it as well if, as I am confident would be the case, not all that we thought it important to say could be accommodated within it. The question is, would it be correct to do so? That, too, seems to be an open question.

Let me now turn to the next observation I want to make about our experience in litigating the mandatory retirement cases. It is that, even though the Charter is said to be concerned with the rights of individuals, it cannot be assumed that the courts always will be. Individuals, in

particular the individuals who actually invoke the Charter, can be lost sight of as the courts proceed to resolve the issues that their cases raise. That was certainly true of Mr. Connell, our client in the *U.B.C.* case. I have already described in some detail the special circumstances surrounding his mandatory retirement - special at least in comparison with those surrounding the mandatory retirement of university professors - and noted that we went to considerable lengths to keep the merits of his challenge separate and apart from those of Dr. Harrison's challenge. In spite of those efforts, the *U.B.C.* case like *McKinney*, its Ontario counterpart, was characterized as a case about the mandatory retirement of faculty. One looks in vain for any indication in the Court's judgments in these cases that the Court was even aware of Mr. Connell's special circumstances, let alone prepared to factor them into its consideration of the substantive issues raised.

I am mindful in making this observation - or perhaps more accurately this complaint - that many of the issues raised by the Charter are appropriately viewed as issues of high principle and call for judges to make very difficult choices between competing sets of important values. Some degree of abstraction from the precise factual context out of which an issue arises is inevitable. But it remains the case that the Charter, including section 15, is about individuals, and it is regrettable when, in a case in which the circumstances of an individual plaintiff can be said to be not only different from those of other plaintiffs but relevantly different given the nature of the constitutional issue raised, no recognition is given either to that individual or to his or her circumstances.

The final observation I wish to make builds on the previous one. It is that, in retrospect, it is apparent that these cases had the wrong plaintiffs. A challenge to the constitutional validity of mandatory retirement brought by university professors and doctors was, I am now convinced, doomed to fail. Whatever else one can say about professors these days, we are by any standards amongst the more privileged members of our society. One of the more telling moments of the trial in the *U.B.C.* case occurred when Dr. Harrison explained to Justice Taylor the nature of his formal teaching responsibilities and the salary he received. The look on the judge's face made it clear that from that point forward it was going to be an uphill battle persuading him that Dr. Harrison was

being treated unfairly when he was mandatorily retired. By the same token, doctors, another privileged group in society, were unlikely to elicit a great deal of sympathy when they complained about being mandatorily retired.

There is much to be said for a view of the Charter that calls for judges to be especially attentive to the interests of the disadvantaged within our society when adjudicating Charter claims. Claims brought by members of such groups should receive a sympathetic hearing, and claims that work against their interests should, by the same token, be viewed with suspicion. One of the interesting features of the mandatory retirement cases, however, is that the claims made in them did not fall neatly into either one of these categories. Evidence of this can, in fact, be found in the very different characterizations of the claims reflected in the majority and dissenting judgments in the mandatory retirement cases. In the view of the majority judges, the claims worked against the interests of disadvantaged younger, unemployed, academics and doctors. In the view of the minority judges, the claims served the interests of disadvantaged older workers.

In retrospect, I think it's clear that we would have been much better off having as a plaintiff, for example, a woman who had returned to the workforce in her fifties after raising a family, was not a member of a union and had no pension plan. There is no doubt but that such people exist - in fact, one was in attendance at the hearing before the Supreme Court of Canada - and that, for them, mandatory retirement is palpably unfair. But they, unfortunately, were not our clients.

CONCLUSION

For someone who spends most of his time looking at Charter decisions from the outside, the experience of actually litigating a couple of cases was both exciting and rewarding. There is much to be learned about the Charter from the process of putting a case together and taking it up through the court system that cannot be learned, or at least learned as well, if one's vantage point

is always at one stage removed. On reflection, however, perhaps the greatest benefit to accrue to me from the experience is the training it provided for the second career I will be looking to embark upon when, thanks to the Supreme Court of Canada's judgments in the mandatory retirement cases, *U.B.C.* will send me packing.

FOOTNOTES

1. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.
2. *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 [hereinafter *U.B.C.* or *Harison & Connell*].
3. *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 [hereinafter *V.G.H.*].
4. *Harrison v. University of British Columbia* (1987), 30 D.L.R. (4th) 206 (B.C.S.C.).
5. *Stoffman v. Vancouver General Hospital* (1987), 30 D.L.R. (4th) 700 (B.C.S.C.).
6. *Human Rights Act*, S.B.C. 1984, c. 22.
7. *R. v. Big M. Drug Ltd.*, [1985] 1 S.C.R. 295.
8. *Hunter v. Southam*, [1984] 2 S.C.R. 145.
9. *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, [1985] 2 S.C.R. 486.
10. *R. v. Oakes*, [1986] 1 S.C.R. 103.
11. *Andrews v. The Law Society of British Columbia*, [1986] 4 W.W.R. 242, 27 D.L.R. (4th) 600.
12. *Harrison v. University of British Columbia* (1988), 49 D.L.R. (4th) 687 (C.A.); *Stoffman v. Vancouver General Hospital* (1990), 49 D.L.R. (4th) 727 (C.A.).
13. *Supra* note 4 at 215.
14. *Ibid.* at 214.
15. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.
16. *Ref. re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.
17. *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1988), 49 D.L.R. (4th) 749 (C.A.).
18. *Dolphin Delivery Ltd. v. R.W.D.S.U. Local 580*, [1986] 2 S.C.R. 573.
19. *Andrews v. Law Society of British Columbia.*, [1989] 1 S.C.R. 143.
20. *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570.

21. *Supra* note 1.
22. *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.
23. *Supra* note 10.
24. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.