

The Legal, Human, Social and Economic Issues Involved in Mandatory Retirement

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This paper is addressed not only to the courts which must make decisions on mandatory retirement, but also to the legislatures which have or will regulate retirement policy and, indeed, to those who sit at bargaining tables in the negotiation of individual or collective agreements of employment. Others will look at the decisions of the Supreme Court of Canada in the long-awaited, and recently pronounced, quartet of cases¹ (hereinafter the *Quartet*) which addressed themselves to the implications of the *Canadian Charter of Rights and Freedoms*² in this area. My primary role is to expose the inherent issues of policy. I wish, however, to deal as well with the *Quartet* and the as yet unreported decision of the *Alberta Court of Appeal in University of Alberta v. Alberta Human Rights Commission and Olive Patricia Dickason*,³ decided August 14, 1991. That decision is of enough moment to require investigation of the effect of the *Quartet* even in those jurisdictions with human rights legislation which protects employees at, below *and beyond* the age of sixty-five. The abolition of mandatory retirement, for reasons of age alone, in those jurisdictions, until now, had been taken for granted. *Dickason* challenges that assumption and renders it unclear. But first things first.

In effect, a majority of the Supreme Court of Canada⁴ in the *Quartet* came to four principal conclusions here relevant:

1. The specification of a mandatory retirement age of sixty-five is a benign thread in the fabric of the Canadian community and marketplace of labour.⁵ The possibility of an alternative age is not precluded by the reasoning;
2. Mandatory retirement requirements, as well as the provisions of human rights codes which limit statutory protection against ageism to those under the age of sixty-five, discriminate against those sixty-five years of age or older, contrary to section 15(1) of the Charter;
3. Nevertheless, given the first conclusion here recorded, mandatory retirement at age sixty-five from any form of employment is a reasonable limit if bargained for or prescribed by

law, and survives invalidation under a proper section 1 Charter analysis if the applicable human rights code protects employees against ageism only up to the age of sixty-five; and

4. In employment subject to direct Charter scrutiny, the mandatory retirement at age sixty-five of university professors, university librarians and physicians survives section 1 analysis, as inherently reasonable, if done under a collective agreement or pursuant to law. However, it is important to note that the majority in *McKinney* (university professors) was larger than in *Stoffman* (physicians) because Cory J. upheld the section 1 analysis in *McKinney* but dissented in *Stoffman* on the basis that testing for individual competence was possible for physicians but too difficult in university settings.⁶

In *Stoffman*, *Harrison* and *McKinney*,⁷ a majority of the Court found that the Charter, in any event, did not apply to the universities and hospitals there involved since they did not form part of government within the meaning of section 32 of the Charter. Additionally, in *Stoffman*, the physicians were found not to be employees of the hospital at all and, therefore, not entitled even to the protection of the British Columbia *Human Rights Act* which was operative only in matters of employment. For both reasons, it may be argued in future cases that the essence of the decisions of the Court in the *Quartet* were merely dicta.

If that were to be the case, and given the absence of unanimity on the Court in the *Quartet*, employees working in less specialized forms of employment, in less innovative industries, in those where academic freedom is not an issue or those working in employment situations which are less secure than those of university professors with tenure and physicians, might still find ways of inducing the Courts, even the Supreme Court to afford Charter protection against their mandatory retirement.

However, that is a most unlikely scenario (unless the mandatory retirement is effected at an age below the maximum, if any, specified in the applicable human rights code). The majority of the Court considered, at length, and in detail, the issue of whether age limits in human rights

codes generally survive section 1 analysis under the Charter and came to the conclusion that such limits are defensible, at least in matters of mandatory retirement from employment at age sixty-five, not only in cases of university professors and physicians, but generally within the marketplace. Indeed, in *McKinney*, La Forest J., specifically stipulated:

I agree, and this was conceded by the Attorney General for Ontario, that the analysis under s.1 should not be restricted to the university context. The appellants in this case were denied the protection of the Code, not because they were university professors but because they were 65 years of age or over. To restrict examination of its application to the university context would be inconsistent with the first component of the proportionality test enunciated by this Court in R. v. Oakes, supra, namely, that the "measures adopted must be carefully designed to achieve the objective in question". Section 9(a) is not restricted to the university context, and while evidence respecting the specific context in which the issue arises may, as I indicated earlier, serve as an example to demonstrate the reasonableness of the objective, it must not be confused with those objectives [...].⁸

It is likely, therefore, that mandatory retirement, at age sixty-five, is universally tolerable, at least in those jurisdictions which limit protection against ageism to those sixty-five years of age or younger.⁹ Moreover, it appears as a result of *Dickason*¹⁰ that the same result may be occasioned even in those provinces with human rights legislation which protects against ageism at *all* ages through the importation of the section 1 analysis in *McKinney* to the interpretation of the normal exceptions found in all human rights legislation for "reasonable circumstances" or, perhaps, for "*bona fide* occupational qualifications" or "*bona fide* occupational requirements".

Indeed, in *Dickason*, the unanimous Alberta Court of Appeal used the reasoning of the Supreme Court in *McKinney* to protect mandatory retirement policy, even in a province with legislation which purported to prohibit discrimination on the basis of age and which extended the protection to persons over the age of sixty-five.

In Alberta, section 7(1) of the *Individual's Rights Protection Act*¹¹ (the "Act") prohibits discrimination in employment on the basis of age. Section 38(a) of that Act defines "age" to mean

"eighteen years of age or older". It does not limit protection against ageism to those sixty-five years of age or under.

Section 11.1 of the Act provides that a contravention of the Act "shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances".

The Court found that a contractual provision for mandatory retirement contained in the collective agreement between the Association of Academic Staff at the University of Alberta and the University did not contravene section 7(1) of the Act, that is, mandatory retirement of university professors pursuant to a collective agreement is lawful in Alberta. Though the agreement is discriminatory, it falls within the exception provided in section 11.1 of the Act. It is important to note that the Court was dealing specifically with employment in the university context and that the evidence in the case was directed specifically and only to that issue. Indeed, Lieberman J.A., analyzes the decision of La Forest, J. in *McKinney* as follows:

*The analysis under s. 1 of the Charter in this second segment is **restricted to the university context and it is this segment which is analogous and applicable to the issue in this appeal.** In the third segment of his decision, he dealt with the first two stated questions, i.e., whether section 9(a) of the Ontario Human Rights Code violated section 15 of the Charter and, if so whether it was justified under Section 1 of the Charter. This was a challenge to the legislation which affected all employers and employees in Ontario, not only those in the university context [...].*

While the three segments all deal with the related subject matter of mandatory retirement, different considerations may apply to the different issues arising in each of them. What is said in one segment may not have application to the other. What is said in the general context in segment three may not be valid in the university context in segment two and vice versa. Segment three deals with a challenge to legislation and introduces the factor of deference to the legislature, a factor not present in segment two. (the emphasis is mine)

Lieberman J.A., referring exclusively to the section 1 analysis of La Forest J. in *McKinney* in the university context, concluded:

These basic social and economic conclusions of the Supreme Court of Canada are judicially approved criteria and policy guidelines binding on this court, whether in the context of a Charter analysis under s. 1 or an analysis s. 11.1 of the Individual's Rights Protection Act.

Assuming *Dickason* to be good law, which will be followed elsewhere, the door thus has been opened for the re-introduction of mandatory retirement everywhere in Canada, even in those jurisdictions with human rights legislation which purports to protect persons at, or older than, the mandatory retirement age. While it is clear that no provincial or federal jurisdiction, in its human rights legislation, compels mandatory retirement at a given age, the fear now is that in the negotiation of collective and individual employment agreements, and in the setting of government policy, the lure of discrimination against older employers will be so attractive as effectively to bring an end to the relatively brief period within which some Canadian employees were employed under voluntary, rather than compulsory, retirement schemes.

Age is a proscribed ground of discrimination in all parts of Canada. But, there the similarity of treatment ends. The prohibition¹² against age discrimination in employment is restricted to those below the age of 65 in the provinces of British Columbia, Saskatchewan, Ontario, Nova Scotia, Prince Edward Island and Newfoundland. Conversely, New Brunswick, Quebec, Manitoba and Alberta prohibit age discrimination in employment, below and beyond the age of 65. The *Canadian Human Rights Act*, which applies to the federal Crown as employer, as well as to employers and employees operating in federally regulated undertakings, such as banks and airlines, does not prescribe an upper age limit beyond which mandatory retirement is permitted. However, the benefits historically have been illusory since the Act does not prohibit termination that is a result of an individual having reached the "normal age of retirement" for individuals working in similar positions. Moreover, the Act provides that it is not a discriminatory practice if employment is terminated because an individual has reached the maximum age that applies to that employment by law. Since mandatory retirement in the public sector normally has

its basis in law of one kind or another, the Act generally has had no application to the public sector rules. Thirdly, it is not age discrimination to retire someone in accordance with any superannuation fund or plan established by Act of Parliament before March 1, 1978.

Therefore, in effect, until recently the *Canadian Human Rights Act* did not affect mandatory retirement in the public sector in more than a limited way because of the exceptions to the prohibition on age discrimination in employment that permits forced retirement at a "normal age". Reform had been promised in *Toward Equality*.¹³ To date, the major change implemented has been to remove the previous provisions of the Public Service Superannuation Regulations (P.S.S.A.) which permitted mandatory retirement in the federal public service. Thus, mandatory retirement has been banned for direct employees of the federal government as well as federally appointed boards, commissions and corporations. But the Act itself has not been amended, to the continued detriment of many workers in the federal sphere.

In New Brunswick and Newfoundland, an employee may be terminated so long as the employee is a member of a *bona fide* retirement or pension plan. Canadian judges of Superior courts are forced to retire at age seventy-five pursuant to the provisions of *The Canada Act* (1982).¹⁴ Provincial judges on the other hand are subject to the various provincial codes and therefore to earlier retirement. Members of the Canadian Armed Forces and the Royal Canadian Mounted Police are retired based on age and rank before age sixty-five.

All human rights legislation in Canada contains either a provision allowing for contravention of that legislation in matters of employment discrimination if it is "reasonable or justifiable in the circumstances", as in the Alberta legislation, or through the notion of "bona fide occupational qualification", which may well be tantamount to a synonym for "reasonable or justifiable in the circumstances". For example, in Manitoba, section 14(1) of the *Human Rights Code*¹⁵ reads as follows:

No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

The decisions of the Supreme Court in the *Quartet*, and the Alberta Court of Appeal in *Dickason*, allow for observations as follows:

1. In all jurisdictions, and under all circumstances in which human rights legislation restricts the protection against discrimination on the basis of age to those below a certain age, say, sixty-five, mandatory retirement beyond that age clearly is lawful, regardless of the nature of the employment or the occupation of the employee and whether or not effected pursuant to a collective agreement or by regulation. That is the clear result of the decision of the majority in *McKinney* and *Stoffman* and the other cases in the *Quartet* which used a section 1 analysis to uphold discriminatory provisions of human rights legislation which protect against ageism only up to a maximum age;
2. The mandatory retirement of university professors is lawful in Alberta;
3. Whether or not mandatory retirement of employees in other forms of employment in Alberta, Manitoba, New Brunswick, Quebec, or federally and of university professors, university librarians and physicians in Manitoba, New Brunswick, Quebec and, if relevant, at the federal level, is lawful will depend on:
 - a) The particular provisions of the controlling human rights legislation in those jurisdictions. To the extent that the controlling legislation in those jurisdictions contains wording similar to section 11.1 of the Alberta *Individual's Rights Protection Act*, presumably the reasoning in *Dickason*, if unappealed or if upheld, affecting university professors will be accepted; and

- b) Whether the more general section 1 analysis of *La Forest J.* will be imported to, and applied to define "reasonable" or "*bona fide* occupational qualifications", that is, the exempting provisions of human rights legislation, so as to find that being younger than age sixty-five is a *bona fide* prerequisite to employment, at least if so bargained or regulated.

That question, in turn, requires four notes, as follows:

1. To do so would be to erase effectively but unjustifiably the protection against ageism for those *seeking* employment at age sixty-five or older;
2. In *Dickason*, the Alberta Court of Appeal was at pains to base its decision not on the general section 1 analysis of the Supreme Court in *McKinney*, but on the more narrow issue of a section 1 analysis in the *university context*. Moreover, Cory J., concurring in *McKinney* and dissenting in *Stoffman*, clearly felt that the enforced retirement of university professors was lawful, but not that of physicians in hospitals; and
3. Even at that, the Alberta Court of Appeal acknowledged the centrality and importance of the evidence presented in each case in determining whether or not the discrimination is reasonable and justifiable under section 11.1 of the *Individual's Rights Protection Act*. The Court said:

The present appeal is likewise governed by McKinney. The issues raised are not to be decided on a case by case basis unless more than minor factual differences exist. No such differences were pointed out to us. (emphasis added)

Clearly, evidence of requirements in open systems of employment, rather than closed systems like universities, will be substantially different than that presented in the *Quartet*.

Nevertheless, it is my understanding of the decision in *McKinney*, and the other cases in the *Quartet*, that the essential rationale of the majority of the Court is twofold. First, courts should defer to legislatures where there are "conflicting pressures".¹⁶ Secondly, not only is a mandatory retirement age of sixty-five defensible on a section 1 analysis, but at least in collective bargaining it may well be a desirable outcome. La Forest J. says:¹⁷

It can be seen, therefore, that the concern about mandatory retirement is not about mere administrative convenience in dealing with a small percentage of the population. The concern is with the impact the removal of a rule that is generally beneficial for workers would have on the compelling objectives the legislature has sought to achieve [...]

It must be remembered that what we are dealing with is not regulation of the government employees; nor is it government policy favouring mandatory retirement. It simply reflects a permissive policy. It allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. It was not a condition imposed on employees. Rather it derives in substantial measure from arrangements which the union movement or individual employees have struggled to obtain. It results from employment contracts that ensure stable, long-term employment and some security for retirement. Far from being an unmitigated evil, it forms, as Professor Gunderson puts it, "an intricate part of the inter-related employment relationship" that is generally beneficial to both employers and employees. Expectations have built up on both sides.

Frankly, the basis of the decision of La Forest J. in *McKinney* seems to be his agreement, both with big business and big labour, that the rights of the individual are best served by a system of mandatory retirement at age sixty-five. Though the analysis is more complex, the reasoning is deceptive. The fundamental finding of the Court is that the Canadian social and economic fabric tolerates, even requires, a mandatory retirement age and that it is up to the private sector itself to determine what age will be appropriate.

In that context, I turn to an analysis of the concept of *bona fide* occupational requirement or qualification.

I. BONA FIDE OCCUPATIONAL QUALIFICATIONS

The concept (hereinafter referred to as B.F.O.Q.) has its origin in Title 7 of the U.S. *Civil Rights Act*, 1964, which dealt with discrimination in employment on grounds other than age. When that federal legislation was supplemented in 1967 by the *Age Discrimination and Employment Act*,¹⁸ the B.F.O.Q. exception was carried forward as an appropriate limitation on the prohibition against age discrimination in employment decisions. Its definition, the limited legislative articulation aside, has essentially been the result of judicial decisions.

The leading decision in Canada on what constitutes a legitimate B.F.O.Q. is that of the Supreme Court of Canada in *The Ontario Human Rights Commission, v. The Borough of Etobicoke*.¹⁹ The case involved the legality of the mandatory retirement, at age sixty, of firemen employed by Etobicoke, that retirement having been mandated by a clause in the collective agreement. McIntyre J., for a unanimous court, approbated what was common ground between the parties, that is, that compulsory retirement at age sixty constituted a refusal to employ or continue to employ the complainants and therefore was a form of discrimination prohibited by section 4 of the Ontario *Human Rights Code*. He observed that, under the Code, non-discrimination is the rule of general application, and discrimination, where permitted by way of the bona fide occupational provision, is the exception. The burden of proof of the existence of prerequisite circumstances for the application of that exception, he said, is on the employer. Moreover, he stated:

*To be a bona fide occupational qualification and requirement, a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economic performance of the job without endangering the employee, his fellow employees and the general public.*²⁰

Having established both subjective and objective prerequisites, he went on to say:

We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.²¹

The Court went on to indicate that the evidence adduced cannot be "impressionistic" and that, more likely than not, it requires some scientific or statistical basis. Lastly, the Court clearly indicated that the protections of the Ontario *Human Rights Code*, having been enacted by the legislature for the benefit of the community at large, and of its individual members, clearly fell within "that category of enactment which may not be waived or varied by private contract"²² even by a collective agreement.

Subsequent decisions in lower courts have indicated two trends. The first is that the B.F.O.Q. exemption will be rather strictly construed and available in relatively narrow circumstances.²³ Nearly all the cases in which it has been successfully invoked involve safety considerations, and most commonly the safety of the public.²⁴ However, even then the courts are strict. Clearly, the cases have indicated the difficulty that employers face in bringing convincing evidence on the effect of aging on job performance.²⁵

Therefore, it is arguable, indeed likely, that both in matters of mandatory retirement below the age of sixty-five in all jurisdictions, and in employment, other than in university and medical settings, in those jurisdictions which protect against ageism at any age, the decisions in the *Quartet*, notably *McKinney*, will not prohibit the courts in subsequent cases from engaging in exactly the investigation prescribed by the unanimous Supreme Court of Canada in the *Etobicoke* case. There is nothing in *McKinney*, or in any of the cases in the *Quartet*, to indicate that

mandatory retirement at ages below sixty-five is inherently lawful. Therefore, the Supreme Court specifications in *Etobicoke* continue to control. The interesting and difficult question is whether in those jurisdictions which provide ageism protection beyond sixty-five, the argumentation developed by La Forest J., in *McKinney* and the *Quartet* cases, based on acceptance of mandatory retirement at age sixty-five as a permissible, perhaps desirable, workplace standard, will now be taken implicitly to have overruled or softened the earlier decision of the Supreme Court in *Etobicoke*. The *Dickason* decision in the Alberta Court of Appeal does not resolve the conflict since it specifically limits its analysis to adopting the *McKinney* reasoning in the university context.

On the other hand, even given a policy of judicial deference to the legislature, the effect of following *Etobicoke* in all jurisdictions will mean that employees in some provinces will be mandatorily retired at age sixty-five and employees in identical circumstances in other provinces will not. Some judges may be tempted to remedy that inequality by employing the *McKinney* reasoning more generally in relation to the exempting provisions, including B.F.O.Q. of provincial legislation. Moreover, it may appear to some that a distinction should not be drawn between employees in the university context and employees in other employment contexts.

I would suggest that this would be a mistake. Given that mandatory retirement provisions for persons under the age of sixty-five must be evaluated under human rights legislation by the *Etobicoke* tests, the same tests should be applied to employees over the age of sixty-five in those jurisdictions which have seen fit to extend protection against ageism beyond the age of sixty-five.

Indeed, earlier jurisprudence would tend to indicate that the courts will adopt tests designed to prohibit rather than enable mandatory retirement.

Both Commissions of Inquiry,²⁶ court decisions and those of adjudicators and boards of inquiry under the various human rights codes have been influential in, and have tended to be

accepting of the abolition of mandatory retirement. Within the statutory framework of the relevant legislation, that is, subject to the particular definition of protected ages and the exceptions thereto earlier referred to, Canadian human rights adjudicators and judges, prior to the *Quartet*, have tended to give very liberal, progressive and far-reaching interpretations to the anti-age discrimination provisions of Canadian human rights legislation.

The most significant jurisprudence has resulted from decisions under the human rights legislation in the province of Manitoba,²⁷ which does not define an upper limit of age beyond which discrimination is permitted. Therefore, a short review of that province's decisional history is instructive.

In *Flyer Industries v. Derksen*,²⁸ the adjudicator interpreted the intent of the human rights legislation in these terms:

I do not believe that the legislature intended that an individual could be denied employment or the continuation of employment simply because he or she has reached a particular age, any more than it intended that someone who is just slightly of the wrong race, nationality, religion or colour, could be denied that equality of employment opportunity so long as all persons of that race, nationality, religion or colour were similarly denied.

The adjudicator held, effectively, that provisions of a collective agreement requiring mandatory retirement at age 65 were void because of the protections against age discrimination contained in the Manitoba *Human Rights Act*.

In *McIntyre v. The University of Manitoba*,²⁹ the Manitoba Court of Appeal dealt with the case of a member of the academic staff of the University of Manitoba who was forced to retire at the age of sixty-five pursuant to a collective agreement between the University and its Faculty Association which incorporated the mandatory retirement provision of the University's pension plan. The Court held the retirement to be illegal. Huband J.A., writing for the majority of three of the five judges, dismissed the University's argument and in so doing said:³⁰

The Act was extended to protect the public at large from discrimination, not just on the basis of age but on the basis of other characteristics as well. Where there is a term in a contract, including a collective agreement, which collides with a statute which is intended to protect the public, the contract, or the specific term thereof, is to that extent invalid.

Moreover, he added:

What is obvious is that, in passing legislation without any limitation by way of definition of the word 'age', the Manitoba Legislature intended to prohibit discrimination in employment against its adult citizens of whatever age.³¹

In *Newport v. Manitoba*,³² the Manitoba Court of Appeal considered the case of Aubrey Newport, a Manitoba civil servant whose employment was governed by the *Civil Service Act*³³ and the *Civil Service Superannuation Act*³⁴ which, in combination, provided that all provincial government employees must retire at age sixty-five. The unanimous Court of Appeal held that the *Human Rights Act*, even though the more general of the statutes, was paramount and prevailed over the more specific requirements of compulsory retirement for a civil servant at age sixty-five under the other earlier legislation. In a companion case, *Parkinson v. Health Sciences Centre*,³⁵ the Manitoba Court of Appeal faced the issue of a neurosurgeon who, pursuant to the hospital's by-law, was required at age sixty-five to retire, entailing the loss of admission and treatment privileges. The majority of the Court declared that the hospital by-law contravened the *Human Rights Act*. In so doing, the majority disagreed with Hall J.A. who was unhappy with the result, observing:

A further observation is in order. One is constrained to say that what is in need of amendment is not the by-law of the Health Sciences Centre but rather the Provisions of the Human Rights Act. The rights created in that statute should not be asserted in general and absolute terms. In the context of the present case, the rights of non-discrimination of medical staff must be consonant with the rights of patients, and the governing body of the Health Sciences Centre should be given authority to ensure, in a practical way, continuity of quality medical care. Some objective test of age is required, otherwise equality of opportunity based upon bona fide qualifications becomes the risk of the patient. Are patients at risk until medical staff decide that one of their members has demonstrated a lack of continuing qualification? In my opinion, the answer to that question is 'no', and thus the

*need arises for amending legislation that permits age discrimination in the case of those afforded hospital privileges at the Health Sciences Centre.*³⁶

The Manitoba Legislature significantly revamped and expanded that legislation in 1987.³⁷ It did not heed the call of Mr. Justice Hall to define an exception, even in the case of neurosurgeons.

Lastly, in a case originating in Manitoba, the Supreme Court of Canada set what is perhaps the high water mark for human rights legislation and anti-age discrimination cases in Canada. In *Winnipeg School Division No. 1 v. Craton*,³⁸ the Court faced the mandatory retirement of a teacher whose employment had been terminated upon turning sixty-five pursuant to the collective bargaining agreement between the school division and the teachers' society. The collective agreement was entered into pursuant to provincial legislation³⁹ which empowered a school board to fix a compulsory retirement age for teachers which, in the terms of the legislation, "shall not be less than 65 years of age". The collective bargaining agreement set sixty-five years of age as the retirement age.

Craton argued that there was a clear conflict between section 50 of the *Public Schools Act* and section 6(1) of the *Human Rights Act* which prohibited age discrimination in employment. Section 50 of the *Public Schools Act* had been passed in 1980, but was to the same effect as a similar provision originally enacted in 1964. Nevertheless, the re-enactment of the specific provision allowing for early retirement at the age of sixty-five followed in time the promulgation of the prohibition contained in section 6(1) of the *Human Rights Act* passed in 1974. The employer contended that the *Public Schools Act* of 1980 was not a mere re-enactment and consolidation of the earlier statute, but was actually specific legislation designed to reaffirm the right of the board to create a mandatory retirement age for school teachers, despite the provision of the *Human Rights Act*.

The Supreme Court decided, *inter alia*, that the Human Rights legislation prevailed, and the statutory entitlement of the School Board to set a mandatory retirement age was void. In doing so, the Court held:⁴⁰

Human rights legislation is of special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it problems. In this case it cannot be said that s. 50 of the 1980 Consolidation is of sufficiently express indication of a legislative intent to create an exception to the provisions of s. 6(1) of the Human Rights Act.

Given that jurisprudential history, it is likely that courts will continue to impose an onus upon employers, through evidence, to justify mandatory retirement provisions where mandatory retirement is required in contravention of the prohibition against discrimination in human rights legislation. That will be the case, even for university professors, librarians and physicians where retirement is required at an age below the maximum specified, or if no age limit is specified in the human rights legislation. That will also be the case for all other employment categories where retirement is required below the specified age, or if no age limit is specified, in the human rights legislation. The tests of *bona fide* occupational qualification, reasonableness or *bona fide* requirement will continue to be applied but, at ages sixty-five or greater, one suspects that employers may have a less difficult time proving the reasonableness of the exception simply on the basis of the reasoning of the majority of the Supreme Court in the *Quartet* of cases, particularly *McKinney*. Nevertheless, the record is so full of decisions decrying arbitrary retirement as discrimination that it will be hard now for courts or adjudicators to back off.

Whether or not that is desirable, whether or not the courts should impose a more or less stringent set of tests, whether or not legislators should react in order to amend human rights legislation and whether or not collective bargainers should tolerate mandatory retirement provisions in their agreements is a matter of policy analysis to which I now turn.

II. THE HUMAN, SOCIAL AND ECONOMIC ISSUES INVOLVED

In my view, the outcome of the Supreme Court's *Quartet* was unfortunate for five reasons:

1. The Supreme Court declined to take the opportunity to unify mandatory retirement policy by eliminating it across Canada. The requirement to retire at a certain age, therefore, will continue to be a matter of jurisdictional difference rather than national standard. While that is a foreseeable and, perhaps, defensible outcome in a confederal system, it is nevertheless unfortunate that an individual's right not to be discriminated against will depend on political rather than ethical claims to protection;
2. The effect of the Court's decisions cannot be rationalized as being other than the demotion of the section 15(1) protection against ageism to a standard of section 1 analysis far easier to meet than is, or will be, the case, with the other enumerated grounds of protection. The substance of the Courts' decisions in the *Quartet* is that, regardless of individual capacity, given the integration within the workplace of age sixty-five as a "normal" date of retirement, society's need for innovation and employment creation and the administrative difficulties inherent in job evaluation, the burden is to fall on the older worker, notwithstanding the express denial of La Forest J. in *McKinney* that the objective of reducing youth unemployment should not be accorded much weight.⁴¹ It would be difficult to imagine substituting any of the other characteristics cited in section 15(1) of the Charter, for example, race, sex, ethnicity, perhaps other than mental or physical disability, and envisioning the Courts' decisions on a section 1 analysis being reached in the same way. While the rhetoric of Canadian law is that distinctions between the enumerated prohibitions in section 15(1) are not to be drawn, the reality is that a majority of the Supreme Court of Canada has dictated that we follow the practice of the Supreme Court of the United States in setting up a hierarchy of protection of those rights. Age discrimination, it appears, may be subject to a "minimal scrutiny" standard of judicial review. The truth is that ageism has

not yet been accepted by the Court as an anti-social form of behaviour on a par with racism or sexism;⁴²

3. The effect of the decisions is to grant undue judicial deference, in difficult rights matters, to the legislative process. The Court essentially has said that competing claims for finite resources cannot be judicially refereed;
4. The decision of the majority is insensitive to the connection between systemic discrimination against women, who earn less, and mandatory retirement which exacerbates that discrimination; and
5. The decisions of the Court in the *Quartet* may well induce those involved in collective bargaining, legislatures and the courts, even in those jurisdictions which now prohibit age discrimination above the age of sixty-five, to reconsider and recapture mandatory retirement policies at that, or a similar, age.

Notwithstanding significant advances in social welfare programmes in Canada, for most people the characteristics of their employment are the major determinants of their standard and quality of living. In a very real sense, for most Canadians, their jobs are their capital and their capital is their security. This capital is measured both by its flow of income, in the form of wages or compensation, and by its longevity, represented by the timing of termination through dismissal or retirement. Equally important are factors such as post-termination capital rights; in particular, pension rights. There are also a number of inherent psychological issues, including job satisfaction, working conditions and access to benefit plans.

One's self-perception is inextricably wound up with the work one accomplishes. Those who are unable to access jobs feel understandably diminished and angry. Those feelings are echoed in the minds of some who are forced to leave because of age related retirement policy,

though, overwhelmingly, it is a matter of public knowledge that most workers look forward to retirement years with great anticipation.

Until recently, we had become quite easy with the selection of age sixty-five as a "normal" retirement age. The notion followed on the development of social security programs in many parts of the industrialized world. In 1889, Otto Von Bismarck, then Chancellor of Germany, initiated social security programs for Germany. Since 1916, those programs set sixty-five as the age when people would begin receiving social security and pension benefits.⁴³ As a result, age sixty-five came also to mean the time of mandatory retirement for many working people.

In the United Kingdom, paragraph 64(1)(b) of the *Employment Protection (Consolidation) Act*,⁴⁴ excepts from the provisions of the Act which prohibit unfair dismissal, the dismissal of an employee upon attaining the "normal retiring age" for the position, or age sixty-five. In the United States, mandatory retirement at age sixty-five became the prevailing practice in the decades following the enactment of the *Social Security Act* in 1935.⁴⁵

In 1967 in the United States, the age *Discrimination in Employment Act*⁴⁶ protected persons age forty through age sixty-five against age discrimination. However, by the mid-seventies the issue had become one of civil rights with the increasingly prevalent view being that mandatory retirement at a specific age was offensive. On April 6, 1978, the *Age Discrimination in Employment Act* of 1967 was amended⁴⁷ to extend protection against age discrimination for most non-federal workers up to age seventy. It also eliminated the upper age limit for most federal employees. Tenured employees at institutions of higher education were excepted from that protection until July 1, 1982. In 1986, the *Age Discrimination in Employment Amendments*⁴⁸ removed the age seventy limit completely, once again providing a seven-year exemption with regard to tenured faculty members of colleges and universities.

It is important to note that throughout the American and Canadian experience, university professors have been identified along with judges, senior executive management, employees in

jobs involving public safety, and a number of public service occupations, as being particularly problematic when abolishing compulsory retirement. Sometimes the focus is inappropriate. Sometimes it is simply a guise to relieve administrative inconvenience.

A review of the literature, as well as legislative and judicial proceedings, discloses a number of arguments which repeat frequently on both sides of the issue, regardless of the jurisdiction in which it is addressed or, indeed, whether or not the forum is legislative or judicial.

The arguments said to favour a policy of non-consensual, mandatory retirement at a given age, say sixty-five, are as follows:

1. A universal mandatory retirement scheme promises more rapid upward mobility for individuals within an employment system;
2. It allows for the more frequent entry of younger employees into the system, thereby reducing the incidence of chronic youth unemployment;
3. In many sectors, notably in universities and industries dependent on research and development, compulsory retirement prevents staleness and promotes renewal and progress;
4. It honours the fundamental principle of freedom of contract, consistently argued both by management and labour, both of which institutions often do not regard mandatory retirement as age discrimination or an infringement of rights;
5. The abolition of mandatory retirement has an adverse impact on pension rights and plans because pension benefits are dependent on a definition of "normal retirement age" for proper actuarial determination. Perhaps, more importantly, it is argued that the right to retire on pension has been a long hard-fought-for benefit in the collective bargaining

process which is put at risk, at least symbolically, with the notion that retirement on pension is not an "expected" benefit, but rather one of individual choice;

6. Older people, through the provision of massive social security benefits, both public and private, including pension benefits, health care assistance, tax benefits and geriatric social services, already are benefitted disproportionately to their entitlement and need in society. Therefore the abolition of mandatory retirement, it is argued, cannot be justified on the basis that it is "age discrimination" since rather than being discriminated against, all things considered, the elders of our communities are actually treated more beneficially than are younger people;
7. Since disease, illness and disability increase with age, the cost of employee benefit plans such as short and long term disability insurance, health and dental care insurance, life insurance, accident insurance and sick leave benefits will be greatly increased either at the expense of the employer, and hence the productivity of the economy, or of other younger workers;
8. The certainty of mandatory retirement encourages planning by individuals for their retirement years. The absence of it may lead to more chaotic and dysfunctional retirement proceedings on the part of those who will procrastinate on the assumption of continued employment;
9. Promotion and seniority systems will be adversely affected to the fiscal and psychological disadvantage of younger workers and those with less seniority;
10. Particularly in institutions or industries with fixed budgets and/or fixed worker complements with tenure, the absence of mandatory retirement will have the effect of continuing to appropriate large, and larger, shares of salary budgets in favour of more expensive, older employees. The theory, and fact, here is that generally our compensation

systems work on a deferred model. We defer compensation in two ways. We extract a portion of earnings in early years in order to fund pension benefits in later years. Moreover, we do not reward productivity in employment appropriately throughout a working career, rather paying lower wages early in a work position and higher wages later. Thus, the salary of an older worker, who may or may not be more productive than a younger worker, is almost inevitably greater than that of the younger worker. The abolition of mandatory retirement, to the extent that older workers remain employed, inhibits, or prohibits, redistribution of the salary lines of older workers in favour of other institutional purposes or in favour of less expensive junior workers, thereby decreasing expansion of the workforce. This problem is particularly acute, it is argued, at universities and in the bureaucracies which have tenure or special job security;

11. A policy of mandatory retirement relieves management of the need to test the "productivity" of those nearing the end of their careers, sometimes called the "coasting period". The abolition of mandatory retirement would lead to an increase in the evaluation and monitoring of employees, and increased incidence of dismissal for cause, with consequent increase in grievance and litigious procedures contesting those decisions. Financially, psychologically and productively, the costs are significant. Moreover, in some jobs, teaching for example, the measurement of performance or productivity is such a difficult and abstract venture that it cannot be done effectively, requiring a more arbitrary system of definition such as that of fixed compulsory retirement age. This argument completely ignores the fact that we do already monitor and evaluate, even in the teaching profession; and
12. In that context, generally, the phenomenon of mandatory retirement preserves the dignity of an older worker who has slowed down, or is less competent, in that, under a mandatory universal scheme, the individual is simply "retired", not for any personal reasons, but because of general policy considerations which do not involve any negative stigmatization of the individual's performance or personhood.

The arguments favouring mandatory retirement are significant and not unpersuasive, though the spectre of harm is somewhat exaggerated given the existing data in Canada and the United States.

However, the arguments against mandatory retirement and in favour of schemes of voluntary employment which allow an individual to choose to retire at a "normal retirement age", or earlier, on pension, or to continue working, are more highly persuasive. Even in the event that the spectre of some systemic dysfunction resulting from abolition was real, basic notions and principles of fair and equal treatment of the working population and equality of opportunity, at any age, argue heavily in favour of voluntary rather than mandatory retirement schemes. These arguments are as follows:

1. Foremost, mandatory retirements, on the basis of age alone, ought to be rejected because denial of opportunity of any kind, when grounded in stereotypical assumptions, is inherently and distinctly unlovely, perhaps even evil. Each of us has the right to be assessed for who and what we are, not what we are assumed to be. Any narrowing of the vision of equality of opportunity in employment, and of respect for the individual employee, ought not to be countenanced by the legal system nor by the policies of any institution. Because mandatory retirement assumes that older workers either are less competent or less entitled than younger workers to the opportunity of employment, it offends basic notions of human and civil rights and liberty. It is no answer to argue that age discrimination, which is the basis of mandatory retirement, is not like other forms of discrimination since, if one lives, everyone reaches the age of retirement and is then equally treated with all others. There is involved, nevertheless, a denial of opportunity and fulfillment in one's work. More importantly, there is inherent, in that notion, an assumption that all persons reaching the defined age of normal retirement will have had equal access to, and an equal term of, employment in the years preceding employment as well as having derived equal income therefrom. That obviously is inaccurate. People are able to access employment, and remain in employment, at quite different times and rates.

The attainment of a certain age is therefore merely a very arbitrary, and unsatisfactory measure of historical opportunity. If mandatory retirement has value in the society, it should be based not on an arbitrary fixed age, but rather on the concept of retirement after having been in employment for a certain aggregate of years, consecutive or not, or having achieved a certain income in aggregate over time. The adoption of a particular age, say sixty-five, is not a sufficient surrogate or arbitrary equivalent;

2. Absent a general rule in the community that all persons employed or self-employed must cease gainful endeavour at the magic age, mandatory retirement imposes a burden on workers, not imposed on others, which is inherently unreasonable;
3. Our society and community generally accord higher status and respect to people who are gainfully employed than to those who are not. Those who are employed are often characterized as more "worthwhile" than those who are not. Neither law nor policy ought to prescribe that an individual must suffer loss of self-esteem and/or a diminution of community respect, even though competent, simply because of having reached a certain age. Indeed, the psychological difficulties of adjustment to the retirement period may lead to increased physical and medical disability;
4. Two of the basic justifications for mandatory retirement plans usually are argued to be those of "efficiency" and "safety". However, the importance of those factors is already accounted for in the existing anti-discrimination legislation in Canada through the provisions of exception for *bona fide* occupational qualifications and requirements, that is, if age is a relevant and reasonable factor, the means to ensure its being factored into employment decisions is protected in current legislation. If there are exceptional problems in particular environments, say, in executive management ranks, for example, it is more appropriate to deal with those matters as exceptions to a general rule prohibiting mandatory retirement. Public safety concerns would be addressed in the same way. Indeed, the decisions in the *Quartet* may be seen as being no more than exceptions to the general rule;

5. The argument that the legislated abolition of mandatory retirement constitutes a denial of freedom of contract, a point of opposition taken frequently both by management and labour groups, is a misplaced objection. The days of laissez-faire economics and the sanctity of contract have long since passed. We, as a community, subject freedom of contract to limitations in many ways. One need think only of consumer protection legislation, restrictions on alienation of property and the entire regulatory mechanism of government as examples. Even closer to the point, current human rights legislation, not to mention constitutional protections, prohibit freedom of contract which involves discriminatory activity or effect. The real issue, then, is whether one accepts "ageism" as discriminatory behaviour in the same sense as racism or sexism or discrimination on the basis of ethnic origin. The decisions of the majority of the Court in the *Quartet* may be criticized on this ground alone. As the baby boom ages, and as technology advances life expectancies, our consciousness is more and more raised to appreciate the equivalence of ageism as discrimination on a par with other earlier proscribed practices;
6. Experience both in the United States and Canadian jurisdictions which have abolished mandatory retirement or extended it to older ages seems to indicate though the evidence is fragile, that very few, if any, problems have actually arisen in the marketplace;⁴⁹
7. The arguments of significant adverse impact on pension and benefit plans arising from the abolition of mandatory retirement are highly exaggerated. There is no evidence that the actuarial basis of pension plans will be adversely impacted by the abolition of mandatory retirement so long as employees are entitled to no further accrual of benefits after a "normal retirement date", particularly where there is an actuarial adjustment which merely pro-rates payments to expected life span. In the case of benefit plans, where costs do increase unusually with age, a decision must be made on continuation of those benefits for older employees. Though the preference would be to continue such plans, in the event that the costs were very significant, that particular plan or fringe benefit could legitimately be

discontinued after the "normal retirement age", or the employee might share in its increased cost;

8. As was earlier indicated, employment productivity is not rewarded evenly throughout the life of a job. For the most part, we employ a deferred compensation system wherein higher earnings accrue, as do pension benefits, later in a career whether or not productivity has remained constant throughout. Thus, the argument is sometimes made that the employee is underpaid in earlier years and overpaid in later years, and that an employee choosing to remain on the job after normal retirement age will receive wages increasingly in excess of productivity, soon receiving more in lifetime income than was produced in career value. The subsidization would come from other employees or the employer. But the theory is only partially accurate. Both inflation and the variations in pension entitlements argue the other way.

Most employees do not have pension rights other than those available under social security systems which, in Canada, include the Old Age Security Pension and the Canada Pension Plan. In the Canada Pension Plan, only those who have worked and contributed are eligible (though spouses may earn a reduced benefit upon the death of the worker). Even amongst those who are covered by personal pension plans (generally those who are subject to collective bargaining), vesting rights, portability and variation in definition of years of service all have an effect on the benefits of many workers. Moreover, most pension plans, and pension benefits, are not indexed, so that inflation eats away at pension value. Thus, for many, if not most workers, working past retirement may constitute an economic necessity in order to survive with dignity in retirement years;

9. Mandatory retirement, with few exceptions, works to the extreme disadvantage of those most vulnerable in our society, namely those in low paying jobs and those underrepresented in the work force. Women are particularly adversely affected by mandatory retirement schemes.⁵⁰ The disadvantaged position of women, and other

underrepresented groups, results from three phenomena. First, it is notorious that women have more difficulty than men accessing employment of any kind. Secondly, women are paid on average less than men even for work of equal value, which means that their pension benefits are inevitably lower than those of men, since pension benefits are dependent on the level of earnings during employment. Thirdly, and similarly, because women delay and defer employment for purposes of child care, their ability to access quality jobs and to be entitled to pensions equivalent to men is substantially disaffected.

For that reason, in its brief to the Ianni Commission, L.E.A.F.⁵¹ said: "In L.E.A.F.'s view, mandatory retirement is another example of adverse effect discrimination against women. Because of the special characteristics of women as employees, including their relatively low wages and shorter work histories, and their low levels of pension benefits, a mandatory retirement policy has a disproportionate and discriminatory adverse effect upon women."

Wilson and L'Hereux-Dubé JJ. dissented in the *Quartet, inter alia*, on those grounds.⁵²

10. The issue of increased monitoring of productivity and evaluation systems as necessary replacements for mandatory retirement also does not bear close scrutiny. Nor does the notion that employees in their later years should be "carried" even though not productive. The arguments make several assumptions which are neither demonstrable nor acceptable. First, is that age and incompetence tend to be related. Yet, prior to the *Quartet*, the vast majority of employers who have relied on the age/incompetence correlation in arguing retirement cases have failed.⁵³ The medical and commonsensical evidence, so far at least, has not been supportive. Moreover, there is an incorrect assumption that senior employees presently escape job evaluation (they don't) and that employees tend to continue to work in jobs in which they offer unsatisfactory performance. Moreover, the assumption seems to be made that retiring all workers is preferable to seeking proper job action against the few who are not competent. These are classic discriminatory assumptions;

11. One of the most frequently made arguments in favour of mandatory retirement policies is that its absence stultifies institutions, prevents renewal of spirit and personnel and affects young potential workers unfairly and disproportionately. This reasoning pervades the decision of La Forest J. in *McKinney*.

Once again, the evidence in support of these contentions, with perhaps the exception of tenured environments, is at best tenuous. First, as will be dealt with more fully later, the incidence of over-holding after a normal retirement age is low, and tends to stabilize after a short period of time.⁵⁴ Secondly, even if it were true that the abolition of mandatory retirement increased unemployment amongst the young, or prevented renewal, there is no reason to accept the notion that the burden of solving those problems ought to be placed on otherwise competent and willing older workers. That is classic discrimination; the singling out of one group based on stereotypical characteristics, in order to solve a problem not of their making. If it is the objective of the economy to ensure work for all those who seek it, the appropriate response, as earlier indicated, is to limit employment to a certain number of years, or income, whenever accumulated, rather than by imposing mandatory retirement which is age based.

In any event, the evidence is at best ambiguous and, more realistically, unconvincing, that the opening of jobs at the senior level inevitably implies increased access at junior levels. While that may be true at institutions like universities, it is unlikely to be true in other institutions or industries where complex variables impact on the decision with respect to replacement. Consider, first, the growing phenomenon of replacing human jobs with technology. Second, there is the ever-increasing practice of meeting budget restrictions and deficiencies by reductions in gross employee complements, very often through the attrition of older, retiring workers. On the other hand, in an economy with increased consumer demand, new jobs for young workers would be opened simply because of the requirement for labour force growth to service the increased demand;

12. In fact, it is likely that the abolition of mandatory retirement would have limited impact, perhaps even only symbolic, on the Canadian federal and provincial economies, except for certain specific institutions, like universities. A concise review of the somewhat impressionistic and unreliable evidence that exists on impact, was provided in the evidence in the *Connell* case.⁵⁵ In his report to the Court, Professor Riddell said:

*In assessing the impact on the labour market of abolishing mandatory retirement, one of the important factors to consider is the number of individuals likely to be affected by such a change. Evidence from a Conference Board of Canada Survey (of 222 employers with 1.4 million employees) indicates that [...] for the economy as a whole, approximately 54 percent of the employees work for employers with private pensions and are therefore affected by mandatory retirement policies'. However, the Conference Board Study also reveals that of employees already 55 years of age, over 70 percent will probably leave the employer before age 65 due to early retirement (50%), death (15%), and layoff (6%). Consequently, only a very small fraction of the labour force (about one-fifth of 1%) is likely to be actually constrained by mandatory retirement in any given year (D. Dunlop, Mandatory Retirement Policy, Conference Board of Canada, 1980, p. 7). Other studies have also estimated small impacts from abolishing mandatory retirement. A study of the Economic Council of Canada (C. Kapsalis, Pensions and the Work Decision, 1979) produced an estimate of 0.3% and one by the Ontario Ministry of Labour (Ontario Ministry of Labour, Internal Memorandum, 1985) produced an estimate of 0.45. The small magnitude of effects estimated in these Canadian studies is consistent with the U.S. evidence regarding the impact of the 1979 Age Discrimination and Employment Act which raised mandatory retirement from 65 years to 70 years. A study carried out by the Urban Institute for the U.S. Department of Labour estimated that this Act increased the U.S. labour force by 0.2%."*⁵⁶

Large-scale impact is therefore unlikely.⁵⁷ In fact, in evidence presented to the Board of Inquiry in *Dickason*,⁵⁸ Dr. Frank Reid, Associate Professor in the Department of Economics for Industrial Relations at the University of Toronto, indicated that though there initially is a reduction in the flow of new hires if mandatory retirement is eliminated, the flow of replacement returns to its initial level in either five or ten years. In other words, within a relatively short period of time an equilibrium position is reached as the newly liberated older workers themselves begin to retire;⁵⁹

13. Mandatory retirement eliminates the experience and valuable insight of older workers, particularly in university and pedagogical systems, to the detriment of students and younger colleagues;
14. The elimination of mandatory retirement provides impetus to management to produce more beneficial and flexible incentives and programs to induce earlier, rather than later, voluntary retirement. Programs which induce voluntary retirement are to be preferred to those which do so on a compulsory basis. Moreover the evidence is quite clear that, with few exceptions, employees in most jobs prefer to retire earlier than later and are doing so in ever increasing numbers.⁶⁰ Early retirements also allow for renewal to take place.

Therefore, it is suggested that as a matter of policy and law, individual choice in a voluntary retirement decision is preferable to an arbitrary, mandatory retirement scheme which implicitly denies an individual's capacity and desire. In those job functions or institutional settings in which the absence of mandatory retirement impacts extraordinarily, problems can be relieved by specified exceptions and exemptions, though the onus should be on those seeking exception and the standard to be met must be difficult. One hopes that the Supreme Court's *Quartet* ultimately will be seen simply as providing an exception, for university professors and physicians, to a general rule which proscribes ageism in the guise of mandatory retirement policy. Nothing less than the dignity of the individual is at stake.

ENDNOTES

1. *Vancouver General Hospital and Board of Trustees of Vancouver General Hospital v. Stoffman*, [1991] 1 W.W.R. 577 [hereinafter *Stoffman*]; *Douglas College v. Douglas/Kwantlen Faculty Association, Attorney General of Canada and Attorney General for Saskatchewan*, [1991] 1 W.W.R. 643 [hereinafter *Kwantlen*]; *University of British Columbia v. Connell* [hereinafter *Connell*]; *University of British Columbia v. Harrison*, [1991] 1 W.W.R. 681 [hereinafter *Harrison*]; and *McKinney v. Board of Governors of the University of Guelph* (1990), 76 D.L.R.(4th) 545 [hereinafter *McKinney*].
2. *Canadian Charter of Rights and Freedoms Part I of the Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the Charter].
3. *University of Alberta v. Alberta Human Rights Commission and Olive Patricia Dickason* (14 August 1991), (Alta C.A.) [unreported] [hereinafter *Dickason*].
4. Wilson and L'Hereux-Dubé JJ. dissenting in *McKinney* and they and Cory J. in *Stoffman*.
5. *McKinney*, *supra* note 1 at 661-673, La Forest J.
6. *Ibid.* at 641-643.
7. *Ibid.*
8. *Ibid.* at 661.
9. Even if the matter were considered to be mere dicta, there is growing evidence that fully reasoned and argued dicta of the Supreme Court will be treated as binding on lower courts. For a view of the binding nature of judicial dicta in the Supreme Court of Canada, see Chouinard, J. in *Sellars v. R.*, [1980] 1 S.C.R. 527; See A. Peltoma, "Obiter Dictum of the Supreme Court of Canada: Does it Bind Lower Courts?" (1982) 60 Can. Bar. Rev. 823. For an exception, see *Pollock v. The Queen* (1981), 81 D.T.C. 5293.
10. *Supra* note 3.
11. *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2.
12. For a comprehensive review of age discrimination and mandatory retirement issues in Canada, see M.E. Atcheson & L. Sullivan, "Passage to Retirement: Age Discrimination and the Charter" in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985). Much of

the data here is taken from there. For the details, see page 240 and following.

13. *Infra* note 26.
14. *The Canada Act*, S.C. 1982, c. 11, s. 92(2).
15. *Human Rights Code*, C.C.S.M. 1987, c. H.175, s. 14(1).
16. *McKinney*, *supra* note 1 at 673 and 676.
17. *Ibid.* at 670.
18. *Age Discrimination and Employment Act*, 29 U.S.C. Para. 621 *et seq* (1967).
19. *The Ontario Human Rights Commission, v. The Borough of Etobicoke*, [1982] 1 S.C.R. 202.
20. *Ibid.* at 208.
21. *Ibid.* at 209.
22. *Ibid.* at 214.
23. See *Winnipeg v. Ogelski*, [1986] 6 W.W.R. 289; *Finlayson v. Winnipeg Police Department*, [1983] 3 W.W.R. 117 (Man.C.A.); *Greyhound v. McCreary* (1987), 78 N.R. 192 (F.C.A.), and *Voyageur Colonial v. Can. Human Rights Comm.* (1980), 1 C.H.R.R. D/239.
24. *Air Canada v. Carson*, [1985] 1 F.C. 209 (F.C.A.); but see *Parkinson*, *infra* note 35. Also, see *Campbell v. Air Canada* (1981), 2 C.H.R.R. D/602; *Stevenson v. Air Canada* (1982), 3 C.H.R.R. D/021; *Air Canada v. Stevenson* (1982), 3 C.H.R.R. D/1025; *Chambers v. C.P. Air* (1982), 3 C.H.R.R. D/1029; *Lamont v. Air Canada* (1982), 3 C.H.R.R. D/1128.
25. See cases cited in *supra* notes 23 and 24.
26. See Manitoba, *Report of the Commission on Compulsory Retirement (Manitoba)*, (February, 1982) Commissioner: M. A. Rothstein, Q.C.; Ontario, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Government of Canada, October, 1985) (Chair: J. P. Boyer) at 17-24; Ontario, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Government Canada, Queen's Printer) at 9-11; Ontario, *Report of the Ontario Task Force on Mandatory Retirement: Fairness and Flexibility in Retiring from Work* (Ontario: Queen's Printer, 1987) (Chair: R.W. Ianni).

27. *Supra* note 15.
28. Unreported decision of an Adjudication under the Manitoba *Human Rights Act*, by Professor Jack R. London delivered June 2, 1977, extensively referred to, *inter alia*, in *McIntyre*, *infra* note 29.
29. *McIntyre v. The University of Manitoba*, [1981] 1 W.W.R. 696.
30. *Ibid.* at 702.
31. *Ibid.* at 710.
32. *Newport v. Manitoba*, [1982] 2 W.W.R. 254.
33. *Civil Service Act*, R.S.M. 1970, c. 110.
34. *Civil Service Superannuation Act*, R.S.M. 1970, c. 120.
35. *Parkinson v. Health Sciences Centre*, [1982] 2 W.W.R. 102; leave to appeal to S.C.C. refused 18 Man.R. (2d) 31.
36. *Ibid.* at 113.
37. *Supra* note 15.
38. *Winnipeg School Division No. 1 v. Craton*, [1985] 6 W.W.R. 166.
39. *Public Schools Act*, S.M. 1980, c. 33, s. 50.
40. *Supra* note 38 at 172.
41. *McKinney*, *supra* note 1 at 664.
42. But see *Canada Employment and Immigration Commission v. Tétreault-Gadoury* (1991), 81 D.L.R.(4th) 358, in which the Supreme Court of Canada found the age restriction in section 31 of the *Unemployment Insurance Act*, S.C. 1971, c. 48, to violate section 15(1) of the *Charter* and not to survive a section 1 analysis because of a lack of proportion. La Forest J., at pages 369 and 372, seems to limit the reasoning in, and effect of *McKinney* to "closed environments" like universities. Yet, the language used in *McKinney* is much broader. Clearly, there is an absence of clarity in the Courts' overall approach to the question of ageism.
43. *McKinney v. The University of Guelph* (1988), 24 O.A.C. 241 at 285 (Ont. C.A.).
44. *Employment Protection (Consolidation) Act* (U.K.), 1978, c. 44, s. 64(1)(b).

45. (1935) 1949 Stat. 620.
46. 29 U.S.C. Para. 621 *et seq* (1967).
47. *Age Discrimination in Employment Act of 1967*, Pub. L. No. 95-256, 92 Stat 189 (1978).
48. *Age Discrimination in Employment Act of 1967*, Pub. L. No. 99-952, ICO Stat 3342 (1986).
49. Ontario, *Report of the Ontario Task Force on Mandatory Retirement: Fairness and Flexibility in Retiring from Work*, Part 2 (Ontario: Queen's Printer, 1987) (Chairperson R. W. Ianni) (The Ianni Commission).
50. The converse is true in workplaces which have limited tenured jobs, like universities, in which women have been unrepresented. If the men overhold their tenured positions the inherent systemic discrimination necessarily continues since no places become available for women to access. The same point is accurate, as will be seen *infra*, on the whole question of renewal within closed systems like universities.
51. Women's Legal Education and Action Fund, *supra* note 49 at 335.
52. See *McKinney*, *supra* note 1 at 689.
53. See *Greyhound v. McCreary and Can. Human Rights Commission*, *supra* note 23, and *Etobicoke*, *supra* note 19.
54. The Ianni Commission *supra* note 49 at 18, estimated that only 25,000 to 50,000 persons would stay on after normal retirement age in a matured system if Ontario banned mandatory retirement; that is, less than 1% of the **total** provincial labour force.
55. *Connell and Harrison v. University of British Columbia* (1988), 21 B.C.L.R. (2d) 145 (B.C.C.A.).
56. *Ibid.* at 159.
57. That was also the conclusion of the *Rothstein Commission* (Manitoba, 1982) *supra* note 26.
58. *Dickason v. The Governors of the University of Alberta*, 9 Can. Hum. Rts Rep., (January, 1988) Paras. 34905-34969.
59. *Ibid.* Note, in particular, the evidence presented at para. 34943.
60. *Supra* note 49.