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LEGALIZED AGE DISCRIMINATION

THOMAS R. KLASSEN* AND C.T. GILLIN**

RÉSUMÉ

La retraite, et tout particulièrement la retraite obligatoire, a pris de l'importance dans la politique gouvernementale du Canada. Cet article passe en revue et analyse la jurisprudence pertinente qui a été soigneusement formulée, spécialement par la Cour suprême du Canada, au cours des dernières décennies. L'article considère brièvement les décisions majeures survenues avant la *Charte des droits et libertés* dans les années quatre-vingt, examine les changements intervenus en 1990 avec l'application de la Charte, analyse les développements juridiques qui ont eu lieu au cours des cinq dernières années, et termine par une analyse des répercussions de ces changements juridiques sur les politiques gouvernementales. Nous maintenons que la Cour suprême a eu tort dans ses décisions initiales sur la Charte, qu'elle s'est appuyée sur des raisonnements socio-économiques comportant des lacunes et n'a pas suffisamment pris en considération les droits fondamentaux de la personne. Nous concluons que la retraite obligatoire est une forme de discrimination juridique et que la lutte contre les lois qui perpétuent la discrimination fondée sur l'âge s'inscrit dans la droite ligne des efforts historiques pour bâtir une société équitable.

An aging population—in particular, the aging of the baby-boom generation—along with the changing character and organization of work,¹ have made retirement-related issues prominent in the public policy agenda. Among the most controversial of these is mandatory retirement, that is, the age at which workers are no longer under the protection of human rights legislation and therefore employers can unilaterally end their employment. Upon attaining office in late 2003, Prime Minister Paul Martin asserted, “I don’t believe in mandatory retirement” and called for public debate.² One quick response came from the president of the Canadian Auto Workers, who defended mandatory retirement as providing “orderly employee turnover”, job opportunities for younger workers, and “a certain degree of job security for younger workers,

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1. These changes include the increased presence of women in the paid labour force, the mobility of the work force, a growing marginal or underground sector, a deterioration of living standards, and ongoing technological developments.
2. Susan Delacourt, “Martin Opposes Mandatory Retirement” *The Toronto Star* (20 December 2003) A10.

especially during periods of economic downturn”.³ In August 2004, the Ontario Ministry of Labour announced and initiated a consultation process on revising laws that permit compulsory retirement.⁴

Mandatory retirement policies are usually not determined by laws directly addressing the age at which an employee must leave paid employment; rather, such policies generally reflect employment practices embodied in pension plans and collective agreements, within the context of human rights or other legislation, overseen by the judicial and quasi-judicial systems. Nor are there consistent laws across Canada concerning age and work. For example, employers covered by the *Canadian Human Rights Act* can legally force workers to retire when they reach “the normal age of retirement” for employees performing the same type of work.⁵ In Ontario, British Columbia, and several other provinces it is legal to retire workers (who are employees of provincially regulated employers) at age 65. Quebec and Manitoba (with some exceptions) prohibit mandatory retirement at any age, while in New Brunswick the termination of employment is linked to pension plan provisions.

The Supreme Court of Canada has had little difficulty determining that mandatory retirement is discriminatory in the sense that it violates section 15 of the *Canadian Charter of Rights and Freedoms*; the debate has largely focused on whether mandatory retirement is justifiable as a reasonable limit in light of section 1.⁶ In its rulings in the past two decades on age-based discrimination in employment, specifically mandatory retirement, the Supreme Court of Canada has made rulings that—often surprising and sometimes inconsistent—provide the judicial foundation for the current mandatory retirement regime.

Our objective in this article is to review the jurisprudence that has been crafted by the Supreme Court over the past two decades. In doing so, we illuminate the framework that allows employers, unions, and others to treat older workers in a discriminatory manner, and has given rise to the current social policy controversies. We proceed in three steps. First, we briefly consider the pre-*Charter* decisions on forced retirement by the Supreme Court to analyze the grounds of judicial determination. Second, we trace the shift that occurred in 1990 with the application of the *Charter* to such cases. Third, we examine the developments of the past five years in the judicial framework

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3. Buzz Hargrove, Comment, “Mandatory Retirement Debate” *The Globe and Mail* (29 December 2003).
 4. Ministry of Labour, *Providing Choice: A Consultation Paper on Ending Mandatory Retirement* (Toronto: Ministry of Labour, August 2004).
 5. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 1(c).
 6. For example, in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [McKinney], as discussed below, the majority of the Supreme Court determined that mandatory retirement violated the rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms* but was justified as a reasonable limit under section 1.

of mandatory retirement. We conclude the paper with a discussion of the social policy implications of the legal shifts of the past two decades.

PRE-CHARTER SUPREME COURT DECISIONS

Before the existence of the *Charter of Rights and Freedoms*,⁷ emergent federal and provincial human rights legislation, employment laws, common law, and judicial findings governed mandatory retirement. Comprehensive human rights legislation was instituted initially in the 1960s (for example, the *Canadian Bill of Rights* passed in 1960 and the first comprehensive *Ontario Human Rights Code* in 1961). It was brought about largely in response to the civil rights movements that challenged the stigmatizing effects in the workplace of race and ethnicity, and—much later—of sexual orientation and other putatively objective conditions that limit opportunities and freedoms associated with minority status. The result in both federal and provincial legislation was a number of grounds—race, age, gender, disability, and others—on which discrimination, that is, the withholding of advantages available to other workers or applicants for employment, was prohibited.

The leading Supreme Court case of the 1980s that focused on mandatory retirement revolved around the question of *bona fide* occupational requirements (BFOR). In *Ontario Human Rights Commission et al. v. Borough of Etobicoke*,⁸ the Supreme Court staked out a progressive position on ageism and mandatory retirement. The case focused on the legality of mandatory retirement at age 60 for Ontario firefighters. Under the then Ontario human rights legislation, workplace discrimination based on age was illegal, with the protection having an upper limit of age 65 for the purposes of employment; however, the Code also provided that an employer may discriminate on the basis of age when age is a *bona fide* qualification or requirement.⁹ On behalf of a unanimous Court, Justice McIntyre wrote,

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 ... 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 ... may be validly imposed ...¹⁰

7. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

8. *Ontario Human Rights Commission et al. v. Borough of Etobicoke*, [1982] 1 S.C.R. 202 [*Etobicoke*].

9. *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, s. 4(6), provided as follows: "The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age ... do not apply where age ... is a *bona fide* occupational qualification and requirement for the position or employment."

10. *Etobicoke*, *supra* note 8 at 209.

Keeping in mind the qualified language concerning circumstances and risks, nonetheless, in this case the Court rejected ageist stereotypes and suggested that individual capacity to work, or the demonstrated limits of that capacity, must be the basis of judicial decisions. In *Etobicoke* the Court held that the employer had not shown that compulsory retirement was a BFOR for the employment concerned.

The Court also provided a standard for when a *bona fide* occupational requirement can be used to justify mandatory retirement. The retirement rule or practice must meet both a subjective and an objective test. On behalf of the Court, Justice McIntyre wrote that, in order to be a *bona fide* occupational qualification and requirement,

the limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not the ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the [human rights] Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.¹¹

This decision identified three key legal standards: (1) that it may be impossible for an employer to defend mandatory retirement on largely economic grounds, (2) that BFORs must meet both a subjective and objective test, (3) and that human rights are fundamental and cannot be contractually varied.

In 1985, in *Winnipeg School District No. 1 v. Craton*,¹² the Supreme Court considered a conflict between Manitoba's *Human Rights Act*,¹³ which prohibited age discrimination, and the *Public Schools Act*,¹⁴ which empowered school boards to establish a compulsory retirement age. A teacher won a declaration from the trial court that the human rights legislation took precedence over the *Schools Act* and therefore, requiring mandatory retirement at age 65, as provided for in her collective agreement, contravened the *Human Rights Act*. The trial court's decision was affirmed on appeal to the Manitoba Court of Appeal, and again by the Supreme Court of Canada.

The Supreme Court, in *Craton*, once again defended the special nature of human rights legislation¹⁵ and continued to express the general antipathy toward imposed retirement first articulated in *Etobicoke*. The Court confirmed a legal presumption against forced retirement, with the BFOR exception available under strict conditions. In the late 1980s, as other mandatory retirement cases made their way through the appellate courts of Ontario, British Columbia, and Alberta, it appeared likely to some that the Supreme

11. *Etobicoke*, *supra* note 8 at 208.

12. *Winnipeg School District No. 1 v. Craton*, [1985] 2 S.C.R. 150 [*Craton*].

13. *Human Rights Act*, 1974 (Man.), c. 65 (C.C.S.M., c. H175).

14. *Public Schools Act*, 1980 (Man.), c. 33 (C.C.S.M., c. P250, s. 50).

15. *Craton*, *supra* note 12 at 6.

Court would eliminate compulsory retirement altogether under the newly enacted *Charter*.¹⁶

LEADING DECISIONS UNDER THE *CHARTER*

The *Charter* was enacted in 1982, but section 15, which guarantees equality rights, did not come into effect until 1985.¹⁷ One of its effects was a substantial expansion of individual rights in Canada, for example, with regard to same-sex marriage and sexual orientation. In the early 1980s, some anticipated that, building on the earlier decisions emphasizing human rights, the new constitutional regime would lead to a view of forced retirement at an arbitrary age as counter to the new prominence of individual rights.¹⁸

A number of cases designed to test the application of the *Charter* reached the Supreme Court during the late 1980s.¹⁹ In 1990, the Supreme Court issued its first decisions under the *Charter* focused on mandatory retirement: *McKinney v. University of Guelph*,²⁰ *Harrison v. University of British Columbia*,²¹ and *Stoffman v. Vancouver General Hospital*.²² In all three cases, the Court was asked to rule if mandatory retirement policies could violate section 15(1) of the *Charter*'s "equal protection and equal benefit" rights, but nevertheless be saved by section 1 as "reasonable limits". Of the three, *McKinney* is the lead decision and is the focus of our analysis.

In 1987, the case of eight professors and one university librarian who were facing forced retirement because they had reached the age of 65 was heard by the Court of Appeal for Ontario in *McKinney v. University of Guelph*.²³ The Court of Appeal had

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16. Neil Finkelstein and Geoffrey Howard, "Retirement as a Case Study" (1998) 9:2 *Advocates' Q.* 142–59. In part, the optimism about change was fuelled by developments in the United States. There, the Age Discrimination in Employment Admendments of 1986 (Public Law 99-592) amended the *Age Discrimination in Employment Act* of 1967 to remove the existing 70-year upper age limit applicable to employees who are covered under the *Act*.
 17. Section 15 of the *Charter* provides as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... age ..."
 18. M. David Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?" (1992) 55:1 *Law and Contemp. Probs.* 167–99.
 19. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994).
 20. *McKinney*, *supra* note 6.
 21. *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451.
 22. *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483. Also decided in the same year, *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 was ostensibly a mandatory retirement case, but the legal issues raised were preliminary ones. The arbitrator, in his award, argued that the *Charter* applied to Douglas College as a Crown agency and that the collective agreement amounted to "law" subject to review under the *Charter*. These findings formed the basis of the appeal. Neither the arbitrator nor the justices, on appeal, addressed the issues of whether the equality clause was violated or whether the violation was reasonable.

held that the *Charter* did not apply to universities because they were not part of government. The Ontario court further found that the provincial *Human Rights Code*,²⁴ under which age protection for purposes of employment expires at age 65, did not offend the *Charter*.

When the case reached the Supreme Court of Canada,²⁵ the justices overwhelmingly agreed that the differential treatment permitted by the restricted definition of age in the *Code* offended the equality rights guaranteed under section 15(1) of the *Charter*. Thus, at its core, this case was about discrimination.²⁶ The reasoning of the majority in *McKinney* was that discrimination based on the enumerated grounds specified in the *Charter* is a social evil, and mandatory retirement deprives employees of a benefit under the *Code* based on age, a ground explicitly identified in the *Charter*. The majority determined, however, that the *Charter* could not rectify all evils. "Only government requires to be constitutionally shackled to preserve the rights of the individual", Justice La Forest wrote on behalf of the majority.²⁷ The *Charter* protects individuals from governmental abuse of power, not from the abuse of private power. Potential abuses of private power may be regulated by governmental agencies, such as human rights commissions, established to prevent, limit, and control private offences against the rights of individuals. In short, since the universities were not government for purposes of the *Charter*, its provisions did not directly apply to them, and relying on section 15(1) could not eliminate compulsory retirement at age 65.

Notwithstanding the determination that the *Charter* did not apply, the Court considered the issue of mandatory retirement socially pressing and furthered its analysis by examining the constitutional status of the human rights legislation. In other words, the Court focused not only on the equality rights guaranteed in the *Charter* but also on whether Ontario's *Human Rights Code*,²⁸ which permits employment discrimination against employees at age 65, met the test of constitutional validity contained in the *Charter*. In Ontario, section 4(1) of the *Human Rights Code*, 1981 (now section 5(1)) provided for equal treatment:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.

23. *McKinney v. University of Guelph*, [1987] 63 O.R. (2d) 1.

24. *Human Rights Code, 1981*, S.O. 1981, c. 53, ss. 4(1), 9(a) [now ss. 5(1), 10(a)].

25. *McKinney*, *supra* note 6.

26. The justices recognized that, based on *Andrews v. Law Society of British Columbia*, [1989] 1 S.R.C. 143, the restricted definition of age constitutes discrimination under section 15(1) of the *Charter*.

27. *McKinney*, *supra* note 6 at 262.

28. *Human Rights Code*, *supra* note 24.

For the purposes of employment, however, the Ontario *Code* specified that “‘age’ means an age that is eighteen years or more, except in subsection 4(1) where ‘age’ means an age that is eighteen years or more and less than sixty-five years”.²⁹ The result is that employers could force employees into retirement at age 65 *and* that employers did not have to provide equal treatment and opportunities in such matters as work conditions, work load, salary, and benefits to employees who continue to work after age 65.

Having found the differential treatment based on age an affront to the principle of equality, the Court rationalized the discrimination with a socio-economic argument. Although the Court determined that the Ontario *Code* had the effect of permitting forced retirement and thus discriminated on the basis of age contrary to section 15(1) of the *Charter*, such a policy was saved by section 1 of the *Charter* as a “reasonable limit”. The majority of the Court argued that retirement is a by-product of modern society, that “65 has now become generally accepted as the ‘normal’ age of retirement” and that “mandatory retirement has become part of the very fabric of the organization of the labour market in this country”.³⁰ Moreover, the majority held that age is to be distinguished from the other enumerated grounds. Justice La Forest wrote, “There is a general relationship between advancing age and declining ability”, whereas no such correlation exists between any of the other specified grounds (*e.g.* race, colour, or religion) and ability.³¹ Justice La Forest argued that in allocating social benefits, it is acceptable to balance the competing needs of different generations.

Justice La Forest also established that the context for the discussion of retirement policy is the importance of work in society.³² He cited *Reference Re Public Service Employee Relations Act (Alta.)*:³³

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.³⁴

Given its fundamental role in human life, work cannot be taken away without significant justification. However, Justice La Forest’s view was that compulsory retirement at age 65 is reasonable because it has become part of the normal structure of the organization of labour in Canadian society. Based on the Ontario appellate court’s arguments in *Re McKinney*, the Supreme Court of Canada saw mandatory retirement

29. *Ibid.*, s. 9(a) [now s. 10(a)].

30. *McKinney*, *supra* note 6 at 294–95.

31. *Ibid.* at 660.

32. The following discussion is indebted to Colin G.M. Gibson and Lindsie M. Thomson, “Age Discrimination: An Update” (Materials prepared for the Employment Law Conference, 2003, Continuing Legal Education) [unpublished].

33. *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

34. *McKinney*, *supra* note 6 at 278.

as allowing deferred compensation, facilitating recruitment, and avoiding continuous productivity reviews, while permitting both employers and employees to plan for their financial futures. The key legal elements of *McKinney v. Guelph* are summarized in Table 1 below.

TABLE 1:
SUMMARY OF THE OPINIONS OF THE SUPREME COURT OF CANADA IN *McKINNEY*
(1990)

	Opinions			
	La Forest, Dickson, Gonthier, and Sopinka	Cory	Wilson	L'Heureux- Dubé
Does <i>Charter</i> apply to retirement provisions of universities?	No	Yes	Yes	No
If yes, does mandatory retirement violate s. 15 of <i>Charter</i> ?	Yes	Yes	Yes	No need to answer
Is the violation justifiable under s. 1 of <i>Charter</i> ?	Yes	Yes	No	No need to answer
Does s. 9 of the <i>Ontario Human Rights Code</i> violate s. 15 of <i>Charter</i> ?*	Yes	Yes	No	Yes
Is the violation justified under s. 1 of <i>Charter</i> ?	Yes	Yes	No	No

* Section 9 of the *Ontario Human Rights Code* protected against discrimination in employment of persons ages 18 and above but less than 65.

The dissenting voices in the Supreme Court decision, the two female justices, took issue with key points in the majority opinion. Justice Bertha Wilson reasoned that section 9(a) of the *Ontario Human Rights Code* was not saved by section 1 of the *Charter*. She argued that because the *Code* fails to distinguish between those who are able to work and those who are not, a rational connection between the policy and its objectives had not been adequately established. She wrote that section 9(a)

operates to perpetuate the stereotype of older persons as unproductive, inefficient and lacking in competence ... reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with.³⁵

Moreover, Justice Wilson remained unpersuaded by her majority colleagues that free collective bargaining justified the discrimination, noting "the vast majority of the workforce is unorganized".³⁶ She remarked further that immigrants, women, and the

35. *Ibid.* at 413.

36. *Ibid.* at 415.

unskilled—“the most vulnerable employees”—would be the most affected by the lack of legislative protection.³⁷

Similarly, Justice Claire L’Heureux-Dubé found that section 9(a) of Ontario’s *Code* was not saved by section 1 of the *Charter*. She argued that the statute’s restricted age definition “is inconsistent with the fundamental values enshrined in s. 15(1): the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based upon individual ability”.³⁸ In the absence of any evidence concerning an individual’s ability, age discrimination is unwarranted. The reach of section 9(a) is overly broad, prohibiting not only complaints of forced retirement but of any form of employment discrimination, including hiring, demotion, transfer, or salary reduction. In a twist on Justice La Forest’s emphasis on the importance of work, Justice L’Heureux-Dubé wrote,

[I]f “in a work-oriented society, work is inextricably tied to the individual’s self-identity and self-worth,” does this mean that upon reaching 65 a person’s interest in self-identity and stake in self-worth disappear? That is precisely when these values become most crucial, and when individuals become particularly vulnerable to perceived diminutions in their ability to contribute to society.³⁹

In assessing the material repercussions of mandatory retirement, she emphasized that women would suffer disproportionately because of lower lifetime earnings and lower or no pension income.

Two years later, in 1992, the analysis provided by the majority in *McKinney* continued to dominate the Court’s reasoning about forced retirement. In *Dickason v. University of Alberta*,⁴⁰ the issue of mandatory retirement in the university sector was once again raised when a faculty member challenged mandatory retirement under Alberta’s human rights legislation.⁴¹ The parties to the dispute agreed that the policy of compulsory retirement contravened the provincial *Act*; the question was whether the practice was constitutionally acceptable. The majority concluded that the university’s mandatory retirement policy was reasonable and justifiable.

In *Dickason*, the majority of the Court was guided by the analysis previously developed in *McKinney*.⁴² Justice Cory wrote the majority opinion and argued that a collective agreement that includes mandatory retirement at a fixed age provides evidence of the reasonableness of compulsory retirement. Once again, age is conceived as distinguishable from other grounds of discrimination, reducing the level of defence needed to

37. *Ibid.*; also, Justice L’Heureux-Dubé noted, “The adverse effects of mandatory retirement are most painfully felt by the poor” (at 433).

38. *Ibid.* at 424.

39. *Ibid.* at 430–31.

40. *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 [*Dickason*].

41. *Individual’s Rights Protection Act*, R.S.A. c. 1–2.

42. *Dickason*, *supra* note 40 at 1127–28.

justify forced retirement. As in *McKinney*, the socio-economic objectives of the retirement policy were seen as sufficient to accept the limitation on the *Charter*'s guarantee of equality.⁴³ The Court was again divided, with dissents from the female justices L'Heureux-Dubé and McLachlin, as well as Sopinka—the last having formerly been part of the majority in *McKinney*. Overall, the Court confirmed its shift on the issue of mandatory retirement from a broad to a narrow interpretation of the provisions of human rights codes.⁴⁴

The most recent Supreme Court of Canada decision directly addressing mandatory retirement is, at the time of this writing, a decade old. In 1995, the Court returned to questions regarding *bona fide* occupational requirements in *Large v. Stratford (City)*.⁴⁵ A police officer in Stratford, Ontario, faced mandatory retirement at age 60—a provision in his collective agreement. The Ontario Human Rights Board of Inquiry found that the provision of the collective agreement contravened the *Human Rights Code*. The Divisional Court and the Court of Appeal upheld the findings of the Board. However, the Supreme Court overturned the decisions made below it and allowed the City of Stratford's defence of the mandatory retirement policy based substantially on the fact that the policy was a provision of the collective agreement and was union-driven.⁴⁶ Moreover, the Court rejected the idea that individual accommodation was necessary, conceiving it as an "impermissible extension" of legal principles set out in earlier cases.⁴⁷

What is striking is that the *Large* ruling is unanimous and contradictory in its result to *Etobicoke*. In the 1982 *Etobicoke* decision, before the *Charter* took effect, the Supreme Court emphasized the human rights legislation was fundamental law and that clear proof of danger to public safety was required to establish the BFOR. In 1995, under the aegis of the *Charter*, the *Large* decision emphasized that mandatory retirement policy was justified as a provision of a collective agreement and that the BFOR does not require individual accommodation. The presumption had shifted from protecting the individual right to work and the dignity associated with that to assuming contrac-

43. Justice Cory argued that, in the case of the University of Alberta, the compulsory retirement policy was based on collective bargaining, presumably reflecting the best interests of the members of the faculty association, and provided current job security (tenure) and future financial security (a pension). *Ibid.* at 1131–34.

44. Shirish P. Chotalia, "The Supreme Court and Mandatory Retirement: Sanctioning the Status Quo" (1993) 4:3 *Const. Forum Const.* 67–70.

45. *Large v. Stratford (City)*, [1995] 2 S.C.R. 733 [*Large*].

46. *Ibid.* at para. 22, *per* Justice Sopinka for the majority. Note reference citations for Supreme Court judgments change from page numbers to paragraph numbers, following reporting practice on the Supreme Court judgments website at <<http://www.lexum.umontreal.ca/csc-ccc/en/index.html>>.

47. *Ibid.* at para. 33. The Court argued that individual accommodation would be inconsistent with the BFOR defence as determined in *Bhinder v. CN*, [1985] 2 S.C.R. 561, *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

tual arrangements justify at least some types of age discrimination. The underlying legal implication was that just because it is possible for an employer to avoid a discriminatory practice, it does not mean that it is necessary to do so.⁴⁸ *Large* confirmed the general trend for the Supreme Court to leave unchanged mandatory retirement regulations and legislation.

As previously noted, the Supreme Court established a BFOR test in *Etobicoke*. In *Large*, the majority of the Court held that an employer could meet the subjective “good faith” element of the test without “belief in the necessity of the work-related requirement” or arrangement, especially when the rule was a product of collective negotiation.⁴⁹ Moreover, the objective element requiring that the rule be “reasonably necessary” could be met without requiring the employer to adjust job duties or individually test employees.⁵⁰ In short, the Court’s reasoning in *Large* weakened the standard articulated in *Etobicoke*. The rule of necessity became merely a rule of relevance. Under *Large*, simply demonstrating some relevance between the policy and the purposes of the enterprise was sufficient; the employer was not held to a higher standard of demonstrating the necessity of the mandatory retirement policy or the difficulties in designing a less burdensome policy, such as adjusting job duties or testing individuals.⁵¹ The legal analysis in *Large* was generally consistent with the pragmatic socio-economic analysis found in *McKinney* and companion cases.

SUBSEQUENT JURISPRUDENCE: A RENEWED EMPHASIS ON HUMAN RIGHTS?

Tétreault-Gadoury v. Canada (Employment and Immigration Commission),⁵² decided in the wake of *McKinney* in 1991, highlights the importance of a case-by-case consideration of the Court’s position on age discrimination. The case, while not about mandatory retirement, does speak to the underlying issues of equity and the dignity of aging persons. Marcelle Tétreault-Gadoury lost her job and was denied ordinary unemployment insurance benefits on the basis that she was over 65. Justice La Forest, writing on behalf of a Court united in its conclusions, found that section 31 of the *Unemployment Insurance Act*⁵³ of 1971 violated the *Charter* in terminating benefits at age 65. Justice Forest wrote,

The most harmful and singular aspect of section 31 of the Act is that it permanently deprives the applicant, and any other person of her age, of the status of a socially insured person by making her a pensioner of the state, even if she is still looking for

48. David Beatty, “The Canadian Conception of Discrimination” (1996) 4 C.L.E.L.J. 263–82 [Beatty].

49. *Large*, *supra* note 45 at para. 23.

50. Beatty, *supra* note 48 at 268–69.

51. See also M.C. Crane, “Human Rights, *Bone Fide* Occupational Requirements and the Duty to Accommodate: Semantics or Substance?” (1996) 4 C.L.E.L.J. 209–32 [Crane].

52. *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 [Tétreault-Gadoury].

53. *Unemployment Insurance Act*, 1971, S.C. 1971–72, c. 48.

a new job. Regardless of her personal skills and situation, she is as it were stigmatized as belonging to the group of persons who are no longer part of the active population ...⁵⁴

The Court's consideration of this case soon after *McKinney* demonstrated that the specific facts of each situation need to be examined, that employers could be required to justify employment policies, and perhaps that its earlier decision was not intended to provide a blanket judicial sanction of mandatory retirement. The Court expressed its concern with the "insidious stereotype" of ageism, whether it results in intentional or unintentional ("adverse impact") discrimination, and articulated a special concern for economically vulnerable older citizens: "The most unfortunate aspect of s. 31 is that it has the effect of denying unemployment benefits precisely to those who need them most".⁵⁵ To what extent the Court's words hold more rhetorical or substantive power will be discussed below. First, we need to consider the nature of the connection between constitutional and human rights principles as they arise in jurisprudence and apply to forced retirement.

The 1999 *Meiorin* decision addresses the BFOR issue and introduces a discussion of a more unified approach. In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*,⁵⁶ the Court strengthened the standards to be met to establish a *bona fide* occupational requirement and emphasized a human rights approach to such cases. Justice MacLachlin (as she was then), writing for the Court, overturned the Court of Appeal and upheld the arbitrator's determination to reinstate a female firefighter who did not meet the aerobic tests designed by her employer. In doing so, Justice MacLachlin focused on the discriminatory effect of the impugned law, de-emphasizing the different legal approaches to the analyses from a *Charter* or a human rights perspective. She wrote, "I see little reason for adopting a different approach when the claim is brought under human rights legislation which, while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the *Charter*".⁵⁷

Justice MacLachlin argued for a

unified approach that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate ...⁵⁸

54. *Tétreault-Gadoury*, *supra* note 52 at 40.

55. *Ibid.* at 46.

56. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 2 S.C.R. 3 ["*Meiorin*"].

57. *Ibid.* at para. 48.

58. *Ibid.* at para. 50.

The emphasis on a stricter standard is a shift away from the 1995 decisions, which accepted a lower standard of defence of age discrimination.⁵⁹ Justice MacLachlin reinforced the importance of a strict approach by noting employers' obligations to take individual and group differences into account. "By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible".⁶⁰ The Court's focus seems to be shifting toward requiring employers to accommodate the potential contributions of all employees based upon the right to have their human dignity acknowledged in practical everyday employment situations—among other places. The jurisprudence in *Meiorin* is based in part on a case decided earlier the same year, *Law v. Canada*.

In *Law v. Canada (Minister of Employment and Immigration)*,⁶¹ Justice Iacobucci, writing on behalf of the Court, focused on the goal of assuring human dignity as a way of defining the more abstract concepts of equality and discrimination. Relying on *Rodriguez v. British Columbia*,⁶² Justice Iacobucci wrote,

[T]he equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment ... It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences ... Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.⁶³

In specific discussion of the purpose of section 15(1), the Court emphasized the importance of "essential human dignity and freedom" and rejected differential treatment based on stereotypical characteristics that has the effect of "perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being".⁶⁴ The Court also noted that under the *Charter's* equality guarantee, dignity relates not to status *per se*, but "concerns the manner in which a person legitimately feels when confronted with a particular law".⁶⁵ It is notable that in *Law* the Court's review of jurisprudence relied on a number of cases but made only minor use of the *McKinney* decision. In spirit, if not by direct attribution, the unani-

59. Also see Beatty, *supra* note 48, and Crane, *supra* note 51.

60. *Meiorin*, *supra* note 56 at para. 68.

61. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*].

62. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

63. *Law*, *supra* note 61 at para. 53.

64. *Ibid.* at para. 51.

65. *Ibid.* at para. 53.

mous Court in *Law* echoes the voices of the dissents in *McKinney* and of human rights principles.

That the current judicial situation concerning mandatory retirement and age-based discrimination is ripe for change is illustrated by the fact that some lower courts and arbitration bodies are urging the Supreme Court of Canada to reconsider the *McKinney* decision. In 2000, an arbitration board in a case concerning the Greater Vancouver Regional District rejected the argument that the law was settled by *McKinney* and ruled that the Supreme Court of Canada contemplated a case-by-case determination. The arbitration award was upheld by the British Columbia Court of Appeal in *GVRD Employees' Union v. Greater Vancouver Regional District*.⁶⁶ The majority of the appellate court upheld the arbitrator's finding that the employer was required to justify its mandatory retirement policy under section 1 of the *Charter*, but also urged the Supreme Court to reconsider the entire issue. In *GVRD*, Madam Justice Prowse wrote,

In the event that *McKinney* is found to stand for the proposition that all mandatory retirement policies in the public sector which are not in contravention of provincial human rights legislation are, therefore, justified under s. 1 of the *Charter*, I would urge the Supreme Court of Canada to reconsider this issue ... The extent to which mandatory retirement policies impact on other equality rights, and on the mobility of the workforce, have become prominent social issues.⁶⁷

It remains an open question whether the Supreme Court of Canada is moving definitely in the direction of giving greater weight to human rights principles.⁶⁸ Despite the Court's expressions of concern about ageism (identified above, for example, in *Tétrerault-Gadoury*), Anderson raises the question whether government, through its human rights legislation, is adequately redressing human rights abuses in the private sector.⁶⁹ Nevertheless, Anderson argues, the Court's acceptance of collective agreements as probative of the reasonableness of a practice challenged as discriminatory, gives deference to private policies at the expense of human rights. The broad vision of social and economic rights and a special concern for disadvantaged groups are lost. The human rights codes "do not 'fill the *charter* gap' because they fail to implement a more social democratic vision of human rights".⁷⁰ Those aged 65 and older constitute an economically disenfranchised minority with fewer statutory protections than younger employees. It is a systemic issue, inadequately addressed by legal

66. *GVRD Employees' Union v. Greater Vancouver Regional District* 2001 BCCA 435 [GVRD].

67. *Ibid.* at para. 127.

68. It has been argued that despite *Law v. Canada*, the Supreme Court continues to apply a restrictive interpretation of human dignity to persons with disabilities. See Ena Chadha and Laura Schatz, "Human Dignity and Economic Integrity for Persons with Disabilities: A Commentary on the Supreme Court's Decisions in Granovsky and Martin" (2004) 19 *J. Law Soc. Pol'y* 94–122.

69. Gavin W. Anderson, "Filling the 'Charter Gap': Human Rights Codes in the Private Sector" (1995) 33:4 *Osgoode Hall L.J.* 749–83.

70. *Ibid.* at 783.

consideration that treats age discrimination as an aberrant individual matter. A whole class suffers—often overlapping with other categories such as gender and ability.⁷¹

HUMAN RIGHTS DEVELOPMENTS

Along with the shifts and counter-shifts of jurisprudence in the past two decades, considerable developments have occurred in the past five years in the legislative human rights arena. With the Court's *McKinney* decision not yet overturned, more legal attention has been given to the assumptions and implications of human rights legislation. In 1999, the federal minister of justice established an independent panel to conduct a review of the *Canadian Human Rights Act*, chaired by retired Supreme Court Justice La Forest, who was on the majority side in *McKinney*, *Harrison*, *Stoffman*, *Dickason*, *Large*, and *Tétreault-Gadoury*. One of the recommendations of the panel, released in 2000, was that a review be undertaken of mandatory retirement “based on human rights principles and socio-economic factors, to determine whether mandatory retirement should be subject only to the BFOR or whether more specific defences should be crafted to allow for mandatory retirement in defined circumstances”.⁷² Additionally, the panel recommended that “there be no blanket defences for mandatory retirement”.⁷³

Also in 1999, which was the International Year of Older Persons, the Ontario Human Rights Commission began consultation on age discrimination, culminating with the 2001 report *Time for Action: Advancing Human Rights for Older Ontarians*. The report was “a broad examination of all issues that may have an impact on the dignity and worth of older adults and that may affect the enjoyment of equal rights and opportunities”.⁷⁴ It emphasized the intersection of age with other designated categories—such as gender, disability, sexual orientation, immigration status, race, and ethnicity. Specifically, with respect to mandatory retirement, the report recommended

That the [Ontario Human Rights] Code [1990] be amended to eliminate the blanket defence to mandatory retirement at age 65 and to extend protection against age discrimination to workers over 65. This could be done by removing the upper limit of 65 in the definition of “age” in section 10(1). Employers who wish to have age-based retirement policies will be required to demonstrate that the policy is based on *bona fide* occupational requirements. Laws and programs that require consequential adjustment should also be reviewed.

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71. See Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Ontario Human Rights Commission, 28 June 2001).
 72. Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Minister of Justice and the Attorney General of Canada, 2000) at 121.
 73. *Ibid.* at 121.
 74. Ontario Human Rights Commission, *Time for Action*, at 9. Prior to *Time for Action*, the Ontario Human Rights Commission published a discussion paper, “Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario” (2000). Subsequent to *Time for Action*, the Commission published its *Policy on Discrimination Against Older Persons Because of Age* (2002).

That, irrespective of whether the *Code* is amended, employers and unions reconsider the utility and necessity of requiring employees to retire at age 65 and revise their retirement policies and collective agreements to promote flexibility and choice.⁷⁵

This report set in motion increased public awareness and greater sensitivity to the issue among political leaders resulting in a policy response in 2004, namely, a public consultation in preparation for amending the Ontario *Human Rights Code*.⁷⁶

CONCLUSIONS

The sequence of the Supreme Court decisions analyzed here challenges us to consider whether the practice of forced retirement at an arbitrary age that applies in most of Canada adequately reflects our society's commitment to fairness and the personal self-worth of individuals. In the *Etobicoke* and *Craton* decisions reached during the 1980s, the Supreme Court treated age as an insufficient ground for justifying mandatory retirement. The Court expressed a presumption against forced retirement motivated by largely economic concerns and established a strict BFOR standard for exceptions, whereas, in *McKinney* and other cases decided in 1990, age became a legitimate ground for achieving certain management objectives. In *McKinney*, the Court retreated from its step toward a broad, purposive interpretation of equality and replaced it with a position more reflective of classical liberalism, more protective of the economic interests of the status quo than community values. In its mandatory retirement decisions under the *Charter*, the Supreme Court displayed a disturbing tendency to articulate principled positions and standards to be met in order to establish the reasonableness of section 1 limits, then to slide past these standards without addressing them in a convincing manner.

It may well be that the judges would prefer the legislators to decide mandatory retirement issues.⁷⁷ In *McKinney* the Court clearly deferred to legislators. More recently, on other human rights issues, such as those dealing with sexual orientation, the Court has been less deferential.⁷⁸ Nonetheless, we propose that in the past several years the Supreme Court appears to have re-thought its *McKinney* decision and repositioned itself to emphasize that in cases of inequality human dignity is paramount, rather than workplace or labour market conditions. In our view, in 1999, the Court moved away from its earlier and sociologically flawed argument in *McKinney*

75. *Ibid.* at 40.

76. Ministry of Labour, *supra* note 4.

77. Thomas R. Klassen and C.T. Gillin, "The Heavy Hand of the Law: The Canadian Supreme Court and Mandatory Retirement" (1999) 18:2 *Canadian Journal on Aging / La Revue canadienne du vieillissement* 259–76.

78. For example, in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the Supreme Court read "sexual orientation" into Alberta's *Individual Rights Protection Act*, R.S.A. 1980 c. 1–2. And in *M v. H.*, [1999] 2 S.C.R. 3, the Court determined that the *Family Law Act*, R.S.O. 1990, c. F.3 must apply to same-sex as well as opposite-sex cohabiting couples.

to a sounder legal argument in *Law*, emphasizing human rights and the “needs, capacities and merits” of employees.⁷⁹ Whether *Law* has established a test for the judiciary that will be objective enough remains to be seen, but it articulates an approach that is likely to prove more effective against age discrimination, possibly including mandatory retirement, than the guiding principles provided by *McKinney*. Also in 1999, in the *Meiorin* case, the Court adopted a more stringent BFOR standard that places a greater onus on employers to justify why individuals should not be accommodated in the workplace.

Under the Constitution and the *Charter*, the courts have specific obligations to ensure fairness and equity. In earlier eras, Canadians accepted discrimination in hiring and wages based on race, gender, and marital status. Over the past several decades, the worst forms of racism, sexism, homophobia, and discrimination against persons with disabilities have been challenged and have been significantly lessened—though hardly eliminated. This has been the result of judicial, legislative, and political actions. It is past time to address the adverse effects of ageism.

Currently, the mandatory retirement regime in most parts of Canada is a form of legal discrimination. Workplace management schemes, whether derived from collective agreements, pension arrangements, or even provincial human rights codes, ought not to trump the fundamental human rights enshrined in the *Charter*. Overcoming ageist laws is an extension of the historical efforts to forge a society in which all persons share equality and dignity in their common humanity. Regardless of amendments to human rights legislation, it ultimately must be the role of the courts to protect the rights of citizens.

Note: Some data for this article were obtained from interviews with officials of human rights commissions, unions, and law firms. We thank Patrick Dickie for his helpful comments on an earlier draft, Brian Eyolfson, senior staff lawyer, Aboriginal Legal Services of Toronto, for his assistance and editorial guidance on this draft, and David Forgiore for his research assistance.

79. *Law*, *supra* note 61 at para. 53.

