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31 August 2004

Revised 10 September 2004

Revised 15 October 2004

Revised 14 December 2004

Revised 11 March 2005

WORKING PAPER No. 22

UT-ECIPA-MUNRO-04-02

The Debate about Mandatory Retirement in Ontario Universities:

Positive and Personal Choices about Retirement at 65

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JEL Classifications: H30, H52, I22, I28, J10, J14, J15, J23, J24, J26, J33, J38, J44, J48, J53, J62, J78, J82, J83, K12, K31, L31.

Key words: labour, the Canadian Charter of Rights, Supreme Court, age discrimination, university employment, diversity in employment, productivity, tenure, collective bargaining, contracts, individual and collective rights, retirement, pensions, university financing.

Abstract: **The Debate about Mandatory Retirement in Ontario Universities: Positive and Personal Choices about Retirement at 65**

by John Munro (Department of Economics, University of Toronto)

The debate about mandatory retirement is fundamentally a moral issue, about human rights, but one strongly related to several major economic issues. Mandatory retirement is a form of age discrimination that seems to be strictly prohibited by section 15(1) of the Canadian Charter of Rights. But the Charter provides an important qualification (section 1): in that 'it guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. That provision was cited in the majority decision of the Supreme Court of December 1990, known as *McKinney v University of Guelph,* which upheld the right of Ontario (and other Canadian) universities to impose mandatory retirement at 65, if not otherwise constrained by provincial legislation.

The reasons that the majority cited to explain this decision bear directly upon important economic issues; and this paper seeks to refute all those arguments, chiefly if not exclusively on economic grounds. The **first** set of arguments were those contending that mandatory retirement, in a supposedly 'closed' system of Canadian universities, is necessary to open employment and promotion opportunities for younger workers, with fresher, more innovative 'new blood', i.e., by forcing academics to leave at 65 (an argument akin to one used in the past against employing females: on the grounds that they took jobs from 'male family-breadwinners'). This basically involves the still widely held 'lump of labour fallacy'; and it is refuted by not only economic logic but by the historical evidence from jurisdictions that have abolished mandatory retirement in full: Quebec, from 1983 (the only Canadian province so far to do so); and the United States, from 1994. Various studies now demonstrate that an end to mandatory retirement has encouraged very few to continue past the normal age of retirement, has not appreciably altered the average age of retirement, and has had no discernible consequences for the employment and advancement of much younger faculty. The **second** related Supreme Court argument was that mandatory retirement is necessary to obviate the need to monitor productivity in order to dismiss unproductive elderly faculty, and thus also to protect tenure (to guarantee academic freedom). This paper argues that performance monitoring is a normal feature of academic life in major North American universities; that there is no evidence that academic productivity declines with, and only with, the onset of the 60s; that in jurisdictions without mandatory retirement none of the predicted adverse consequences has taken place; and that tenure remains intact. The **third** argument concerns the validity of freely-negotiated labour contracts, containing provisions for mandatory retirement. In the case of the University of Toronto and many other Ontario universities, this paper demonstrates that mandatory retirement was imposed unilaterally, without negotiated contracts; but the paper also discusses the nature, and economic rationale, of such contracts that involve the suppression of individual rights in the presumed favour of the majority (if and when freely negotiated). The paper also addresses labour union concerns to protect normal retirement benefits at 65 (when most do wish to retire).

The paper also considers two other economic issues not considered by the Supreme Court: (1) mandatory retirement as an employment tool to ensure greater diversity of Canadian faculty – and thus whether one may engage in one form of discrimination to combat the presumed consequences of another; and (2) mandatory retirement as a fiscal necessity, when government grants have been shrinking. Quite clearly universities do gain by rehiring forcibly retired academics to do stipendiary teaching (making a mockery of their reasons for mandatory retirement). Against this are set the costs of mandatory retirement: in promoting the flow of some productive and renowned faculty to the US; or in encouraging productive senior faculty to seek alternative employment in Canada; and in hindering (or even preventing) the recruitment of renowned senior faculty from jurisdictions that prohibit mandatory retirement.

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The Debate about Mandatory Retirement in Ontario Universities:

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Introduction

On 29 May 2003, the Ontario Progressive Conservative government introduced a bill designed to eliminate contractual mandatory retirement.[1] The purpose of this bill was to prohibit private employers, and unions, from imposing mandatory retirement or from including such provisions even in freely negotiated labour contracts. However, the legislation was not passed before the government lost the election of October 2003 and was replaced by a Liberal administration. In August 2004, it declared its intention to introduce a similar bill, to be preceded by public hearings on this issue, during September 2004.[2] That the former Conservative government chose to introduce such a bill was a major surprise, for it had seemingly turned a deaf ear to pronouncements from the Ontario Human Rights Commission to abolish mandatory retirement as a clear violation of basic human rights.[3]

The Ontario Human Rights Code, in the version enacted in 1981, explicitly states in section 5(1) on Employment, that: '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'. But the following section 9(a) severely qualifies the ban on age discrimination by stating that: in 'subsection

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[1] Bill 68: *An Act to Amend the Provisions of Certain Acts Respecting the Age of Retirement*, 4th Session, 37th Legislature, Province of Ontario, 52 Elizabeth II: 2003.

[2] Ontario Ministry of Labour, News Releases: *Providing Choice: a Consultation Paper on Ending Mandatory Retirement,* 18 August 2004 <http://www.gov.on.ca/LAB/english/news/2004/04-92cp.html> [18 August 2004]

[3] Indeed, the Home Page of the Ontario Human Rights Commission still contains this prominently placed statement: 'Nobody has a shelf life. The only thing that's out of date is the idea that older people don't deserve the same respect and opportunities as everyone else. Let's stop age discrimination. It's old news'. <http://www.ohrc.on.ca/english/index.shtml>

5 (1) ... "age" means an age that is eighteen years or more and less than sixty-five'. Furthermore, section 24(1)(b) contains yet another significant qualification: 'The right under section 5 to equal treatment with respect to employment is not infringed where .... the discrimination in employment is for reasons of age, sex, record of offences, marital status or same-sex partnership status , if the age, sex, record of offences, marital status or same-sex partnership status of the applicant is a reasonable and *bona fide* qualification'.[4]

The crucial issue is whether or not provincial Human Rights codes should, in this fashion, *permit* age discrimination, specifically in the form of mandatory retirement for those 65 (and over) in Canadian universities and similar organizations, when section 15 of The Canadian Charter of Rights and Freedoms (1982) expressly forbids any such form of age discrimination, in stating that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.[5]

If mandatory retirement is indeed a form of unwarranted and unjustified age-discrimination, we must note that American legislation on this issue has long been more advanced than has the Canadian. From as early as 1967, the U.S. Congress has enacted a series of laws to protect the rights of older workers and finally to abolish mandatory retirement completely. In 1978, Congress amended the 1967 Age Discrimination in Employment Act to establish 70 (rather than 65) as the minimum age of mandatory retirement for most workers; but university professors were then excluded (i.e., with mandatory retirement at 65), until the act was amended in 1982. In October 1986, Congress prohibited mandatory retirement

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[4] Known as BFOR: bona fide occupational requirement. The version of the Ontario Human Rights Code that the Supreme Court used in December 1990 was '1981, S.O. 1981'. The version currently in force is given as 'R.S.O. 1990, Chapter H.19', amended in 1993, 1994, 1995, 1997, 1999, 2001, and 2002. Section 9(a) is now section 10(1). See Government of Ontario, Public Statutes (English), Human Rights Code (R.S.O. 1990): <http://192.75.156.68/DBLaws/Statutes/English/90h19_e.htm>.

[5] Government of Canada, Department of Justice, Canadian Charter of Rights and Freedoms: <http://www.justice.gc.ca/loireg/charte/const_en.html#recours>. The Canadian Charter of Rights and Freedoms constitutes Schedule B of the Constitution Act, 1982 (79), and the Canada Act 1982 (U.K.) 1982, c. 11, which came into force on 17 April 1982; but section 15 did not do so until 1985.

everywhere, though again with the significant exception of university professors – whose employment, however, was still permitted to continue until age 70, i.e., five years beyond the standard age of mandatory retirement in Canada, at 65. As Ashenfelter and Card inform us in a recent article, that exemption 'was a hard-fought victory for college and university representatives, who argued that mandatory retirement was needed to maintain a steady inflow of younger faculty and promote the hiring of women and minorities' – arguments that will be encountered later in this study.[6] The 1986 act had required Congress to review this exemption in seven years; it did so, and voted to have this exemption expire, on schedule, on 31 December 1993. By that date, many American universities and colleges had already, quite voluntarily, withdrawn their mandatory retirement provisions.[7]

For this issue in Canada, 1986 was also a significant year. Following the spirit of section 15 of the Charter, which had come into force the previous year (1985), the federal government abolished mandatory retirement for its own civil service employment. It was not, however, the first government in Canada to do so. Manitoba was the first, but by a rather circuitous route. In June 1974, the New Democratic Party (NDP) government of Edward Schreyer passed its own Human Rights Act, one that also prohibited age discrimination, but – in contrast to all other provincial human rights legislation – without setting any age limits.[8] Subsequently, in 1980, Imogene McIntire, Professor of Education at the University of Manitoba,

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[6] Orley Ashenfelter and David Card, 'Did the Elimination of Mandatory Retirement Affect Faculty Retirement?', *The American Economic Review*, 92:4 (Sept. 2002), 957.

[7] *Ibid.,* pp. 957-80.

[8] *Statutes of Manitoba*, 1974, C.65, s. 3, 4, 5, 6, 7 (2). Prof. Ernest Sirluck, who was President of the University of Manitoba from 1970 to 1976, has told me personally (in November 2004) that, after the enactment of the Human Rights Act in June1974, his administration terminated mandatory retirement, on the belief that its prohibition against age discrimination had rendered this retirement policy untenable. Unfortunately, however, this issue is not discussed in his chapter on his years as President of the University of Manitoba, in: *First Generation: An Autobiography* (Toronto and Buffalo: University of Toronto Press, 1996), pp. 304-80. However, Prof. Donald McCarthy, who was Dean of Arts at the University of Manitoba at this time (and not known to be one of the president's supporters), has confirmed, by e-mail, that 'Sirluck did abolish mandatory retirement; and for a good number of years after the administration [of his successor, Ralph Campbell] had little interest in reinstating it ... As time

decided to contest the mandatory retirement that she faced that June, at age 65, by filing a suit with the Court of Queen's Bench to request a declaratory judgement that the university's retirement policy was in contravention of the 1974 Human Rights Act. The Court fully agreed (1981) that, because this Act lacked any upper limit on age, 'no employer may refuse to continue to employ a person solely on the basis of his age'. [9] In March 1981, the Conservative government of Sterling Lyon established the Commission on Compulsory Retirement under Marshall Rothstein; and in that same year the Manitoba Court of Appeal upheld the *McIntire* decision, so that when, Rothstein finally issued his report in 1982, he endorsed the abolition of mandatory retirement. As Thomas Flanagan comments in his study of this case, 'by 1982, the result was effectively the same as if the legislature had decided to abolish fixed-age retirement', even though, as he further contends, neither the NDP nor Conservative governments had ever favoured such an abolition.[10] The story does not end here. For, in 1996, following a successful though bitter faculty strike at the University of Manitoba, the Gary Filmon's Conservative government amended its legislation governing the Universities of Manitoba, Winnipeg, and Brandon, to permit them to include contractual mandatory retirement in their

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passed, however, and resources became more scarce, the administration revisited the matter and decided [that] it would be in the University's best interest if there were mandatory retirement. This *would get rid of the highest paid faculty members and free up resources* [my italics added] for other urgent problems. Accordingly, the administration raised the matter during contract negotiations with UMFA', which agreed to reinstate mandatory retirement. This account is confirmed also by retired professors Lawrence Douglas and Edward Bolt [Ed_Boldt@UManitoba,ca, forwarding text from Prof. McCarthy, dated Thursday 25 Nov. 2004]. This e-mail text cogently explains why most university administrators want to retain or impose mandatory retirement.

[9] Thomas Flanagan, 'Policy-Making by Exegesis: the Abolition of "Mandatory Retirement" in Manitoba', *Canadian Public Policy/Analyse de Politiques*, 11:1 (1985), 40-53, in particular p. 45, with the quotation cited from *Imogene McIntire v. The University of Manitoba, et al*, 2 C.H.R.R. (1981) D/305, AT D/309.

[10] Flanagan, 'Policy-Making', pp. 45-48; he also notes that the 'University of Manitoba Faculty Association, after sitting on the sidelines in *McIntire*, did recommend abolition to the Rothstein Commission, but only for a five-year period'. (p. 48). His paper was subsequently re-published in Frederick L. Morton, ed., *Law, Politics, and the Judicial Process in Canada* (University of Calgary Press, 2002). Flanagan was unaware of President Sirluck's abolition of mandatory retirement at the University of Manitoba in 1974.

contracts, with the argument that age is a '*bona fide* occupational requirement' for academics.[11]

Thus, contrary to often expressed views, Quebec is currently the only province that has included university professors in its complete ban on mandatory retirement, a ban that was enacted in December 1983, in the Bill known as 'Respecting Labour Standards'.[12] 1982, New Brunswick had similarly enacted legislation ostensibly to abolish mandatory retirement, enabling those forced into retirement to file a complaint under the Human Rights code; but excluded from this provision are those whose contractual employment benefits contain a registered pension plan that is contingent upon retirement at a certain age (normally 65). In neighbouring Prince Edward Island, mandatory retirement has been in force in its universities since 1995. Finally, Alberta, despite having abolished mandatory retirement for its civil service in the early 1980s, and despite including a clause prohibiting age discrimination in its Human Rights code, still permits its universities to include mandatory retirement in contracts with their faculties (Universities of Alberta, Athabaska, Lethbridge, but not yet Calgary). An important test case was resolved in September 1992, when the Supreme Court of Canada, in the decision known as *Dickason v. University of Alberta*, upheld that university's right to impose mandatory retirement, as stipulated in a contract with its faculty association.[13]

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[11] See Jonathan Kesselman, 'Time to Retire Mandatory Retirement', Department of Economics Working Paper, University of B.C.: 26 November 2003, p. 21, n. 59, citing section 61.1 of the University of Manitoba Act (1996 Amendment); Jonathan Kesselman, 'Challenging the Economic Assumptions of Mandatory Retirement' (omitting some details in the UBC working paper), and David MacGregor, 'The Ass and the Grasshopper: Universities and Mandatory Retirement', both in C.T. (Terry) Gillin, David MacGregor, and Thomas R. Klassen, eds., *Ageism, Mandatory Retirement, and Human Rights in Canada* (Toronto: Canadian Association of University Teachers and Lorimer Press, 2005). The current contract with the University of Manitoba requires retirement at 69.

[12] For this and the following, see MacGregor, 'Ass and the Grasshopper', pp. ; OCUFA Ontario Confederation of University Faculty Associations) 'Mandatory Retirement Discussion Paper' (August 2002) <http://www.ocufa.on.ca/retirement/retire.asp>. Flanagan, however, cites a different source for the Quebec legislation: Legislature of Quebec, 1982, C.12: *loi sur l'abolition de la retraite obligatoire*.

[13] *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103, whose text is reproduced in: http://www.lexum.umontreal.ca/csc-scc/en/pub/1992/vol2/html/1992scr2_1103.html (by Lexum, Université de Montréal). This case is discussed in greater detail in C.T. Gillen and Thomas Klassen,

McKinney v University of Guelph: the role of the Canadian Supreme Court

Many of the arguments put forward in deciding this case are similar to those contained in the landmark legal decision, *McKinney v. University of Guelph*, issued by the Supreme Court of Canada in December 1990.[14] In 1985, Professor David McKinney of the University of Guelph, joined by eight other professors (and one librarian) at Laurentian University, York University, and the University of Toronto, supported by their faculty associations and the Ontario Confederation of Faculty Associations (OCUFA), but opposed by their universities, and the Attorney General of Ontario, filed a law suit to apply 'for declarations that the universities' policies of the mandatory retirement at age 65 violate s. 15 of the Canadian Charter of Rights and Freedoms, and that s. 9a [now 10(1)] of the [Ontario] Human Rights Code, 1981, by not treating persons who attain the age of 65 equally with others, also violates s. 15'. In 1989, the Court of Appeal for Ontario rejected their suit, which was then appealed to the Supreme Court of Canada.

In upholding the Ontario Court of Appeal's decision, the Supreme Court based its verdict on three essential grounds.[15] First, the Charter of Rights and Freedoms [by s. 32(1)] 'is confined to government action', whether by the federal, provincial, or territorial governments, 'to protect individuals against the coercive power of the state'; and therefore its provisions cannot be applied to institutions in the private sector. Second, Ontario universities, even though constituted by provincial acts of parliament, and even

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'The Shifting Judicial Foundations of Legalized Age Discrimination', in in C.T. (Terry) Gillin, David MacGregor, and Thomas R. Klassen, eds., *Ageism, Mandatory Retirement, and Human Rights in Canada* (Toronto: Canadian Association of University Teachers and Lorimer Press, 2005); and also in MacGregor, 'Ass and the Grasshopper'.

[14] In: *McKinney v. University of Guelph,* published in: *Reports of the Supreme Court of Canada,* 1990, vol. 3, pp. 229-449, File No.: 20747: officially cited as: [1990] 3 S.C.R 229, reproduced in two official web documents: <http://www.canlii.org/ca/cas/scc/1990/1990scc121.html>, and <http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol3/html/1990scr3_0229.html>, from the University of Montreal, which provides the original pagination from the Supreme Court publication. In this latter version, the quotation is from [1990] 3 S.C.R .229. For references to 'bona fide occupational requirements' in this decision, see 3 S.C.R. 229, pp. 291, 308, 412, 439-41.

[15] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 232-33.

though heavily funded by governments to serve and to carry out government-mandated policies in education, are nevertheless, 'legally autonomous' institutions that 'do not form part of the government apparatus' and are thus 'private entities'.[16] Third, even if these universities' mandatory retirement policies do violate section 15 of the federal Charter of Rights and Freedoms, as does section 9(a) of the Ontario Human Rights Code, nevertheless the *raison d'être* for mandatory retirement policies are those that fully meet the test of section 1 of the Charter, namely, that 'it guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[17] Justice Gerald La Forest wrote this majority report, on behalf of himself, Chief Justice Dickson, and Justices Sopinka, Gonthier, and Corry; the dissenters were the two female Justices, Bertha Wilson and Claire L'Heureux-Dubé. Their arguments, for and against contractual mandatory retirement , will serve well in elucidating why the administrations of virtually all Ontario universities still seek to maintain mandatory retirement. There are five key arguments utilized to support mandatory retirement, the first three of which figured strongly in the Supreme Court Decision. The remainder of this study will review and analyse these.

(1) *To open employment and promotion opportunities for younger workers*

Kesselman notes that this is one of the most commonly cited arguments for mandatory retirement.[18] As Justice La Forest himself stated: 'the problem of unemployment would be aggravated if employers were unable to retire their long-term workers'; and further, that 'mandatory retirement has become part of the very fabric of the organization of the labour market in this country'. For La Forest, this situation fully justified

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[16] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 275: Justice La Forest. Section 32(1)(b) of the Canadian Charter of Rights and Freedom states that: 'This Charter applies... to the legislature and government of each province in respect of all matters within the authority of the legislature of each province': < http://www.justice.gc/loire/charte/const_en.html>

[17] See *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 258.

[18] Jonathan Kesselman, 'Mandatory Retirement and Older Workers: Encouraging Longer Working Lives', *C.D. Howe Institute Commentary*, 200 (June 2004), p. 6; and Kesselman, 'Challenging Economic Assumptions'.

the restrictive clause s. 9(a) in the Ontario Human Rights Code, which the dissenting Justice Claire L'Heureux Dubé called 'blatantly discriminatory' (indeed the whole Code). His chief point was that since Canadian universities operate 'as a closed system with limited resources .... there is a significant correlation between those who retire and those who may be hired'. If mandatory retirement were to be abolished, he contended, 'the young [prospective faculty members] would suffer'; and that situation, furthermore, would deprive university students 'of younger faculty members and of the better mix of young and old that is a desirable feature of a teaching staff', gratuitously adding, without citing any proof, that 'there is at present a significant problem of an older teaching staff in universities'.

Evidently he did not consider this to be serious problem in the Canadian judiciary, a system in which federally appointed judges may continue to serve until 75. Does the Canadian judiciary constitute less of a 'closed system' than do our universities? Just what is meant by a 'closed system', especially when Canadian universities recruit faculty from across the world (as the Canadian judiciary does not)? La Forest also stated, in making these arguments, that 'I am not suggesting that discrimination against the old is as such justifiable to alleviate the difficulties faced by the young'.[19] But surely that is precisely what he was advocating: age discrimination, in order to alleviate purported and unsubstantiated difficulties that young academics with PhD degrees face in securing university appointments.

Kesselman and Reid however, attack the view that contractual mandatory retirement is required to increase the employment of 'younger workers', by contending that the arguments adduced to support contractual mandatory retirement run 'counter to elementary economic principles', and constitute what economists calls the 'lump of labour' fallacy: namely, that at any specified time the 'economy offers only

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[19] *McKinney v. University of Guelph* [1990] 3 S.C.R. 299, pp. 287-88; partly cited also in Kesselman, 'Mandatory Retirement and Older Workers', p. 6. n. 12: 76 *Dominion Law Reports* [DLR](4th) 545, at 658, 653; and in Kesselman, 'Challenging the Economic Assumptions'.

a given total amount of work'.[20] In a remarkable study published by the Canadian Labour Congress — still obdurate in defending mandatory retirement – its research staff contended that any defence of compulsory retirement on the grounds that it creates new jobs for the young is both 'bad economics and dangerous ethics'.[21]

In any event, economic history also invalidates the 'lump of labour fallacy'. Thus, the Canadian economy, with a continuously rising population, having grown from 18.224 million in 1961 to 31.748 million in 2003,[22] provides an ever increasing demand for skilled and educated labour – and that certainly includes university professors, especially since student enrolments have grown so much more rapidly than has the number of available professors. We are told that Ontario alone will suffer a net deficit of some 10,000 professors or more over the next fifteen years. As Justice Bertha Wilson observed in *McKinney v University of Guelph,* any 'exclusion' of younger academics from universities, if it exists, 'flows solely from the government's policy of fiscal restraint';' and thus it has nothing to do with the continued employment of senior faculty.[23]

At the same time, of course, nobody would contest the view that universities, along with similar

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[20] Kesselman, 'Time to Retire', pp. 6-8 (for the quotations); Kesselman, 'Challenging the Economic Assumptions'. He cites the following statement in James Pesando, *The Elimination of Mandatory Retirement: An Economic Perspective* (Toronto: Ontario Economic Council, 1979), p. 23: 'the argument that ending compulsory retirement would reduce the job opportunities available in the labour force is not substantiated by economic analysis'. Pesando, however, was one of the authorities whom La Forest cited to sustain the majority decision , in *McKinney v. University of Guelph,* in upholding the validity of mandatory retirement.

[21] Cited in Thomas Klassen and David Forgione, ' "A Little Schizophrenic:" Compulsory Retirement and Unions', in C. Terry Gillin, David MacGregor, and Thomas R. Klassen, eds., *Ageism, Mandatory Retirement and Human Rights in Canada* (Toronto, 2005). For the Canadian Labour Congress resolution of 1980, stating its opposition to any attempts to eliminate mandatory retirement, see also below, pp. 22-23.

[22] CANSIM II @ Chass <http://www.chass.utoronto.ca/>

[23] *McKinney v. University of Guelph* [1990] 3 S.C.R. 299, pp. 242, 402. On the relationship between government financing of universities and mandatory retirement, see below pp. 27-28

institutions, need to be continuously rejuvenated with 'new blood' — younger people who may have newer, fresher, or at least different ideas and educational experiences, if not necessarily better ones. But to suggest that universities can hire new professors only by getting rid of older professors, by compulsory retirement is, on the face of it, absurd for reasons beyond those of the 'lump of labour' fallacy. For many university professors leave for reasons other than mandatory retirement: some do choose voluntarily to retire before 65, and undoubtedly many more leave to seek better or better paid opportunities elsewhere (especially in the U.S. – and increasingly even in the United Kingdom). For example, in 2003, the Department of Economics at the University of British Columbia hired four new professors, not all of whom were young (one older professor was lured away from the University of Toronto's Economics Department); but it also lost four professors, none of whom retired, and thus all of whom found better opportunities elsewhere. Obviously, even within a 'static state' employment economy a university can receive 'new blood'.

This argument to justify contractual mandatory retirement also implies that, if professors were not forced to retire at 65, they would stay on forever: 'old professors never die; they just fade away' (to misquote General Douglas MacArthur's famous farewell speech). Professors do die, before and after 65. Furthermore, most of those who might choose to continue after 65 would probably wish to retire in a very few years, at 68 or 70; very few would stay on into their 70s. That would indeed be 'a few of the very few', because the historical experience of Manitoba (from 1982 to 1996) and Quebec (from 1983) has been that most professors retire around or indeed before the age of 65. Currently in Quebec, the average age of retirement, in all universities, is 63.5.[24] Finally, Kesselman cites a study undertaken years after Manitoba and Quebec banned contractual mandatory retirement, which found 'the effects on labour force participation rates of

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[24] Howard Fink, 'Quebec Universities Without Mandatory Retirement: Policies and Experiences, in Peter Russell and Ken Rea, eds., *Redesigning Retirement: Proceedings of a Joint Forum Presented by the University of Toronto Faculty Association and the Retired Academics and Libarians at the University of Toronto: Innis Town Hall, Saturday 5 April 2004* (Toronto, 2004), pp.11 - 13. Online version: <http://www.ralut.ca/proc.pdf>

people 65 and over to be statistically insignificant'.[25]

The most recent attack on the 'lump of labour' fallacy, fully supporting Kesselman's views with far more extensive data, appears in a recent article on 'Mandatory Retirement and Older Worker Employment', in which the authors, Shannon and Grierson, analysed employment statistics for the two provinces without mandatory retirement, i.e., Quebec and Manitoba (the latter, 1982-1996). On that basis, they contend that the numbers who chose to remain in the labour force after 65 are very small and that elsewhere no statistical support can be adduced for the still common and indeed prevalent view that 'eliminating mandatory retirement will significantly worsen the job prospects of younger workers or substantially boost average labour costs by forcing employers to retain large numbers of better-paid older workers'.[26]

Exactly comparable data for the U.S. for which the age of mandatory retirement had been 70, from 1978 to 1993, are not yet available. But a recent economic analysis of the effects of abolishing contractual mandatory retirement in 1994 shows that retirement rates before and after 1994 were 'very similar', so that 'none of the differences ... is even close to [having] statistical significance'.[27] The only significant difference, and one to be expected, was in the proportion of the faculty who voluntarily chose to retire, or chose not to, at the ages 70 and 71, the former age of mandatory retirement. If some differences in pension plans (private and state) within the US and between the US and Canada may slightly skew results, the statistical conclusion remains inescapable that, even if the 'lump of labour' fallacy were true for universities, the impact that terminating mandatory retirement has had upon the employment of the young is

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[25] Kesselman, 'Time to Retire', pp. 7-8, citing Frank Reid, 'Economic Aspects of Mandatory Retirement: the Canadian Experience', *Relations industrielles*, 43:1 (1988), 101-13.

[26] M. Shannon and D. Grierson, 'Mandatory Retirement and Older Worker Employment', *Canadian Journal of Economics*, 37:3 (August 2004), 528-551 (quotation on p. 550).

[27] Ashenfelter and Card, 'Mandatory Retirement', pp 967-69, especially Table 2, p. 968.

inconsequential.[28]

Finally, if the young, or anybody else, face employment constraints, the forced retirements of all over 65 would be no more justifiable than excluding women from such jobs on the specious and indeed odious grounds, so commonly enunciated many decades ago, that their employment would deny employment income to male 'bread-winners' (i.e., responsible for feeding a 'large family'). Is age discrimination – for that is the core of mandatory retirement – today any more justifiable, and any less despicable, than sexual (gender) discrimination?

(2) *To obviate the need to monitor employment performance and thus to maintain tenure, with perceived productivity problems in ageing professors*

A closely related argument for allowing contractual mandatory retirement is that productivity declines as employees approach age 65, or that their compensation rises faster than does their productivity, so that contractual mandatory retirement permits employers to discharge such unproductive or costly workers gracefully and equitably at 65, without requiring costly or harsh performance monitoring.[29] In *McKinney vs University of Guelph,* Justice La Forest, asserted, with virtually no documentation, 'that on average there is a decline in intellectual ability from the age of 60 onwards',[30] so that 'to raise the retirement age [beyond 65], then, might give rise to greater demands for demeaning tests for those between the ages of 60 and 65'. In citing publications of two University of Toronto economists, Morley Gunderson and James Pesando, La Forest painted an even more dire picture of the likely consequences of abolishing contractual mandatory retirement at 65: 'dismissals of older workers would likely increase; monitoring and evaluation

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[28] In her dissent, Justice Claire L'Heureux-Dubé observed that 'since the number of people who attain that age [of 65], and wish to continue working after that age and physically and [are] intellectually capable of doing so, is not overwhelming, it is difficult to conclude that the labour force will be adversely affected'. *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 235, 435.

[29] Kesselman, *Mandatory Retirement*, pp. 8-11, and especially n. 18; see also Kesselman, 'Challenging the Economic Assumptions'.

[30] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 289-97.

of all workers would also increase; so too would continuous monitoring and evaluation; ultimately, compensation of older workers would fall and that of younger workers would rise; [and] the importance of seniority would be affected'.[31] As Kesselman acidly comments, 'it is ironic that the mean age of the justices deciding the case was 65; three were over 65, and Supreme Court justices can continue holding office until 75'.[32] In her own rebuttal, Justice L'Heureux-Dubé made the same observation and noted that American university professors were not then required to retire before 70.[33] Therefore, why should Canadian academics be forced to retire so much earlier? Justice Wilson asked an even more pertinent question: [34]

> Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue? Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? I think [that] the answer to these questions is clearly yes and that s. 15 [of the Charter] is accordingly infringed.

Is there any evidence to support the view that academic ability or performance declines with age? In a recent study, Kesselman denies that there is any such convincing evidence, for 'even if an individual's work skills do eventually decline with advanced age, there is no evidence that this occurs abruptly at 65 or as early as 65 in most occupations'. He also noted that in many so-called 'white collar' occupations, according to one major study, 'reliability and especially experience seemed to compensate for the effects of

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[31] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 289, 309. The specific work cited is Morley Gunderson and James Pesando, eds. , *Eliminating Mandatory Retirement: Economic and Human Rights* (Toronto: Faculty of Management Studies, University of Toronto,1980). See also Morley Gunderson and James Pesando, 'The Case for Allowing Mandatory Retirement', *Canadian Public Policy/Analyse de politiques*, 14:1 (March 1988), 32-39; and Morley Gunderson and Douglas Hyatt, 'Mandatory Retirement: Not As Simple As it Seems', in C.T. (Terry) Gillin, David MacGregor, and Thomas R. Klassen, eds., *Ageism, Mandatory Retirement and Human Rights in Canada* (Toronto: CAUT and Lorimer Press, 2005).

[32] Kesselman, 'Time to Retire', p. 8 (for the quotation); Kesselman, 'Challenging the Economic Assumptions'..

[33] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 427-8.

[34] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 393.

somewhat reduced physical abilities'.[35] He contends that those 'who do experience declining physical, sensory, or mental faculties are more likely to retire voluntarily prior to age 65', so that an 'individuals' labour force participation and retirement decisions can be modelled as a utility-maximizing choice'. In other words, any problems of declining performance are largely a self-correcting and self-adjusting phenomenon: that 'most workers who find their productivity declining tend to self-select into early retirement'.[36] In my own view, many academics – though generally more so in the humanities than in the pure sciences – prove to be more productive in their later than in their earlier years, because they then possess a far greater stock of intellectual capital on which to draw, from accumulated research over so many years, and because they have better mastered the art of academic writing, after so many years of experience.[37] Some of these are the ones more likely to wish to continue their academic career beyond that arbitrary retirement age of 65.

Support for this argument may be found in the previously cited article by Ashenfelter and Card. Their multi-variable regression analyses of retirements in American universities in the 1990s provides two very interesting results. First, the statistical analyses 'suggest that salary exerts a strong negative effect on the probability of retirement': i.e., that the higher the relative salary the lower is the likelihood of choosing retirement; while, on the other hand, 'pension wealth works in the opposite direction, but has a considerably smaller effect'. That is hardly surprising, since salary increases, combined with years of service, largely determine the amount of pension received at retirement, under both Defined Contribution and Defined

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[35] Quotations from Kesselman, 'Time to Retire', p. 9, citing Josef Richter, 'Economic Aspects of Ageing: A Review of the Literature', in Georg Stolnitz, ed., *Demographic Causes and Economic Consequences of Population Aging: Europe and North America* (New York: United Nations, 1992), p. 181.

[36] Kesselman, 'Time to Retire', p. 9, n. 24, and Kesselman, 'Challenging the Economic Assumptions', n. 35, cites a 1995 Labour Canada report, which states that 'poor performers are usually unhappy in their jobs and are anxious to leave as soon as feasible'.

[37] In my own case, with a university career so extending from 1964 (age 26) to 2005 (age 67, i.e., post formal retirement), 29 of my 81 publications of journal articles and essays (excluding book reviews, and earlier monographs, etc.), or 35.8 per cent, have appeared since I turned 60, in 1998.

Benefit schemes.[38] One may also assume that salary levels, especially at private universities, are very strongly correlated, *ceteris paribus,* with academic merit and productivity, especially in terms of peer-reviewed articles and monographs.

Even more interesting are the statistical comparisons between the major research institutions, chiefly private, on the one hand and public research and non-research institutions on the other. In the former, which includes the famous Ivy League universities (but also Berkeley), only three percent of 60-year old faculty were still employed at age 73, when mandatory retirement was in force [up to 1993]; but after its abolition, that proportion has risen to '30 percent or even higher'. In the other public and non-research institutions, however, 'the expected fraction of 60-year-olds who remain at work until 73 has risen to [just] 10 percent'. That of course corresponds to the first result, indicating a negative correlation between salary levels – obviously far higher (and well documented) higher salaries at the very best American universities – and optional retirement. In view of the academic achievements of so many senior faculty at these universities, with so many Nobel prizes, can one doubt society's gains by allowing such professors to continue research and teaching into their early seventies? Indeed, Jon Kesselman has found an editorial on *The Process of Aging* in Harvard's student newspaper, the *Crimson* (23 February 2004), which provides one of the most powerful arguments against mandatory retirement. It is a paen of praise to older professors (i.e., those over 70), contending in particular that their contributions in both research and teaching provide 'one of the most unique aspects of being a Harvard student', so that 'we are grateful to these professors for dedicating their lives to academia'.[39]

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[38] Ashenfelter and Card, 'Elimination of Mandatory Retirement', pp. 976-77. Their study was based exclusively on universities using TIAA-CREF [Teachers Insurance Annuity Assocation and College Retirement Equity Fund], the largest defined contribution pension system used in US universities. Defined Benefit schemes tend to be found mainly in the smaller, state-run colleges.

[39] Kesselman, 'Challenging the Economic Assumptions'. The online source (not given in Kesselman) is http://www.thecrimson.com/article.aspx?ref=357661. Worth quoting is the key paragraph: 'Simply put, older professors are some of the most valuable teachers at Harvard. The faculty who choose to keep working late into their lives do so out of passion. Often they love to teach and excel at it; others

Over the past ten to fifteen years, my conversations with various department chairs and deans at the University of Toronto have led me to believe that most university administrators hold instead strongly contrary views, namely to the effect: that academic performance generally does decline with age, from the early 60s; that underachievers would not voluntarily resign at 65, if mandatory retirement were abolished; and thus that, if such professors did not do so, administrators would be faced with the invidious task of monitoring their performance and then of terminating the employment of those found truly wanting.

In rendering the majority decision in *McKinney v. University of Guelph*, Justice La Forest certainly took such a view: that the costs and social unpleasantness involved in terminating the employment of unproductive professors 'for cause' were greater than the costs incurred in losing good professors. His chief argument was that mandatory retirement was a necessary '*quid pro quo* for a tenure system with minimal peer evaluation', whose maintenance was to be justified in protecting academic freedom and thus 'in enabling universities to be centres of excellence on the cutting edge of new discoveries and ideas'. That view in turn is linked to a related argument cited earlier: namely, that mandatory retirement 'ensures a continuing, and necessary, infusion of new people'. In La Forest's view this laudable objective, sought within 'a closed system with limited resources' – that is, in all Canadian universities -- 'can only be achieved by departures of other people'. Therefore, if mandatory retirement were to be abolished, university administrators would be forced to impose or ensure a sufficient number of such 'departures' by measures that would likely lead to the abolition of tenure. In his alarmist view, universities would have to institute 'a stricter performance appraisal system' and one 'likely requiring competency hearings and dismissal for cause', which, furthermore, 'would be difficult and costly and constitute a demeaning affront to individual dignity'.[40]

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stay on because their eclectic research interests still awaken curiosity even after decades of study; and for many more it is a combination of the two. For undergraduates, the chance to interact with these dynamic professors and hear first-hand about their storied careers is one of the most exciting and unique aspects of being a Harvard student. We are grateful to these professors for dedicating their lives to academia'.

[40] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 235; and p. 425.

In a statement reported recently in *University Affairs,* in December 2003, Professor David Foot reiterated what is undoubtedly still a very common view, in stating that ' there will be no more coasting to retirement', if professors were no longer required to leave at 65, and, furthermore, that an end to mandatory retirement would 'undermine the purpose of tenure, which is supposed to free professors from excessive supervision to ensure academic freedom'.[41]

In her reply to Justice La Forest, Justice L'Heurex Dubé rejected the 'proposition that abolition of mandatory retirement of university faculty and librarians would threaten tenure as a result of increased performance evaluations', while also challenging Justice La Forest's argument that 'an evaluation scheme will "constitute a demeaning affront to individual dignity" '. She posed this most pertinent, indeed crucial question:

> Are objective standards of job performance a demeaning affront to individual dignity? Certainly not when measured against the prospect of getting 'turfed out' automatically at a prescribed age, and witnessing your younger ex-colleagues persevere in condoned relative incompetence on the strength of a "dignifying" tenure system. The elderly are especially susceptible to feelings of uselessness and obsolescence..... Forced removal from the workforce strictly on account of age can be extraordinarily debilitating for those entering their senior years... [42]

As she also observed, 'those jurisdictions which have eliminated mandatory retirement of university faculty or librarians have not experienced any increase in so-called destructive performance evaluations, or any infringement of academic freedom', so that the 'tenure system remains firmly in place'. Noting that, by 1990, fifteen percent of American universities had voluntarily eliminated provisions for compulsory retirement, she stated that 'not a single university has abolished tenure', in either the U.S. or Quebec. Her statement remains just as true today, more than ten years after contractual mandatory retirement was fully abolished in the U.S. Today most American universities continue to thrive, with, on average, much higher

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[41] David Foot: Quoted in Rosanna Tamburri, 'Rethinking the Rules on Retirement', in *University Affairs,* December 2003, p. 13.

[42] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 430-31, cited in part in Kesselman, 'Mandatory Retirement', p. 20; and in Kesselman, 'Challenging the Economic Assumptions'.

salaries and research grants than are enjoyed by their Canadian counterparts.[43]

Needless to say — yet it must be stated clearly – any provincial legislation to abolish contractual mandatory retirement in Canadian universities can not and may not permit such universities to abolish tenure from the age of 65. If that were permitted, Canadian university administrators could then do 'an end run' to achieve their former goal of dispensing with professors at that age by engaging in arbitrary dismissals, i.e., without specifying and documenting the legitimate reasons for doing so.

Let us be clear on the true meaning of the term tenure, as it applies now to North American universities. It does not mean – contrary to popular opinion – guaranteed university employment; rather, it means that a university is not permitted to engage in such arbitrary and capricious dismissals. In 1967, the Board of Governors of the University of Toronto agreed to adopt tenure, by legally defining it as 'a continuing full-time appointment which the University has relinquished the freedom to terminate before the normal age of retirement except for cause,' and 'after following certain procedures', involving 'due process'.[44]

Any such dismissals would be based on the evidence documented in the annual reports that, in all major North American universities, each departmental chair, institute director, and/or faculty dean is required to produce for each faculty member within his/her jurisdiction. The chief purpose of those reports is, of course, to permit a reasonably objective assessment of the 'merit award' or the 'Progress Through the Ranks' (PTR) component, which is added to any negotiated Cost of Living Allowance (COLA) increase, in determining faculty salaries for the following year. The departmental chair's assessment, often undertaken

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[43] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 427-28; and also her comments, on p. 435. In 1997-98 (latest available data), the average salary for a full professor at the University of Toronto ($102,800 CAD), generally regarded as Canada's leading university, was only 77 percent of the mean of average salaries for full professors in ten comparable public universities in the U.S. ($133,220 CAD). University of Toronto Faculty Association, *How Competitive Are Our* Salaries?, UTFA News Bulletin (9 April 1999): <http://www.utfa.org/html/newsbul/html/apr0999.htm.>

[44] See Martin Friedland, *University of Toronto: a History* (Toronto: University of Toronto Press, 2002), p. 565. That then meant the age of 68.

in collaboration with the associate chairs, is based on two documents, produced each Spring: (1) the student evaluations of the professor's courses (undergraduate and graduate); and (2) the *Annual Activity Report* that every faculty member is required to file (or else forgo any merit award increase): to provide detailed evidence on his/her publications (refereed and non-refereed), those either accepted for publication or currently in press, conference papers and public lectures, and research in progress (with explanations on how the research has been conducted). This very detailed report also documents the professor's 'service contributions' to the university and the community. The merit award (PTR) is thus based on the accumulated points produced by some weighting of the three components: teaching, research, and academic service.[45] As Justice L'Heureux-Dubé herself observed, that is precisely the form of almost universal 'monitoring' that critics so fallaciously contend would be too costly or socially painful to administer.[46]

Although some student course evaluations may be unfair, since some students, guaranteed anonymity, may be vindictive for unjust reasons, these evaluations combined with the faculty's annual activity reports have provided a very valuable tool for faculty 'monitoring' over the forty or more years that they have been in use. At the University of Toronto, those in the Senior Salary category receive an annual salary increase, if any, based *solely* on 'merit awards', determined by this very same process. Furthermore, it has become an accepted custom that any tenured faculty member who does not earn any merit award increase for three consecutive years is subject to 'dismissal for cause'.

To be sure, undertaking the legal procedures to dismiss an incompetent professor for cause may be costly and unpleasant. Nevertheless, the potential costs involved hardly constitutes a significant argument

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[45] At the University of Toronto, student evaluations of teaching were first undertaken by the Department of Political Economy in 1965-66, and then by other departments in the Faculty of Arts and Science in 1966-67, under the administration of the Students Administrative Council (SAC). Merit award increases, combined with Across the Board increases (COLA), began in 1972. See Friedland, *History*, p. 531; William H. Nelson, *The Search for Faculty Power: the History of the University of Toronto Faculty Association, 1942 - 1992* (Toronto, UTFA: 1993), pp. 78-81.

[46] In *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 426-7. She also commented that: 'the value of tenure is threatened by incompetence, not by the aging process'.

for retaining mandatory retirement, because the occasions requiring such dismissals would still be few and far between. First, many Ontario universities (e.g., the University of Toronto) have been quite successful in convincing such 'undesirable' professors to retire early, even if the solution is more often a 'buy-out' package than a threat of 'dismissal for cause'. Indeed, many American colleagues have told me that moral suasion and attractive 'buy-out' packages are the common remedies that their university administrators employ to get rid of unproductive faculty (including those under 70); and they scoff at the notion that abolishing mandatory retirement has burdened them with supposed 'deadwood'. Second, we must recall Kesselman's arguments and evidence about 'self-selection': i.e., that the vast majority of such professors, who 'could not make the grade', are much less likely to continue teaching as full-time academics, after the normal age of retirement.[47] Third, since the 1970s, the monitoring procedures undertaken by formal departmental academic committees engaged in hiring (involving 'job paper' seminars), and then in promoting colleagues to tenure and finally to Full Professor, are now so rigorous that not that much 'deadwood' survives, certainly at the major Canadian universities. Is it likely that, in the absence of mandatory retirement, the experience of Ontario universities would differ substantially from universities in Quebec or the U.S.?

In my view, Ontario university administrations are guilty of crass hypocrisy in contending that they require mandatory requirement in order to get rid of academic 'deadwood', relatively 'painlessly', and no later than the age of 65, because, in my experience (i.e., in the Economics department, at the University of Toronto) no retired colleague who wishes to teach a course has ever been refused, whatever has been his/her academic record in teaching and research. The word 'deadwood' never, ever arises in such cases, not even in the case of many retired colleagues now in their 70s who continue with some stipendiary teaching. If the university really upholds contractual mandatory retirement for this specious reason, then it should be more selective in hiring stipendiary teachers – who, after all, have no basic contractual rights to teach or to

[47] See n. 36 above.

continue teaching. But in fact, our department and so many others are so desperately short of teachers or lecturers to hold necessary classes that virtually no offers to teach a course will be rejected. In our department, the proportion of courses given by stipendiary lecturers, including retirees, ranges from 35 to 40 per cent. The only constraint is the supply of funds to pay what are, in fact, miserly stipends ($5,000 per semester course).

(3) *Mandatory retirement as a contractual agreement:*

As noted earlier, the proper term to be employed is 'contractual mandatory retirement'; and my colleagues Gunderson and Pesando believe that mandatory retirement at 65 is socially justifiable on the grounds that it is a feature of so many freely negotiated labour contracts.[48] Their arguments, or those published in 1988, deeply influenced the majority decision in both *McKinney* and in *Dickason*; and certainly, in the former, Justice La Forest justified contractual mandatory retirement several times *inter alia* on these very grounds.[49]

In the case of the University of Toronto itself, this argument is invalid, in the light of the university's history. According to its historian, Martin Friedland, the retirement benefits that the administration secured from the Carnegie Corporation for academics 'at non-sectarian institutions', on the eve of World War I, were not available until a professor had reached the age of 70; and he assumes that most did continue teaching until that age. If, following the Great War, 65 became the customary age of retirement, university administrations nevertheless granted an exemption to most faculty members who wished to continue

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[48] See Gunderson and Pesando, 'The Case for Allowing Mandatory Retirement', 32-39; and other publications cited in n. 25 above; Morley Gunderson, *Flexible Retirement as an Alternative to 65 and Out*, C.D. Howe Institute Commentary 106 (Toronto, 1998); Morley Gunderson, 'Age Discrimination in Employment in Canada', *Contemporary Economic Policy*, 21:3 (July 2003), 318-28; Morley Gunderson, *Banning Mandatory Retirement" Throwing Out the Baby with the Bathwater*, C.D. Howe Institute Backgrounder no. 79 (Toronto, 2004). See also Gunderson and Hyatt, 'Abolishing Mandatory Retirement: Not As Simple As it Seems'.

[49] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, pp. 233, 244, 266, 269, 272, 379, 388; *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103, pp. 1132, 1167-69, 1173-74.

teaching, with full salary and benefits, to 68, or sometimes to 70.[50] In 1955, President Sidney Smith raised the 'official' age of retirement to 68, in effect making it mandatory, while still permitting voluntary retirement with full benefits at 65. That mandatory retirement age remained unchanged for the next seventeen years, until 1972, 'when it was abruptly lowered to 65 .... without consultation with UTFA [University of Toronto Faculty Association]', as stated in UTFA's official history.[51] John Evans had became the new President on 1 July 1972; and the new Governing Council, marking a radical reorganization of university government, held its first meeting on 4 July.[52]

That unilateral action, by administrative fiat, took place five years before the faculty had finally achieved sufficient organizational cohesion and power to gain rights of collective bargaining, in 1977, through the Memorandum of Agreement. The administration finally and most reluctantly agreed to sign this document, only after the faculty had twice voted to consider union certification as the only effective alternative. The university administration was thus convinced that such certification would inevitably lead to faculty strikes or other serious disruptions to academic life. As William Nelson comments, in his history of UTFA, on the university's imposition of mandatory retirement, in 1972: a 'few years later the "frozen policies" clause in the Memorandum would have made such a unilateral change impossible' — i.e., the clause stipulating that university policies and traditions in force at the time that the Memorandum was signed could henceforth be changed only by mutual consent, through collective bargaining.[53] It should also be noted that the Memorandum of Agreement does not permit the University of Toronto Faculty Association to go

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[50] Friedland, *History,* p. 234. To make his subsequent point, he cites (on p. 125) the case of the philosophy professor, James Hume, 'considered a disaster', who, after 37 years, 'was forced to retire at age 65 [in 1926], when almost everyone else in his position was granted an extension'.

[51] Nelson, *Faculty Power*, pp. 155, 15, respectively..

[52] Friedland, *History*, pp. 543-54.

[53] Nelson, *Faculty Power*, p. 155. For the Memorandum of Agreement, see pp. 93-112; and for the *de facto* binding arbitration achieved in 1982, see pp. 113-34.

on strike; but, by 1982, it had been revised – again under the threat of full union certification and almost certainly a strike – to provide various alternative measures of mediation and arbitration (with *de facto* compulsory arbitration, as the last resort).[54]

Therefore, as far as the University of Toronto itself is concerned, the argument to justify contractual mandatory retirement at 65 on the basis of 'freely negotiated contracts' certainly does not apply. Consider these two scenarios, the first a 'counter-factual'. Suppose that the University of Toronto had not (in 1972) imposed mandatory retirement at age 65, and subsequently, after the adoption of the Memorandum of Agreement, suppose that it had sought to do so. The Executive and bargaining committee of UTFA would have responded by pointing to the 'frozen policies' clause of the Memorandum and then would have stated that this was not an issue for negotiation. That is not idle speculation, because in 1985, under the leadership of and at the urging of then President Michael Finlayson, the UTFA Council endorsed the current resolutions of the Canadian Association of University Teachers (CAUT) condemning contractual mandatory retirement and it then passed 'a resolution opposing mandatory retirement and urging a flexible retirement policy on the administration'.[55] Those resolutions have been endorsed by many subsequent UTFA Annual General Meetings, most recently on 15 April 2004.

Consider the opposite scenario. Suppose that, some time after 1985, the UTFA Executive had sought to bargain with the university to abolish contractual mandatory retirement , in compliance with the Finlayson resolution and those of subsequent UTFA Annual General Meetings. The administration similarly would have pointed to the 'frozen policies' clause of the Memorandum of Agreement and retorted (as it has often

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[54] Friedland, *History,* pp. 563-7, 584.

[55] Nelson*, Faculty Power*, p. 155. The current (revised November 2002) CAUT resolution states: that 'Mandatory retirement is discrimination on the basis of age, and may give rise to discrimination on the basis of sex or other grounds. Academic staff have a right to continue their employment beyond the standard retirement age under the same terms and conditions'. See the on-line document at: <http://www.caut.ca/english/about/policy/retirement.asp>

done, in effect) that the issue was and is not one subject to negotiation.[56] But suppose, further, that the administration would have been willing to negotiate this issue: what costly (and demeaning) concessions would it have demanded in return? Of course, for reasons cited earlier, an abolition of mandatory retirement combined with the abolition of tenure would be completely unacceptable.

In the light of this evidence, it is all the more amazing that Justice La Forest, and those supporting the majority decision in *McKinney v. University of Guelph*, subscribed to and so enthusiastically endorsed these fallacious arguments about 'freely negotiated contracts' that supposedly permitted contractual mandatory retirement in Ontario universities. Not only had the CAUT and then UTFA (from 1985) adopted resolutions opposing mandatory retirement, as contrary to the Charter, but both had supported the appellants in that Supreme Court case (and the earlier court case heard in the Ontario Court of Appeal).[57] Furthermore one of the listed appellants in *McKinney* is the York University Faculty Association.[58] Did the Justices really believe that faculty associations in Ontario universities were somehow, and improperly, reneging on 'freely negotiated contracts'? Or did they simply ignore the faculty views and their published resolutions? Let us remember that this celebrated case concerned, and concerned only, Ontario universities. Surprisingly, even the two dissenting Justices, L'Heureux-Dubé and Wilson, did not comment on this vital issue.

One may concede, however, that in many other cases, particularly those concerning industrial workers, such as the United Auto Workers, union contracts quite clearly do contain freely negotiated clauses to permit mandatory retirement. In 1980, the Canadian Labour Congress adopted a resolution, valid to this

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[56] The Memorandum of Agreement may be found as a document on the web site of UTFA (University of Toronto Faculty Association): <http://www.utfa.org/>. This agreement speciously suggests that, with permission of the chair and dean, a faculty member may continue with his/her employment until age 68 – though only on condition that the dean and chair find and provide the necessary funding, since the professor's salary is removed from the departmental budget on retirement. Needless to say, very, very few professors have been able to enjoy this privilege, chiefly those who bring research funds to the university.

[57] Nelson, *Faculty Power*, p. 154.

[58] See *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 230.

day, which explicitly stated that 'the organized labour movement has fought hard and long legislative battles to establish the mandatory retirement age of sixty-five (65) years'; and therefore it 'resolved that the Canadian Labour Congress oppose the erosion of the mandatory retirement system'.[59]

Nevertheless, one may question whether two contracting parties, the employer and the union of employees, have the moral right to abrogate what is clearly a minority right, namely a freedom from age discrimination. Certainly Justice Wilson asked just such questions, in discussing labour union contracts in her dissent to *McKinney v. University of Guelph*:[60]

> The immediate question which the "package deal" argument raises in relation to the Charter is whether citizens can contract out of their equality rights under s. 15 or whether public policy would prevent this. This Court has already held that some of the legal rights in the Charter may be waived but it has not yet been called upon to address the question whether equality rights can be bargained away. Having regard to the nature of the grounds on which discrimination is prohibited in s. 15 and the fact that the equality rights lie at the very heart of the Charter, I have serious reservations that they can be contracted out of.

An opposing view, one argued by Gunderson and Hyatt, is that such age discrimination in employment can be justified on two linked grounds.[61] First, it differs from 'other enumerated grounds in human rights codes such as sex or visible minority status, in that all individuals can expect to reach age 65 (with good fortune), but all persons cannot expect to be female or a visible minority'. Second, we are entitled to bargain away certain rights and benefits that might accrue to us later, if we did survive to 65, in return for superior current benefits, so that 'then presumably we are discriminating against *ourselves* – or at least ourselves in the future'. Both arguments must be contested, despite some dubious support to be found in Justice La Forest's majority decision – though with arguments subsequently contested by Justice

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[59] Cited by Justice La Forest in *McKinney v. University of Guelph* [1990], 3 S.C.R. 229, p. 313. For a further discussion of this issue, see Klassen and Forgione, 'Compulsory Retirement and Unions', in Gillin, MacGregor, and Klassen, eds., *Ageism, Mandatory Retirement and Human Rights in Canada* (Toronto: 2005); and also in this essay, see below, pp. 00-00.

[60] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 406.

[61] Gunderson and Hyatt, 'Abolishing Mandatory Retirement: Not as Simple As It Seems'.

L'Heureux-Dubé.[62] Section 15 of the Charter does not evaluate the conditions of discrimination. The ones cited are all completely and equally invalid. Otherwise, we would find ourselves in an alien world, akin to George Orwell's *Animal Farm,* in which 'all animals are equal, but some animals are more equal than others'. [63] Furthermore, if one were to choose to alter one's sex (as some certainly do, by physical operations) or to change one's religion — thus removing the 'permanence' of such conditions – would any court seriously consider this to be a valid argument to permit sexual (gender) or religious discrimination?

Second, members of a labour union, in agreeing to a contract that stipulates mandatory retirement for those over 65, are certainly not, in most cases, making a decision that weighs their own individual present benefits over their own individual future benefits (i.e., by trading away their own individual right to continue working after 65), even if most probably do have a high discount rate, and live primarily 'for the moment'. Instead, most are essentially bargaining away the rights of a few current older workers to improve their own personal benefits – and that certainly is age discrimination.

The Gunderson-Hyatt argument fails, as Kesselman observes, to distinguish between an individual contract, freely negotiated by that one individual with his/her employer, and a collective union agreement.

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[62] Justice La Forest, in *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 292: 'There has long been a differentiation made between it and other rights, and that like other rights, it is not absolute. Under the Charter, however, questions as to whether these qualifications have been made must be measured against the requirements of s. 1 of that instrument'; and p. 297: there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability', an argument whose validity was disputed above. Justice L'Heureux-Dubé responded by contesting that association, and further stated (p. 423) that: 'Equality means that no one is denied opportunities for reasons that having nothing to do with inherent ability'. In *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103, p. 1175, Justice L'Hereux-Dubé also contended that: 'The fact that we all experience the aging process is not a safeguard which prevents discriminatory acts by the majority. The prospect that current decision makers may some day be 65 and older is no guarantee against their acting in a discriminatory fashion against older individuals today, or against their acting on the basis of negative stereotypes'. See the more detailed analysis of this issue in Gillin and Klassen, 'The Shifting Judicial Foundation'.

[63] George Orwell, *Animal Farm: A Fairy Story* (London: Secker & Warburg, 1945; reprinted 1961), p. 105: this new and now the farm's single commandment, replacing all others, was stated in capital letters.

The distinction is important, because in Canada contractual mandatory retirement 'is highly concentrated in work covered by collective agreements ... not individual contracts'. One may also add that even if rank-and-file younger union workers might well accept the common argument of their union leaders to justify mandatory retirement – that it is a necessary trade-off to ensure the receipt of their pension benefits at 65, an important issue next to be addressed –- most such contacts are written by their union leaders (along, of course, with their employers) and not by the rank and file. Furthermore, as Kesselman also observes, 'even if all CMR [contractual mandatory retirement agreements] were clearly based on consensual agreements between individuals and their employers, one might question the ability of most people to predict their situation and needs many years into the future'.[64]

(4) *To promote the university's goal of greater diversity*

This is an argument that the Canadian Supreme Court (in 1990 and 1992) did not consider, but it is certainly one now maintained by the University of Toronto.[65] As noted earlier, it was also the most serious consideration in exempting university faculty from the otherwise complete U.S. ban on mandatory retirement in 1986 (in the Age Discrimination in Employment Act).[66] Certainly increasing the 'diversity' of the university's faculty is a laudable goal – if universities could agree on what is meant by 'diversity'. Yet it seems invidious, and contrary to the university's intellectual traditions, to manipulate both retirements and new employments to ensure that such older males are replaced by females and/or other males of non-

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[64] Kesselman, 'Time to Retire', pp. 3-4 (for quotations), also citing Krashinsky, 'The Case for Eliminating Mandatory Retirement', pp. 40-51, on the inability of employees properly to predict their future circumstances. See n. 49, above; and also Kesselman, 'Challenging the Economic Assumptions'..

[65] See the remarks of Prof. Angela Hildyard, Vice-President Human Resources', at the UTFA-RALUT conference of 5 April 2003, in Russell and Rea, *Redesigning Retirement*, pp. 14-15 : 'then finally one of the concerns that I have is equity and diversity. We do rely on retirement within all of our staff groups but particularly within the faculty as a way for us to start to increase the diversity of the faculty on this campus. The diversity of our students is huge. Our faculty diversity does not match our student population and we do rely on the[se] retirements to[o] in an attempt to bring more diverse faculty on this campus'.

[66] See above, n. 6 and the related text.

European origin. We may well ask the question: does the University really mean that, faced with scarcities of qualified professors in many academic fields , it will allow considerations of supposed 'diversity' to supersede considerations of intellectual merit, talent, and experience? 'Furthermore', as Professor Emeritus Meyer Brownstone asked in a recent *Bulletin* of the University of Toronto, 'what is the basis of excluding age as a highly significant element in diversity?' [67]

Finally, we may observe that mandatory retirement is a poor and rather ineffective tool to achieve such goals of diversity, for the reasons cited above to attack the argument that mandatory retirement is absolutely necessary to permit universities to hire new blood. But more important, it is unethical: one cannot condone the use of a tool that is a blatant form of age-discrimination in order to combat the perceived ills of a heritage of another form of discrimination.

Unfortunately, however, these views might not be supported by some Canadian jurists, because section 15(2) of Canada's Charter of Rights and Freedoms does explicitly permit age and other forms of discrimination to help achieve this goal (known as 'affirmative action'), in stipulating, in the 1985 amendment, that 'Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.[68] In *McKinney v. University of Guelph,* the Supreme Court agreed not to invoke this clause on the grounds 'that younger academics do not constitute a "vulnerable" group within the meaning of the case law'.[69] But it is significant the Supreme Court also did not refer to the arguments used to obtain that exemption from contractual mandatory retirement for American professors in the Age Discrimination in Employment Act

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[67] Meyer Brownstone, 'Forum: Time to Go – Mandatory Retirement, Who Decides?, *The Bulletin of the University of Toronto*, 57:16 (22 March 2004), 16.

[68] Government of Canada, Department of Justice, Canadian Charter of Rights and Freedoms: <http://www.justice.gc.ca/loireg/charte/const_en.html#recours>

[69] *McKinney v. University of Guelph* [1990] 3. S.C.R. 229, p. 403.

(1986 amendment), which, as noted, Congress permitted to expire on 31 December 1993.[70]

(5) *Mandatory retirement as a fiscal necessity.*

When, in 1972, the University of Toronto administration arbitrarily imposed mandatory retirement, at the reduced age of 65, its ostensible reason was to permit the university to cope with its current financial stringency, which, of course, has always been 'dire'. The university's fiscal rationale was, as follows: that, for every two full professors who retired at 65, the university could either hire, as replacements, three junior assistant professors, for the same price; or it could reduce the university's aggregate salary budget by hiring only two to replace those two forced to retire.[71] The blame for this fiscal crisis was laid – then as now – on the Ontario provincial government, which has consistently ranked last, or less frequently, next to last, amongst Canadian provinces in per capita university funding, in the past thirty years.[72] Nevertheless, as noted earlier, all Canadian university administrations, in all provinces but Quebec, from the very best to worst funded, still wish to retain mandatory retirement, for whatever reasons they deem best at the time.

Does the University of Toronto still reap such financial gains from imposing mandatory retirement at 65? In our Economics department, there do not appear to be any such gains, not for at least five years. Consider the arithmetic. A newly hired, freshly minted PhD, with absolutely no teaching or other academic experience, can now expect to receive a salary about 75 percent of the average final salary for a retiring professor, but for the first five years (or so) will do only 60 percent of his/her teaching load: i.e., no more than three semester courses, instead of the customary five courses. That is the necessary part of the current

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[70] See above, n. 6 and related text; and also *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 427, referring to 29 U.S.C. \SS\ 631(d).

[71] See Kesselman, 'Time to Retire', p. 13, n. 36, and Kesselman, 'Challenging the Economic Assumptions', citing Michael Krashinksy, 'The Case for Eliminating Mandatory Retirement: Why Economics and Human Rights Need Not Conflict', *Canadian Public Policy/Analyse de politiques*, 14:1 (March 1988), 40-51: to the effect that, in 1984, the ratio of final salaries for 65-year old professors was then 2.5 times the average salary for newly hired assistant professors. See also Nelson, *Faculty Power*, pp. 79-82, from the introduction of PTR (merit award increases) at the University of Toronto, in 1972.

[72] See Friedland, *History*, pp. 560-61, 581-2; See also Nelson, *Faculty Power*, pp. 124-25.

market price that we must pay in order to attract new faculty, rather than losing them to many other universities, especially American, whose standard teaching load is just three or four semester courses. Furthermore, we rarely succeed in 'filling all our slots', for new positions in this extremely competitive market, dominated by American universities with no mandatory retirement; and, therefore, it does not appear that young economists are being hindered in securing academic employment, or would be if mandatory retirement were abolished.[73] Since many retired colleagues continue to be engaged in fruitful research that produces publications, the university can hardly argue that it is getting a compensatory dividend in the form of published research from the newly hired professor, who is not likely to publish successfully for several years, in many cases.[74]

Is the fiscal argument, therefore, without any merit? No: the university does gain, at least by hiring a retiree, on a stipendiary contract. In my own case, my total stipend for teaching four semester courses is about 15 percent of my former salary. As James Turk (Executive Director of the Canadian Association of University Teachers) states so succinctly, in the December 2003 issue of *University Affairs:* 'It is not that they [Canadian Universities] don't want older teachers to teach, it's that they don't want to pay them as much to do so'.[75] In other words, contractual mandatory retirement is a useful device – and from the university's point of view, a necessary device – to permit it to offer more courses by so cheaply employing retirees (and other stipendiary lecturers). Of course such stipendiary teaching, undertaken quite voluntarily, does not constitute exploitation, an unduly charged word that economists rarely use. If one has taught here for 35 years, as I have done, the pension income is now sufficiently good enough that most currently retiring faculty in my situation would not require such stipendiary teaching to maintain their standard of living.

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[73] See Kesselman, *Mandatory Retirement*, pp. 8-10; and Kesselman, 'Challenging the Economic Assumptions'.

[74] See n. 32 above.

[75] James Turk: Quoted in Tamburri, 'Rethinking the Rules on Retirement', p. 13.

On the other hand, mandatory retirement in most departments at the University of Toronto does mean the loss of one's private office. The price to be paid to obtain some semi-private space, in the form of a lockable cubicle in a retiree's room, is to agree to provide such teaching. That office space, though semi-open and lacking in privacy (and peace and quiet), does at least allow such a retiree to have fruitful contacts with departmental colleagues, access to departmental amenities (fax, photocopying, mail-services, online computer access), and, above all, close access to the Robarts Research Library, the third or fourth best university library in North America. One may also note that those retirees who continue to offer lecture courses on a stipendiary basis do so without the benefit of tenure, and its protection of academic freedoms. So far, at the University of Toronto, that issue has not yet arisen with retirees on stipendiary teaching contracts.

As a recent retiree from the University of Toronto, I and many others can fully appreciate Justice L'Heureux-Dubé's conclusions on the harmful nature of mandatory retirement, even if personally I am less afflicted or disadvantaged than many others, especially those female professors who, in raising their own families, have been unable to serve as many years in university employment as I have done. Most eloquently she contended:[76]

> [that] its negative effects significantly outweigh any alleged benefit associated with its continuation. Mandatory retirement arbitrarily removes an individual from his or her active worklife, and source of revenue, regardless of his or her actual mental or physical capacity, financial wherewithal, years of employment in the work force, or individual preferences. The continued opportunity to work provides many individuals with a sense of worth and achievement, as well as a source of social status, prestige, and meaningful social contact; and on the evidence, there is no basis for denying to a segment of the population, i.e., those aged 65 and over, the protection of legislation which is of fundamental importance in the area of employment discrimination.

Final Considerations: the link between normal and mandatory retirement

A vitally important question must now be addressed: is there a difference between the concerns of university professors and, say, unionized industrial workers about mandatory retirement? On the basis of

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[76] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 437.

a computerized *Google* search, Professor John Myles concluded that concerns about mandatory retirement seem 'to focus on two occupational groups: university professors and judges' – two groups whose members disproportionately continue to enjoy and relish their occupations into and sometimes past their 60s.[77] In many other occupations, however, especially in industrial occupations governed by labour union contracts, a substantial majority of workers do not enjoy their jobs, especially if they are physically arduous, labourious, and tedious. For so many unionized workers, their goal is to retire earlier than at the age of 65, and most certainly not after that date.

For this reason any faculty association or other advocacy group in Canada that seeks to eliminate mandatory retirement (outside Quebec) must strictly beware engaging in any form of linkage between the abolition of contractual mandatory retirement and the age of normal retirement. We must therefore respect the views and concerns of labour union leaders and clearly understand that the primary reason why they are so opposed to the abolition of contractual mandatory retirement is the fear, rational or not, that in doing so the ultimate consequence may be an increase in the age of retirement to 68 or 70. Any threat to change the age of retirement, and thus any threat to the aspirations of the vast majority of wage-earning employees to secure their full pension and other retirement benefits at 65, is certainly bound to harm the public case for abolishing mandatory retirement. There must be full recognition that only a few will freely choose to continue with their employment past 65, and that society stands to gain more than it will lose from such choices.

Such a fear, entertained by union leaders (and evidently inspired by employers), might have seemed rational when the Canadian Labour Congress enunciated it in 1980, and thus before mandatory retirement was abolished anywhere in Canada or the U.S.[78] But given the now long historical experience with the

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[77] John Myles, 'Changing Public Policies, Changing Market Policies', in Peter Russell and Ken Rea, eds., *Redesigning Retirement* (Toronto: RALUT, 2003), pp. 4-6 <http://www.ralut.ca/proc.pdf>

[78] See above, p. 23.

abolition of mandatory retirement, especially outside the academic world – in Manitoba since 1982, in Quebec since 1983, and in the U.S. since 1986 (university professors, from 1994)-- do such fears now have any rational foundations? Nowhere in any of these jurisdictions have employees, whether or not unionized, yet lost their right to enjoy their full pension and other retirement benefits at 65 (or even earlier, though with somewhat reduced benefits), *if they have freely chosen to retire at that age.* Yet one cannot dismiss the fear that this situation could change in the future, especially since so many Canadian employers have encouraged the view that, if forced to abolish mandatory retirement, they would seek to raise the age at which the retirement benefits would be provided to 68 or 70. In the U.S., legislative measures have been initiated to increase the age to receive pensions and other retirement benefits to 68 (in stages, by age cohorts), even if for reasons unrelated to mandatory retirement.

One closely related aspect of very serious concern that I find in Kesselman's otherwise excellent articles is the implication that society would gain economically from abolishing contractual mandatory retirement, if that meant that those who continued to be employed would not only pay more income and payroll taxes, but would also reduce the burden on public pensions by delaying their initial payments from such pension schemes. Therefore – and this is by far the more ominous and least desired implication of his publications – society would again all the more, if the normal or standard age of retirement were raised from 65, to say, 68 or even 70.[79] Whatever may the long-term economic merits and justification for such arguments, North American society today still holds as sacrosanct the right to retire with full benefits at 65.

Will universities really suffer from the abolition of contractual mandatory retirement? Surely, if proof of the pudding is in the eating, we must cite the historical experiences in the US and Quebec. Can

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[79] Kesselman, 'Time to Retire', pp. 14-17; but with a somewhat different view in Kesselman, 'Challenging the Economic Assumptions', adopting a much more nuanced view, with no recommendation to raise the age of retirement, and providing a good case for contending that society would enjoy significant benefits if more of the educated work force chose – voluntarily – to continue working past normal retirement age, without drawing a private pension. Under current regulations, anyone who has a Canada Pension Plan may begin drawing that pension in the month after the 65th birthday, whether or not that person continues to be employed.

anyone now make a rational case to demonstrate that universities in Quebec and in the U.S. have suffered significant costs or losses from the abolition of contractual mandatory retirement? Until someone does so, then the cant emanating from Ontario university administrations should be ignored – or better, should be contested and refuted.[80] Perhaps some may contend that universities in Quebec and the U.S. have achieved that lower average of retirement by offering financial inducements – but the University of Toronto has, in the past decade, similarly provided such inducements for early retirements, for various reasons (chiefly fiscal, but also including a desire to reduce the number of less desirable faculty, especially those who received *de facto* tenure before the 1970s). No one has yet, to my knowledge, made a convincing case that the abolition of contractual mandatory retirement in these jurisdictions has provided a net financial burden on their universities.

What are the gains, for universities, in abolishing contractual mandatory retirement? First, Canadian universities (outside of Quebec) would gain by drawing upon a larger pool of exceptional talent, 'at a just price', to speak, without taking advantage of those few professors of talent who do wish to continue full-time with their academic careers after 65, as stipendiary lecturers. Second, Canadian universities, in depending so heavily on stipendiary lecturers, may find a significant change: that those who would continue teaching, without mandatory retirement, would do so with a greatly enhanced sense of self-esteem, morale, and enthusiasm – that is, with potentially greater productivity.

Third, universities would find that they would lose fewer highly talented professors before the age of normal retirement. Certainly many have left the University of Toronto for universities in Quebec and especially in the US, in order to escape mandatory retirement, and not to just to seek higher salaries (somewhat offset by higher U.S. medical costs) and research grants. Others have left to establish elsewhere in Canada an alternative career that will offer them productive and rewarding lives into their 70s.

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[80] As noted earlier, the current average age of retirement, estimated for all Quebec universities, after twenty years without contractual mandatory retirement , is 63.5. See n. 20 above.

Fourth, and conversely, therefore, the University of Toronto and other Ontario universities would have far greater success in attracting similar talent from American universities (or from other universities that do not practise mandatory retirement). Those Canadian universities practising mandatory retirement do not have any hope, whatsoever, of hiring professors over the age of 50 from universities elsewhere that do not have contractual mandatory retirement . Even if such professors may think, at the age of 50 or so, that they probably would retire, voluntarily, at 65, they all want the right to choose when they retire.

I certainly do believe that the intellectual costs – the costs in foregone talent – that we incur by practising mandatory retirement are quite staggering; and that the University of Toronto administrators who comprehend something of this loss are unjustified in merely shrugging their shoulders and muttering that this is the cost that must be borne. It does not have to be so borne.

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