

# RETIRE MANDATORY RETIREMENT

C.T. Gillin and  
Thomas R. Klassen

*Mandatory retirement laws are institutionalized ageism. Both because they are a violation of human rights and because if all baby boomers stop working at age 65 the retirement income system will come under great stress, mandatory retirement laws should themselves be retired. The main argument against doing so—that it will create unemployment among young people—is not persuasive. Such laws have been rejected in the United States, and yet for the last two decades the US has had much lower unemployment than we have.*

*La retraite obligatoire est une forme d'âgeisme institutionnalisé. D'une part, on viole par là les droits de la personne; d'autre part, si tous les « baby-boomers » cessaient de travailler à 65 ans, le régime de pension subirait d'énormes pressions. Les lois qui fixent l'âge de la retraite obligatoire devraient par conséquent être, elles-mêmes « retirées ». Le principal argument qu'on oppose à cette solution — la présumée hausse qu'elle imprimerait au chômage parmi les jeunes — n'a rien de convaincant. Prenons le cas des États-Unis : les lois sur l'âge de la retraite y sont plus rares qu'au Canada et, pourtant, nos voisins du Sud connaissent depuis deux décennies un taux de chômage nettement inférieur au nôtre.*

The aging of the baby-boom generation will thrust retirement policies into the forefront of public debates during the first half of 21st century. In 1973 about seven per cent of Canadians were aged 65 or older; by 2003 the figure will have nearly doubled, to 13 per cent; by 2023 it will reach 20 per cent. This inexorable demographic change will force a review of mandatory retirement laws and social policies that we currently take to be settled matters. In response to social, economic and legal challenges, laws and policies will be significantly altered.

At present, the laws governing retirement are rooted in human rights legislation, and vary somewhat across provinces. Ontario's situation is typical. The *Ontario Human Rights Code* protects persons from discrimination based on designated categories including age. With regard to employment, however, "age" refers to persons 18 years or older and less than 65 years. In other words, in Ontario, an employee can be forced to retire at age 65 unless he or she has explicit contractual protection to the contrary. In contrast, the *Manitoba Human Rights Code* excludes only persons under the age of majority from its protection. In Manitoba, as a matter of public policy, there is no mandatory retirement at a given age, except as specified in employment contracts.

Although mandatory retirement at age 65 is now widespread, it only became established in Canada during the early decades of the 20th century. In fact, given the lower average life expectancy at the time, most workers failed to live to this

age. In the middle years of the century, mandatory retirement fit logically into the normative life cycle of North Americans, which involved learning, work and free time, in that order.

Indeed, during the final decades of the 20th century it seemed that forced retirement at 65 might wither away as many workers retired earlier than that age. For many individuals, especially those not yet retired, mandatory retirement seemed a dated notion as the average age of retirement declined from 65 years in 1970 to 62 by the late 1990s. Indeed, some investment firms market their services on the premise of ensuring that clients can begin retirement in their mid-fifties. Yet, mandatory retirement continues to be a concern for two groups of workers: those in the secondary labour market, and those with higher education. For these groups, mandatory retirement is usually a euphemism for forced unemployment.

Low-paid workers have no choice but to work past the age of 65: They often have insufficient savings for retirement. This is particularly true for women, who typically earn less than men and are more likely to have withdrawn from the labour force for a time to rear children. As a result, women are more likely than men to have insufficient savings by the time they are faced with mandatory retirement. Moreover, women outlive men by seven years on average and thus need to have larger pensions than men in order to support themselves.

Highly educated workers, on the other hand, typically are financially able to retire at age 65 or earlier; but a signifi-

Highly educated workers typically are financially able to retire at age 65 or earlier; but a significant number prefer to continue on in employment because of the intrinsically interesting nature of their occupations.

cant number prefer to continue on in employment because of the intrinsically interesting nature of their occupations. In fact, educational attainment is a strong predictor of labour force participation: The higher the level of education, the longer an individual is likely to remain in the labour force.

When these two groups of workers—women and highly-educated workers—have sought to continue to work past age 65 most have run into legal barriers that effectively prevent them from doing so. This may seem an odd situation since the *Canadian Charter of Rights and Freedoms* clearly prohibits discrimination based on “race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability” (emphasis added).

On several occasions in the last two decades, mandatory retirement has been challenged on *Charter* grounds all the way to the Supreme Court of Canada. In 1982, adjudicating the validity of mandatory retirement at age 60 for Ontario fire-fighters, the Court seemed to be moving toward a position on aging similar to its treatment of racism and sexism. On behalf of a unanimous Court, J. McIntyre wrote that “it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age ... may be validly imposed.” The Court rejected ageist stereotypes while permitting mandatory retirement where justified by *bona fide* occupational requirements.

In 1990, however, this legal context changed significantly because of *McKinney vs. University of Guelph*, which remains the leading case on the issue of mandatory retirement. The Court’s reasoning in this case was that, while mandatory retirement does constitute discrimination based on age, the *Charter of Rights and Freedoms* only protects individuals against abuses of government power, so groups such as professors and doctors, who are not government employees, are not covered. Moreover, writing for the majority, J. LaForest wrote, “there is a general relationship between advancing age and declining ability” which distinguishes age from other designated categories. From challenging the ageist stereotype in 1982, the Court had moved toward justifying it in 1990. In further cases since then, it has consistently ruled that mandatory retirement does not offend constitutional law.

As a result of these decisions, Canada enters the 21st century with mandatory retirement laws and policies that are likely to prove inappropriate to changing demographic, social and eco-

nomical conditions. At present there are four working Canadians for every retiree, but by 2030 the ratio will be two to one. Not only will the elderly be more numerous but they will live longer than ever before, with those reaching age 65 having another 20 years, on average, to live.

Such an age pyramid threatens the nation’s social programs, health care and economic competitiveness. To date, significant immigration has helped raise the ratio of working to retired persons, but immigration is not a complete solution. For the past decade, Canada has been unable to reach its immigration quotas, and there is no guarantee that we will remain an attractive destination for migrants. Moreover, it is inefficient to seek immigrants to fill jobs when the workers who already hold these jobs could—if forced retirement were abolished—continue on in their positions.

Not only is Canada’s demographic profile changing, but so is the life cycle of many citizens. Divorce and remarriage rates have risen, while economic cycles, technological change and globalization have made career paths less secure. The family and work histories of Canadians are becoming increasingly heterogeneous and unpredictable. Mandatory retirement, with its implicit assumption of more “traditional” personal, family and work patterns, is an increasingly ill-suited policy given this diversity of contemporary life patterns.

Finally, changes in Canada’s industrial structure have drastically reduced the number of jobs available in the primary and manufacturing sectors. The vast majority of Canadians are now employed in the service sector, where many jobs rely on social and intellectual capital, thus placing a premium on social competencies, knowledge and the ability to continue learning, rather than on physical strength.

The United States has more progressive retirement policies. Mandatory retirement has been substantially eliminated, and this may be a factor in why some Canadian professionals relocate to the US. Moreover, beginning next year and phased in over 22 years, the Social Security retirement age will climb to 67 from age 65, in an explicit attempt to deal with the financial demands of the baby boom generation.

In Canada, by contrast, mandatory retirement policies have become wedged between politicians’ reluctance to tackle the issue and the Supreme Court’s unwillingness to treat the right to work past age 65 as a fundamental human right. Both politicians and (judging by the *McKinney* decision) Supreme Court justices fear that eliminating mandatory retirement will increase unemploy-

ment rates, which historically have been higher in Canada than the US. For their part, most employers vigorously oppose abolishing mandatory retirement, believing that to do so would increase costs by making it impossible to discharge older, more highly paid workers at a pre-determined age. Although some labour unions support the abolition of mandatory retirement, others are reluctant to give back the right to retire at a specified age, a benefit originally won through negotiation.

Given recent US labour market experience, however, the fear of significantly increased unemployment seems unfounded. Most workers will want to retire sooner rather than later (given that for many, work is on balance a disagreeable experience). Many others will continue to be forced into retirement for health reasons. In all likelihood, only a small minority of individuals will want to work past an age when they could comfortably retire. These are usually those individuals who are not only highly educated but also highly committed to their work. Indeed, even the *McKinney* decision acknowledges, "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."

In the US, the Congress, prodded by both executive and judicial pressures, as well as by the American Association of Retired Persons, has provided leadership on retirement policies and the protection of older workers through such legislation as the *Age Discrimination in Employment Act*, and the *Equal Employment Opportunity Commission*. In contrast, the Supreme Court of Canada, while showing signs a quarter century ago of providing leadership, has subsequently deferred to Parliament to address the issue.

The timidity of Canada's Supreme Court on this issue is a serious problem and suggests the existence of deep-rooted societal stereotypes regarding the elderly (even among justices who may continue in office to age 75). As noted, in their leading 1990s decisions, the majority of

Supreme Court justices assumed a general relationship between ageing and declining ability. This view stands in opposition to scientific research that finds no pattern of significant decay in occupational skills among older workers. Furthermore, even if skills do eventually decline over time for some occupations, there is absolutely no evidence that this occurs at age 65. Indeed, three of the justices who decided *McKinney* were 65 or older, and the mean age of all the justices was precisely 65, the age at which the Court judged university professors to be unfit to teach and do research.

The use of ageist stereotypes by distinguished jurists is as troubling as their giving voice or effect to racism, sexism or homophobia would be. Mandatory retirement is a polite phrase for employment discrimination—for being fired because of age. Yet, human rights legislation is specifically designed to help create a social climate of mutual respect for all, which requires prohibiting the use of stereotypes associated with ascribed characteristics. As J. L'Heureux-Dubé noted, dissenting in *McKinney*, "The internal age restrictions imposed on the application of [Ontario] *Human Rights Code, 1981*, emasculate its very purpose."

The majority of the justices argued, on the contrary, that in allocating social benefits it is appropriate to balance the competing needs of different generations. In other words, mandatory retirement is functional for society as a whole because forcing older workers to retire creates job opportunities

for younger workers. There is, in fact, little evidence of a direct relation between retirements and job creation, especially in a rapidly changing economy. The ever-increasing length of formal education required for employment, along with the demographic decline in young people as a proportion of the overall population, means that youth unemployment is less likely to be a major problem in coming decades. Even if it should be, it will not be caused by older workers hoarding jobs. While the "disengagement" of older workers is thought



Canadian Picture Archive

They might prefer working

Mandatory retirement policies have become wedged between politicians' reluctance to tackle the issue and the Supreme Court's unwillingness to treat the right to work past age 65 as a fundamental human right.

Ageism is a persistent and destructive prejudice and is fundamentally inconsistent both with the values expressed in the Charter's "equal protection and equal benefit" provision and with the public policy goals expressed in human rights codes.

to be functional in a society experiencing rapid technological changes and high unemployment, disengagement from paid work can only be functional if the elderly individuals have the financial resources to support themselves, or if the state can afford to do so.

The pattern of Court decisions shows that age is currently constructed differently from other prohibited grounds of discrimination. The level of legal defense needed to justify forced retirement is lower than for other forms of discrimination. Ageism is a persistent and destructive prejudice and is fundamentally inconsistent both with the values expressed in the *Charter's* "equal protection and equal benefit" provision and with the public policy goals expressed in human rights codes that recognize and protect the "dignity and worth" of each person.

One other aspect of the Supreme Court's decisions is worth noting: The female justices were always in the minority, that is, they always supported eliminating mandatory retirement. They noted that laws, policies and programs, such as those related to pensions, inadequately reflect women's career patterns and longer life spans.

As the baby boomers march inexorably into their 50s and beyond, it is clear that a second revolution in retirement policies is quite likely. The first revolution gave individuals the flexibility to retire early. Policies that provide for partial pensions at ages below 65, increase pension portability, and encourage private savings have given Canadians the flexibility to retire earlier than ever before. What is needed now is the same flexibility with regard to continuing on in paid employment after age 65.

Governments have already been warned of the time bomb posed by an unreformed pension system. For example, in January 2000 the Association of Canadian Pension Management called for changes in pension rules so that individuals will be better prepared to look after themselves. It recommended doubling RRSP limits, encouraging Canadians to delay retirement, altering the tax system to stop favouring those who spend over those who save, and eliminating CPP/QPP rules that encourage retirement at age 60. Such changes will clearly assist the economically better-off, but it is also critical for Canadian governments to help meet the needs of the less well-off elderly, as they have historically done.

In some ways individuals have already begun to find creative ways of by-passing existing forced retirement policies. For instance, the number of

self-employed workers has grown sharply in the past couple of decades (from 10.9 per cent of the paid labour force in 1976, to 17.2 per cent in 1998). By being self-employed, workers effectively circumvent the provisions of forced retirement; and, financially, they often need to.

At the same time, the majority of Canadian workers continue to be bound by compulsory retirement. Their only option is to retire and then seek re-employment with their employer or a new employer. In either case, they will likely be paid substantially less than they were before they reached age 65, even if they do the same work. Moreover, they are unlikely to enjoy the same employment benefits and opportunities. Most importantly of all, when older workers encounter discrimination, they will have no access to protective and remedial human rights legislation. They can be laid off or fired without cause.

At the moment it is unclear whether politicians or the Supreme Court will take the lead in reformulating current policies. The appointment of Canada's first female chief justice could herald a more activist stance by the Court on mandatory retirement. It seems most likely, however, that changes will develop in a patchwork fashion, as individual citizens, and some labour unions, employers, industrial sectors and provinces seek to eliminate compulsory retirement.

Reforms to mandatory retirement policies will come in response to the demands of organized individuals. As they approach mandatory retirement age, a considerable number of baby-boomers may find that they cannot afford to retire. A variety of financial imperatives, such as their children's tuition fees, long-term medical expenses and other commitments, will compel them to seek to continue paid employment. Others will find the prospect of the loss of interesting work, social status and identity too great, and their interest in leisure activities too small. Others still, having played midwife to the North American human rights movements against racism, sexism and homophobia, will continue their struggle against injustice by taking on ageist stereotypes.

Under the combined force of these developments, forced retirement seems bound to wither.

Good riddance.

*C. T. Gillin is a professor in the Department of Sociology at Ryerson Polytechnic University in Toronto. Thomas R. Klassen is an assistant professor in the Sociology Department at Trent University, Peterborough, Ontario. He can be reached at tklassen@trentu.ca.*