

The Elimination of Mandatory Retirement: Unfinished Business

prepared for the 2010 Canadian Conference on Elder Law
held in Toronto, Canada on October 29 and 30, 2010

Thomas R. Klassen
Associate Professor
Department of Political Science, and School of Public Policy and Administration
York University
4700 Keele Street
Toronto, Ontario, Canada M3J 1P3

voice: 416-736-2100 ext. 88828
fax: +1-416-736-5686
e-mail: tklassen@yorku.ca
web: www.yorku.ca/tklassen

October 15, 2010

The Elimination of Mandatory Retirement: Unfinished Business

Thomas R. Klassen

abstract

Contractual mandatory retirement at age 65 has been a feature of employment in Canada for decades. Beginning in the 1980s some provinces enacted legislation to ban this practice, and in the past five years all other provinces followed. Notwithstanding these developments, contractual mandatory retirement and associated limits on employment benefits at age 65 remain a feature of employment relations in Canada. This is because age based limits to employment continue to be permitted under federal legislation and because provinces provided for various exemptions in eliminating contractual mandatory retirement. This paper, first, analyzes the judicial and political process that resulted in the abolition of mandatory retirement during the past decade, focussing on the province of Ontario. Second, the paper examines how and why workers' compensation legislation continues to assume that workers retire at, or near, age 65. As such, age 65, as an arbitrary marker of the end of working lives, remains embedded in legislation and institutional practices. The paper concludes that legislative reform and judicial activism is still required to achieve workplace relationships that incorporate an anti-ageist approach.

1. Introduction

As with any significant policy change, the elimination of contractual mandatory retirement in Canada has been gradual and at times even contradictory. Although mandatory retirement has recently been banned for most workers, there are still some – most notably those under federal jurisdiction – who are compelled to retire at a pre-determined age. Provincial governments, which regulate most workers in Canada, have in the past five years revised human rights and employment related legislation to prohibit mandatory retirement for the vast majority of workers. However, as this paper analyzes, some provincially regulated workers are still faced with legislation that assumes their retirement at or near age 65. Most prominent are workers' compensation schemes that terminate payments based on the assumption that all workers retire at 65. This paper utilizes the province of Ontario as a case study to show how some of the arguments used by the Supreme Court of Canada in upholding age discrimination legislation more than two decades ago continue to shape current public policy.

The paper begins with a review of how age 65 was institutionalized as the age of retirement in Canada including the demographic context. Then, the legislative and policy regime, particularly the key Supreme Court decision on contractual mandatory retirement are analyzed. In section five, the paper turns to an examination of the pressures for legislative change and the nature of policy reform in the province of Ontario. Section seven studies the how the workers' compensation scheme was sheltered reform, notwithstanding the elimination of mandatory retirement.

2. The institutionalization of age 65.

Income security programs for those who are old or injured are a fundamental feature of modern societies. Historically, in Canada and in other nations, age 70 or 75 has been the age at which elderly individuals become entitled to income security. Newfoundland's old age pension, begun in 1911, set age 75 as the minimum age to receive benefits.¹ Canada's *Old Age Pension Act*, in force from 1927 to 1952, set the pensionable age at 70. In the 1950s when the *Old Age Security Act* was implemented, 70 continued to be the age when recipients were eligible for full benefits.²

The Canada Pension Plan, introduced in the mid-1960s, initially retained age 70 for the payment of benefits, however the age (to receive a full pension) was gradually reduced to 65 pension over a five-year period. At the same time, the age to receive Old Age Security payments was similarly reduced to 65. In this manner, age 65 became the accepted marker for exit from the labour market and entry into old age, primarily because the two federal income support programs – the Canada Pension Plan and Old Age Security – had adopted this age. Thereafter, a range of other incentives reflected in public policy, such as taxation, public health care provisions, and as well as private workplace arrangements, such as collective agreements and pensions, utilized 65 as the age at which employees should, and in many cases must, retire. The adoption of age 65 as the marker for exit from the labour force was most evident in contractual mandatory retirement provisions, which until recently applied to the majority of workers in Canada.

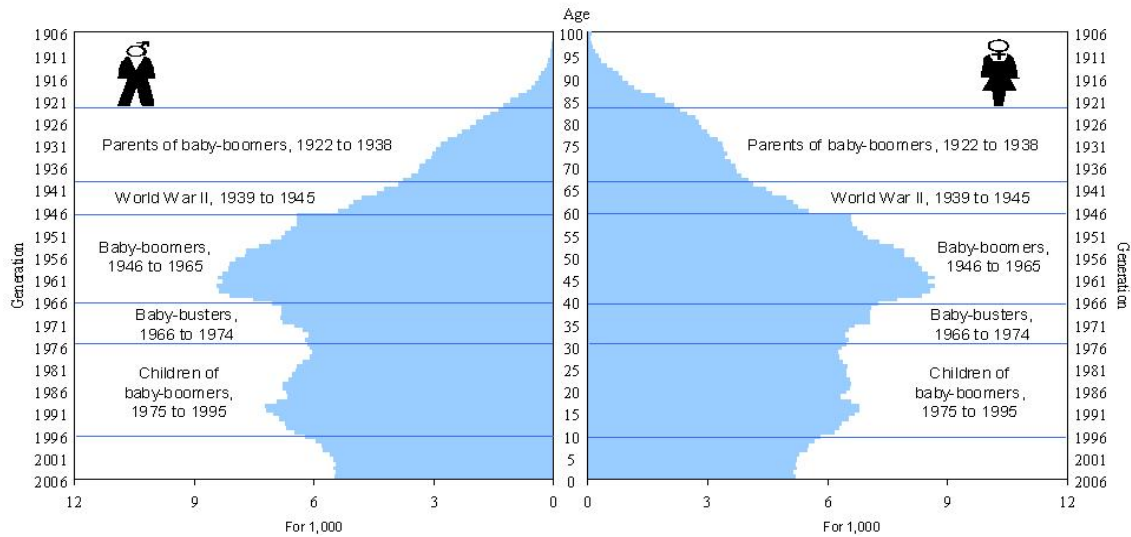
The institutionalization of age 65 occurred in a particular context shaped by prevailing demographic, life cycle, labour market and occupational conditions, as well as human rights legislation. These do not remain static but rather shift, at times considerably. Consequently, as discussed in later sections of this paper, so does the age at which workers are expected, or required, to withdraw from paid employment shift.

As shown below in Figure 1, Canada's demographic profile is dramatically shaped by the baby-boom generation born between 1946 and 1965. This group of unprecedented size has influenced income security and related policies to-date and will continue do to so for several more decades.

¹ Alvin Finkel, *Social Policy and Practice in Canada: A History*. Waterloo: Wilfrid Laurier University Press, 2007. p. 106.

² Denis Guest, *The Emergence of Social Security in Canada*. Vancouver: University of British Columbia Press, 1997.

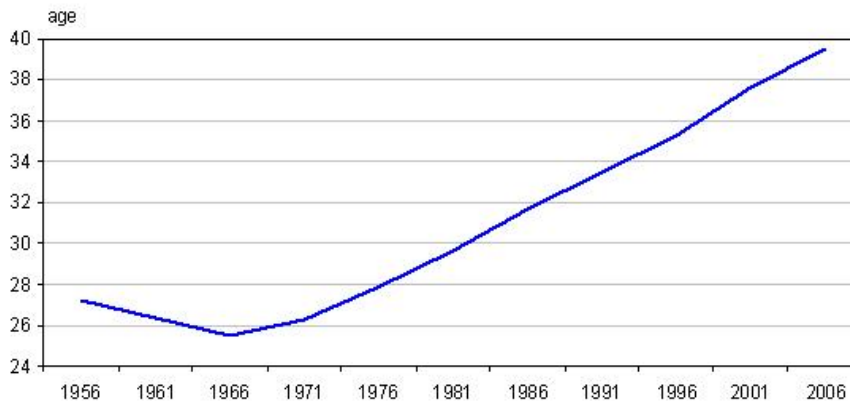
Figure 1: The age pyramid of the Canadian population, 2006



Source: Statistics Canada, Census of Population, 2006.

Another way to understand the population of Canada is to examine the median age, as seen in Figure 2 below. In the mid 1960s, when 65 became accepted as the mandatory retirement age, half of all Canadians were younger than 25.

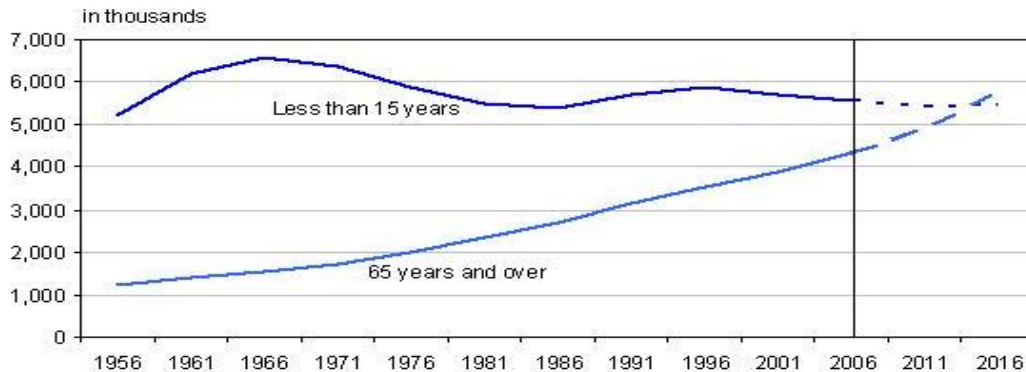
Figure 2: Median age in Canada, 1956 to 2006



Sources: Statistics Canada, censuses of population, 1956 to 2006.

As a result of the baby-boom generation there were few persons over the age of 65 in the population until the past several years, as seen in Figure 3 below. Indeed, during the 1960s and 1970s there were approximately five times as many persons 15 years or younger than 65 and over.

Figure 3: Number of persons aged 65 years and over and number of children aged less than 15 years in Canada, 1956 to 2016



Source: Statistics Canada, Censuses of Population 1956-2006, and Alain Bélanger, Laurent Martel and Éric Caron-Melanfant, 2005. *Population Projections for Canada, Province and Territories 2005-2031*, Statistics Canada Catalogue no. 91-520, scenario 3.

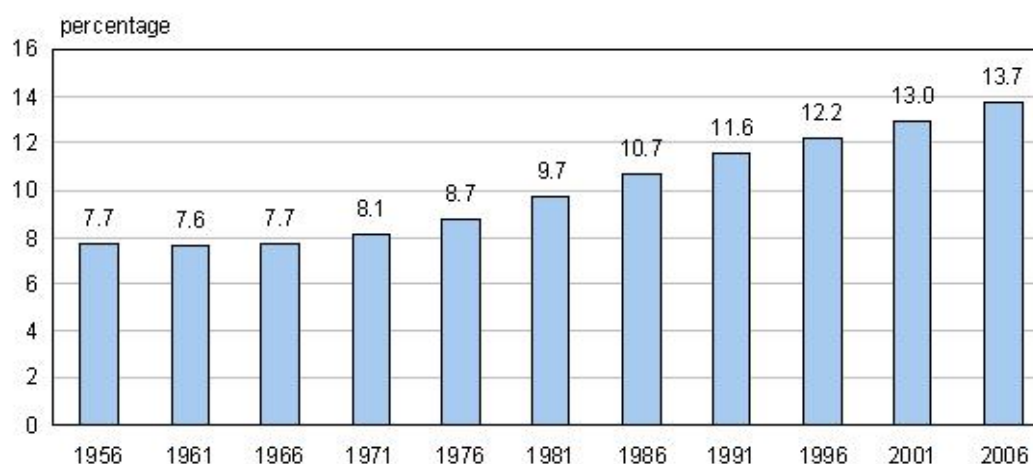
Due to the unique demographic profile, there were very few older persons and indeed older workers in Canada until the past decade. Accordingly, income support and workplace policies reflected a labour force of many young workers and few older workers. Not surprisingly, mandatory retirement at 65 was seen as a means to ensure that there would be jobs available for many workers entering the labour force. During the 1970s and 1980s a variety of policies and incentives were introduced to encourage retirement at younger ages. For instance, in 1987 the Canada Pension Plan was amended so that benefits could be paid as early as age 60. In addition, early retirement provisions in private pension plans, and other policies (such as tax-subsidized registered retirement saving plans) provided Canadians with considerable flexibility to retire before age 65.

Employer sponsored (registered) pension plans, particularly those with defined benefits incorporated considerable incentives for early retirement. Full pension benefits may be paid as of: (i) age 60, (ii) 30 years of service, (iii) when age and years of service reach 80, while full pensions at age 55 can be paid for workers in public safety occupations. The codification the tax regulations for the plans, and the early retirement provisions, was undertaken in the 1980s and early 1990s when there fast labour force growth, relatively high unemployment and restructuring linked to North American Free Trade Agreement. Thus, there was strong demand to accommodate early retirement arrangements. During the late 1970s the average age of retirement in Canada was 65, but it declined markedly to 60 years of age by the 1990s. In the past few years is has begun to increase again and now stands at about 61 years.

As noted above, until very recently there were relatively few older people in the population as a whole. As shown in Figure 4 below, the aging of the baby-boom generation – whose first members turned 60 in 2006 and will turn 65 in 2011 – is causing a rapid aging of the population and labour force. As a result of the increase in the number of seniors since 2001, their proportion relative to the total population reached a record 13.7% in 2006. That proportion, the best

representation of the aging of Canada's population, has been rising steadily since 1966, when it was 7.7%. The proportion of the under-15 population fell to 17.7% in 2006, its lowest level ever.

Figure 4: Proportion of persons aged 65 years and over 1956 to 2006



Sources: Statistics Canada, censuses of population, 1956 to 2006.

In addition to the movement of the baby boom generation through the age pyramid, there has been a dramatic increase in life span. Canadians are living longer than ever before, with significant increases in life expectancy between 1931 and 1991. For males, life expectancy at birth increased from 60.0 years in 1931 to 75 years in 1992 (a rate of 2.4 years per decade). For females, the increase was 3.1 years per decade, from 62.1 years in 1931 to 81 years in 1992. Canadians reaching age 65 today will live longer and healthier than has ever been the case: at age 65, Canadian women can expect to live at least another 21 years, and men another 17 years, with most of these years being healthy ones.

The rate at which the population is ageing has been accentuated because of unprecedented decline in fertility rates. In other words, not only is the baby boom cohort aging, but fewer children are being born today than was the case in the past. The current fertility of Canadian women is 1.5 births per woman, a level that has remained unchanged since 2000, and is considerably below the 2.1 births necessary to replace the current population (immigration is what keeps the total population from declining).

As mentioned earlier, public policy from the 1960s to the 1980s was shaped by the prevailing demographic, life cycle, labour market and related conditions. Perhaps nowhere is this more obvious than in the judicial decisions made in the early 1990s on contractual mandatory retirement at age 65.

3. Legislative and Policy Regime - McKinney v. University of Guelph 1990

Although the legislative and policy regime that instituted contractual mandatory retirement was largely in place by the late 1960s, acceptance by workers was never fully achieved (and indeed

was repealed in the 1980s in Quebec and Manitoba, as well as for federal civil servants, and never applied to the self-employed). The introduction of the *Charter of Rights and Freedoms*, which specifically lists “age” as an equality right, seemed to portend a rapid change in public policy.

In the 1987 *McKinney v. University of Guelph* case, eight professors and one university librarian faced forced retirement because they had reached the age of 65.³ The Court of Appeal held that the *Charter* did not apply to universities because they were not part of government. The Ontario court further found that the provincial *Human Rights Code*,⁴ under which age protection for purposes of employment expires at age 65, did not offend the *Charter*.

When the case reached the Supreme Court of Canada,⁵ the justices overwhelmingly agreed that the differential treatment permitted by the restricted definition of age in the *Code* offended the equality rights guaranteed under section 15(1) of the *Charter*. The reasoning of the majority in *McKinney* was that discrimination based on the enumerated grounds specified in the *Charter* is a social evil, and mandatory retirement deprives employees of a benefit under the *Code* based on age, a ground explicitly identified in the *Charter*.

The majority determined, however, that since universities were not government institutions for purposes of the *Charter*, its provisions did not directly apply to them, and section 15(1) could not permit the elimination of compulsory retirement at age 65. Notwithstanding the determination that the *Charter* did not apply, the Court considered the issue of mandatory retirement socially pressing and furthered its analysis by examining the constitutional status of the human rights legislation. In other words, the Court focused not only on the equality rights guaranteed in the *Charter*, but also on whether Ontario’s *Human Rights Code*,⁶ which permitted employment discrimination against employees at age 65, met the test of constitutional validity contained in the *Charter*.

Having found the differential treatment based on age and affront to the principle of equality, the Court rationalized the discrimination through a socio-economic argument. Although the Court determined that the Ontario *Code* had the effect of permitting forced retirement and thus discriminated on the basis of age contrary to section 15(1) of the *Charter*, such a policy was saved by section 1 of the *Charter* as a “reasonable limit.” The majority of the Court argued that retirement was a by-product of modern society, that “65 has now become generally accepted as the ‘normal’ age of retirement” and that “mandatory retirement has become part of the very fabric of the organization of the labour market in this country.”⁷

Justice La Forest also established that the context for which the discussion of retirement policy was based on is the importance of work in society. He cited former Chief Justice, Brian Dickson:⁸

³ *McKinney v. University of Guelph* [1987] 63 O.R. (2d) 1.

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

⁵ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229

⁶ *Human Rights Code*, *supra* note 14.

⁷ *McKinney*, *supra* note 15 at 294-95.

⁸ *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at page 368.

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.⁹

Given its fundamental role in human life, work cannot be taken away without significant justification. However, Justice La Forest's view was that compulsory retirement at age 65 was reasonable because it has become part of the normal structure of the organization of labour in Canadian society.

The dissenting voices in the Supreme Court decision, the two female Justices, took issue with key points in the majority opinion. Justice Bertha Wilson reasoned that the Ontario *Human Rights Code* was not saved by section 1 of the *Charter*. She argued that because the *Code* failed to distinguish between those who are able to work and those who are not, a rational connection between the policy and its objectives had not been adequately established. She wrote that section 9(a) "operates to perpetuate the stereotype of older persons as unproductive, inefficient and lacking in competence . . . reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with."¹⁰ She further remarked that immigrants, women and the unskilled – "the most vulnerable employees" – would be the most affected by the lack of legislative protection.¹¹

Similarly, Justice Claire L'Heureux-Dubé found that Ontario's *Code* was not saved by section 1 of the *Charter*. She argued that the statute's restricted age definition "is inconsistent with the fundamental values enshrined in s. 15(1): the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based upon individual ability."¹² In a twist on Justice La Forest's emphasis on the importance of work, Justice L'Heureux-Dubé wrote: "if 'in a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth', does this mean that upon reaching 65 a person's interest in self-identity and stake in self-worth disappear? That is precisely when these values become most crucial, and when individuals become particularly vulnerable to perceived diminutions in their ability to contribute to society."¹³

The *McKinney* decision thus determined public policy for more than a decade-and-a-half. Individuals and groups that opposed forced retirement at age 65 had to wait for legislators to amend the human rights statutes to eliminate contractual mandatory retirement. This, as analyzed in section five, would start with Ontario. However, even in the absence of legislative reform, the Supreme Court has since 1990 seemed to distance itself from the *McKinney* ruling.

⁹ *McKinney*, *supra* note 15 at 278.

¹⁰ *Ibid.* at 413.

¹¹ *Ibid.* at 415; also, Justice L'Heureux-Dubé noted, "The adverse effects of mandatory retirement are most painfully felt by the poor" (at 433).

¹² *Ibid.* at 424.

¹³ *Ibid.* at 430-31.

4. Selected Supreme Court Decisions Post-McKinney

Although the Supreme Court has not ruled again on mandatory retirement in a human rights context, in its subsequent jurisprudence since *McKinney*, the Court has placed greater attention on human rights. For instance, in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*,¹⁴ decided in the wake of *McKinney* in 1991, the Court stressed the importance of a case-by-case consideration of age discrimination. The case, while the issue was not mandatory retirement, does speak to the underlying issues of equity and the dignity of aging persons. Marcelle Tétreault-Gadoury lost her job and was denied ordinary unemployment insurance benefits on the basis that she was over 65. Justice La Forest, writing on behalf of a Court united in its conclusion, found that section 31 of the Unemployment Insurance Act¹⁵ of 1971 violated the *Charter* in terminating benefits at age 65. J. Forest wrote:

The most harmful and singular aspect of section 31 of the Act is that it permanently deprives the applicant, and any other person of her age, of the status of a socially insured person by making her a pensioner of the state, even if she is still looking for a new job. Regardless of her personal skills and situation, she is as it were stigmatized as belonging to the group of persons who are no longer part of the active population. . . .¹⁶

The Court's consideration of this case, soon after *McKinney*, demonstrated that the specific facts of each situation need to be examined, and that the outcome of *McKinney* was not intended to provide a blanket of judicial sanction of mandatory retirement. The Court expressed its concern with the "insidious stereotype" of ageism, whether it results in intentional or unintentional ("adverse impact") discrimination, and articulated a special concern for economically vulnerable older citizens.¹⁷

The 1999 *Meiorin* decision was a critical one in providing guidance on employment discrimination and human rights cases. In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* (often referred to as *Meiorin*),¹⁸ the Court strengthened the standards for establishing a *bona fide* occupational requirement and emphasized a human rights approach to such cases. Justice MacLachlin, writing for the Court, overturned the Court of Appeal and upheld the arbitrator's determination to reinstate a female firefighter who did not meet the aerobic tests designed by her employer. In doing so, Justice MacLachlin focused on the discriminatory effect of the impugned law, de-emphasizing the different legal approaches to the analyses from a *Charter* or a human rights perspective. She wrote, "I see little reason for adopting a different approach when the claim is brought under human rights legislation which,

¹⁴ *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 22 [*Tétreault-Gadoury*].

¹⁵ *Unemployment Insurance Act*, 1971, S.C. 1971-72, c. 48.

¹⁶ *Tétreault-Gadoury*, *supra* note 52 at 40.

¹⁷ *Ibid.* at 46.

¹⁸ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* [1999] 2 S.C.R. 3 ["*Meiorin*"].

while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the *Charter*.”¹⁹

Justice MacLachlin argued for a “unified approach that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate. . . .”²⁰ The emphasis on a stricter standard is a shift away from earlier decisions, which accepted a lower standard of defence of age discrimination. Justice MacLachlin reinforced the importance of a strict approach by noting that: “By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible.”²¹

The jurisprudence in *Meiorin* is based on a legal precedent of a case decided earlier the same year, *Law v. Canada*, which outlined how human rights principles are to be understood. In *Law v. Canada (Minister of Employment and Immigration)*,²² Justice Iacobucci, writing on behalf of the Court, focused on the goal of assuring human dignity as a way of defining the more abstract concepts of equality and discrimination. Relying on *Rodriguez v. British Columbia*,²³ Justice Iacobucci wrote:

[T]he equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. . . . It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. . . . Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.²⁴

In the specific discussion of the purpose of section 15(1), the Court emphasized the importance of “essential human dignity and freedom” and rejected differential treatment based on stereotypical characteristics that has the effect of “perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being.”²⁵

Since the *McKinney* decision (made, after all, shortly after the introduction of the Charter), the Supreme Court has promulgated a nuanced view of age discrimination. In any case, the underlying rationale for the *McKinney* decision, that mandatory retirement and hence age

¹⁹ *Ibid.* at para. 48.

²⁰ *Ibid.* at para. 50.

²¹ *Meiorin*, *supra* note 28 at para. 68.

²² *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 [*Law*].

²³ *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519.

²⁴ *Law*, *supra* note 32 at para. 53.

²⁵ *Ibid.* at para. 51.

discrimination are a fundamental feature of the labour market and social structure of Canada, is no longer valid.

5. Legislative Change in the Province of Ontario

Pressure for legislative change in Ontario reached a new level in 2001 when the Ontario Human Rights Commission issued a report, *Time for Action*, recommending changes to Ontario's human rights code that would essentially eliminate compulsory retirement at age 65 and would extend protection to workers who were 65 and older.²⁶ In early 2003, Ontario's Progressive Conservative government introduced legislation designed to eliminate mandatory retirement.²⁷ The bill, however, could not be acted upon when the Progressive Conservatives called an election and subsequently lost. The Liberal government, having won the 2004 Ontario election, stated its intentions to eliminate mandatory retirement.²⁸ In 2005, the Minister of Labour introduced legislation, which was to become law, to amend the *Ontario Human Rights Code* and to extend protection from discrimination to workers 65 and over. In doing so the Minister noted that:

The intent of this bill is to simply give all citizens the right to choose when they want to leave the workplace. This legislation is a simple acknowledgement of what we already know: Skills, ability, commitment and drive do not suddenly evaporate when somebody turns 65. In fact, in many cases employees are forced to leave a long-time job they love, only to take their years of experience and skills to a new and unfamiliar employer or organization. There have been many cases in Ontario where organizations and educational facilities have lost valued employees through this long-standing and, let's face it, rather archaic policy.²⁹

As analyzed in the next section, the amendments of *Ontario Human Rights Code* so that workers 65 and older would no longer be excluded from its protection (and thus no longer permitting contracts, or collective agreements, that require workers to be terminated at age 65) did not extend to the *Workplace Safety and Insurance Act*.

As a result of Ontario's lead, mandatory retirement at age 65 – in the space of a few years – has become obsolete in all Canadian provinces, subject to some exceptions (such as in New Brunswick, where it is permitted when part of the terms or conditions of a *bona fide* retirement or pension plan).

²⁶ Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Ontario Human Rights Commission, 2001). See also Arlene T. McLaren and Margaret M. Manery, *Factors Affecting the Economic Status of Older Women in Canada: Implications for Mandatory Retirement* (Victoria: British Columbia Human Rights Commission, 2001).

²⁷ Richard Brennan, "Tories May Scrap Forced Retirement," *The Toronto Star*, 6 April 2003. The core of the proposed legislation (Bill 68, Mandatory Retirement Elimination Act, 2003 [37th Legislature, 4th Session]) was to redefine age in the Ontario Human Rights Code. Currently, for the purposes of discrimination in employment, age is defined as more than 18 and less than 65 years. This has made it possible for employers and unions to require employees to retire at age 65. Bill 68 would have removed the ceiling of 65 years.

²⁸ Canadian Press, "McGuinty Promises Bill to Ban Forced Retirement," *The Toronto Star*, 29 January 2004.

²⁹ Bill 211, An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement, October 19, 2005. Toronto: Ontario.

Workers in industries within federal jurisdiction are the only ones that continue to face mandatory retirement. Under the *Canadian Human Rights Act* it “is not a discriminatory practice if an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.”³⁰ However, the federal government eliminated mandatory retirement in 1986 for its own employees, without any adverse impacts.³¹

At present, less than 10% of Canada’s workers face mandatory retirement. Most of these workers are covered by federal jurisdiction. However, as previously mentioned, some federal workers are no longer subject to mandatory retirement. Figure 5 provides a summary of recent legislative developments and mandatory retirement laws at the federal and provincial level.

Figure 5: Summary of federal and provincial legislation on mandatory retirement

Newfoundland and Labrador	Mandatory retirement was eliminated through changes to the Human Rights Code, effective May 26, 2007.
Nova Scotia	Mandatory retirement was eliminated on July 1, 2009 through changes to the Human Rights Act, as well as the Labour Standards Code.
New Brunswick	Since 1982 mandatory retirement applies only for workers with a bona fide pension or retirement plan.
Prince Edward Island	Mandatory retirement has never been permitted in human rights and employment standards legislation.
Quebec	No mandatory retirement since amendments to legislation in 1983.
Ontario	Legislative changes effective December, 12, 2006 eliminated mandatory retirement.
Manitoba	No mandatory retirement as of 1983, with the exception of university professors.
Saskatchewan	Legislative changes, effective November 17, 2007 made mandatory retirement illegal.
Alberta	Mandatory retirement is not permitted, unless it can be shown to be “reasonable and justifiable.”
British Columbia	Legislative changes effective January 1, 2008 eliminated mandatory retirement.
Yukon	Mandatory retirement has never been permitted in human rights and employment standards legislation.
Northwest Territories	Mandatory retirement has never been permitted in human rights and employment standards legislation.
Nunavut	Mandatory retirement has never been permitted in human rights and employment standards legislation.

³⁰ *Canadian Human Rights Act* 15 (c).

³¹ The armed forces and RCMP continue to have some mandatory retirement provisions.

Canada	The Canadian Human Rights Act permits terminating a worker's employment because he or she has reached "the normal age of retirement for employees working in similar positions." In July 2010, federal government announces plans to review the legislative provision. Mandatory retirement for federal civil servants was abolished in 1986.
--------	---

6. Worker's Compensation and Mandatory Retirement

When the Ontario government in 2004 proposed to eliminate mandatory retirement at age 65, a number of pieces of legislation had to be revised, in addition to the *Ontario Human Rights Code*. These include the *Coroners Act*, *Election Act*, *Ombudsman Act*, *Health Protection and Promotion Act* and the *Public Service Act* because these Acts contained clauses that mandated retirement at age 65, and thus were inconsistent with the objective of Bill 211. The *Workplace Safety and Insurance Act* (WSIA) was also amended, however unlike the other Acts, to protect it from the revised *Ontario Human Rights Code*.³² Specifically, Section 7 of Bill 211 amended the *Workplace Safety and Insurance Act* to provide that the *Act* and the regulations under it, and decisions and policies under that *Act* and regulations that require or authorize a distinction because of age continue to apply. This is at odds with the objective of amending the human rights code, namely to eliminate discrimination based on age.

In seeking to account for what were inconsistent, if not contradictory, positions, the government stated that:

One of the important aspects of this bill is that abolishing mandatory retirement would have no effect on the *Workplace Safety and Insurance Act*. The WSIA is designed as a fully integrated insurance system to assist injured workers with some replacement income until they are able to return to paid employment. The Workplace Safety and Insurance Board has a statutory responsibility to preserve the integrity of this insurance plan. For that reason, under this legislation, age-based provisions under WSIA would remain. The status quo would remain.³³

However the government did not indicate what risk to the integrity of the Workplace Safety and Insurance Board was entailed in ending mandatory retirement. Given that the workers' compensation scheme has existed for nearly a century, it is surprising to imagine it might be at some risk from an amendment to the *Ontario Human Rights Code*. Perhaps the best explanation is found in the submissions of employer groups during the public consultation of preparing Bill 211. For example, the Canadian Manufacturers & Exporters (Ontario Division) had argued that if the age 65 limit were to be removed from the *Workplace Safety and Insurance Act* and policies, "the current unfunded liability could exceed its previous all-time high of \$11 billion. This is an

³² Although not explored in this paper, the legislation to amend the human rights code also left intact the provisions of the *Employment Standards Act* and regulations that permit employers to discriminate in the provision of benefits against employees who are age 65 and older. This includes medical and dental benefits, as well as life and disability insurance. In other words, employers are not prohibited from providing lesser, or no benefits at all, to employees once they reach age 65. The government justified this by noting that individuals aged 65 and are eligible for government benefits such as the Ontario Drug Benefit Plan.

³³ Statement by Hon. Steve Peters (Minister of Labour): during the second reading of Bill 211, *An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement* - October 19, 2005.

additional cost burden to employers.”³⁴ However, there was no evidence provided in any submission, nor by the government, that liability or costs in fact would increase, or that existing liability costs were at all related to existing the age-based provisions.

At the same time, other groups argued that all workers, regardless of age or which legislation applies to their circumstances, should be treated equally upon amendment of the *Ontario Human Rights Code*. For instance, the Frontenac-Kingston Council on Aging wrote that “It is also vital that WSIB coverage is continued past the age of 65 without age discrimination for those workers who will continue their employment.”³⁵ The Canadian Association of Retired Persons stated, in legislative hearings on Bill 211, that:

The *Workplace Safety and Insurance Act*, 1997, and its predecessor, the *Workers' Compensation Act*, and all regulations, policies and decisions made under them should be amended to extend protection to workers over 65 in the same manner as those under 65, so that the choice is in no way hampered if people decide they want to continue to work.³⁶

The Ontario Human Rights Commission, in its statement to the legislative committee, focused on the exclusion of the *Workplace Safety and Insurance Act* from Bill 211. The Commission stated that:

Bill 211's approach to benefits and workers' compensation is inconsistent with the general intent of this legislation, which is to recognize the worth and contribution of older workers, to provide workers with the dignity of choice and to ensure that employees are assessed on their skills and abilities, not on their age. The provisions of Bill 211 respecting benefits and workers' compensation are a form of age discrimination. They send a message that older workers are essentially of lesser worth and value than their younger co-workers, and reinforce negative and ageist stereotypes and assumptions about the abilities and contributions of older workers. They fail to recognize the contribution of older workers to their workplaces or the importance of work to older workers. These provisions are offensive to dignity, and the commission believes they will be vulnerable to challenge under the charter.³⁷

Since the elimination of mandatory retirement, other groups have highlighted the problematic nature of the current legislation. The Law Commission of Ontario in its December 2008 report noted that:

³⁴ Canadian Manufacturers & Exporters (Ontario Division) submission to the Ministry of Labour on the Elimination of Mandatory Retirement. Toronto, September 24, 2004, page 5.

³⁵ Frontenac-Kingston Council on Aging Presentation to the Ministry of Labour Public Consultation on Ending Mandatory Retirement, September 15, 2004, page 2.

³⁶ Legislative Assembly of Ontario. Standing Committee on Justice Policy, November 23, 2005.

³⁷ Legislative Assembly of Ontario. Standing Committee on Justice Policy, November 23, 2005.

For example, the Ontario Legal Clinics Workers Compensation Network and the Ontario Worker Adviser point out that aged-based termination of significant benefits under Ontario's workers' compensation system ignore the diversity among older adults: many need to work past age 65 due to economic necessity, and older women and recent immigrants are particularly vulnerable because they have not had the opportunity to build up either private or public retirement benefits.³⁸

The Commission also reported that the Ontario Bar Association urged a review of legislation that uses age-based criteria. Specifically, the Bar Association stated that:

The use of age-based criteria in laws and programs requires re-examination. Specific age-based criteria are most common in employment, pension, insurance and driving. A comprehensive, articulated social policy-framework should underlie these laws and programs, and be proactive in anticipating the life-cycles and age-specific requirements.³⁹

As the Law Commission of Ontario noted, there is a need to ensure "that new laws take into account the needs and circumstances of" older adults.⁴⁰ Additionally, the Commission wrote that now is the time to determine "whether laws affecting older adults are achieving their purposes or are having unintended impacts on older adults."⁴¹

Most recently, the provisions of the provisions of the *Workplace Safety and Insurance Act* that set age limits on compensation have been subject to a constitutional challenge. Specifically, a cleaner suffered a back and neck strain at age 63. The workers' compensation board paid loss of earnings benefits until the worker reached age 65 as per the provisions of the legislation. The worker challenged the constitutionality of the provision arguing that he was planning to, and would have worked, past age 65.⁴² Although the decision of the Workplace Safety and Insurance Appeals Tribunal has not been released, it may well be that this case, or other like it, will result in rapid legislative change, or perhaps, as with *McKinney* in an extended period of policy stasis.

7. Conclusion

The elimination of mandatory retirement in Canada is not yet complete. Most workers under federal jurisdiction continue to be bound by forced retirement provisions. In the province of

³⁸ Law Commission of Ontario, *The Law as it Affects Older Adults: Moving the Project Forward*. Report on the Preliminary Consultation. Toronto. December 2008, p. 12.

³⁹ Law Commission of Ontario, *The Law as it Affects Older Adults: Moving the Project Forward*. Report on the Preliminary Consultation. Toronto. December 2008, p. 16.

⁴⁰ Law Commission of Ontario, *The Law as it Affects Older Adults: Moving the Project Forward*. Report on the Preliminary Consultation. Toronto. December 2008, p. 1.

⁴¹ Law Commission of Ontario, *The Law as it Affects Older Adults: Moving the Project Forward*. Report on the Preliminary Consultation. Toronto. December 2008, p. 2.

⁴² Ontario Workplace Safety and Insurance Appeals Tribunal. 2007. Decision No. 512/06I [2007 ONWSIAT 164].

Ontario, which has been the focus of this paper, workers' compensation policy continues to assume that retirement is at or near 65. Furthermore, medical and dental benefits, as well as life and disability insurance need not be provided to employees 65 and older. However, it is just a matter of time – as suggested by the Law Commission of Ontario and others – until such legislation is evaluated, challenged, reviewed and amended. Indeed, this is already occurring with the federal government promising new legislation and the Ontario workers' compensation limits subject to a constitutional challenge. Given the demographic, life cycle, labour force trends and human rights developments discussed in the paper, and the stated objective of the Ontario government in eliminating contractual mandatory retirement, it seems reasonable that the age of a worker should not be a factor in determining opportunities for re-employment from, and compensation for, a workplace injury.

However, as the analysis of the 1990 *McKinney* decision revealed, long established practices, such as contractual mandatory retirement, have considerable institutional inertia. The majority in *McKinney* found that mandatory retirement at 65 was reasonable, and hence justifiable discrimination, because it had become an ingrained component of the organization of work, and the life cycle. More than 20 years later, the same rationale, even if flawed, is still in effect, but this time utilized by legislators, with regard to older injured workers.