

The Elimination of Mandatory Retirement: Unfinished Business

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INTRODUCTION



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 faced with forced retirement provisions at 65.

The focus of this paper are workers' compensation schemes that terminate payments based on the assumption that all workers retire at 65, particularly in the Province of Ontario.

The institutionalization of retirement at age 65 in Canada.

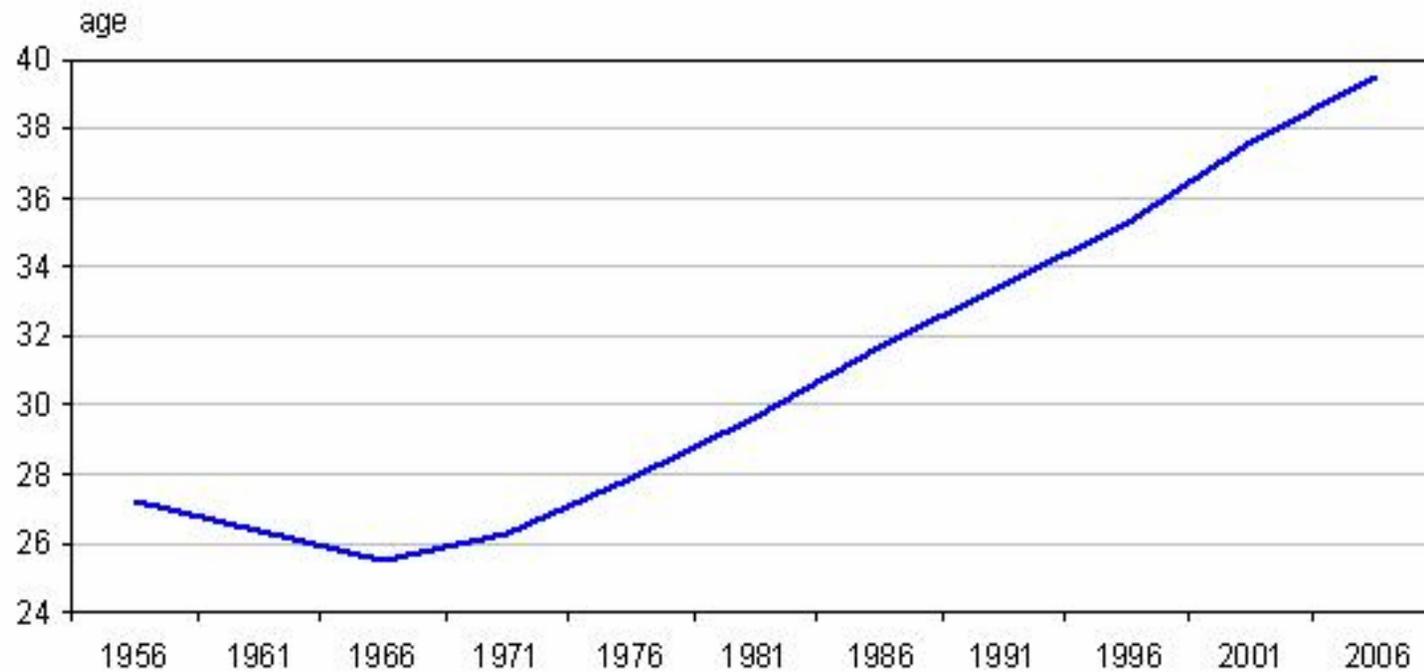


Age 70 or even 75 was used at the eligibility age for public pension programs in Canada until the 1960s.

The Canada Pension Plan institutionalized age 65. Human rights legislation then adopted this age.

The institutionalization of age 65 as contractual mandatory retirement occurred in a particular context shaped by prevailing demographic, life cycle, labour market and occupational conditions.

Median age in Canada, 1956 to 2006



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

Demographic profile and public policy



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, contractual mandatory retirement at 65 was seen as a means to ensure jobs for the many young workers entering the labour force.

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retirement was largely in place by the late 1960s, acceptance by workers was never fully achieved (and indeed was repealed in the 1980s in Quebec and Manitoba, as well as for federal civil servants).

The introduction of the *Charter of Rights and Freedoms* in the mid-1980s, which specifically lists “age” as an equality right, seemed to portend a rapid change in public policy.

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



The Supreme Court of Canada in 1990 considered the issue of mandatory retirement socially pressing and as part of the *McKinney* case furthered its analysis by examining the constitutional status of human rights legislation.

The majority of the Court ruled that retirement was a by-product of modern society and that “65 has now become generally accepted as the ‘normal’ age of retirement” such that “mandatory retirement has become part of the very fabric of the organization of the labour market in this country” (*McKinney*, at 294-95).

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



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.

However, even in the absence of legislative reform, the Supreme Court seems since 1990 to have distanced itself from the *McKinney* ruling.

Selected Supreme Court Decisions Post-McKinney



In *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, decided in the wake of *McKinney* in 1991, the Court stressed the importance of a case-by-case consideration of age discrimination.

The Court implied that the outcome of *McKinney* was not intended to provide a blanket of judicial sanction of mandatory retirement. In addition, 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.

Selected Supreme Court Decisions Post-McKinney



The 1999 *Meiorin* decision was a critical one in providing guidance on employment discrimination and human rights cases.

In this case, the Court strengthened the standards for establishing a *bona fide* occupational requirement and emphasized a human rights approach to such cases.

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 to extend protection to workers who were 65 and older (and thus effectively eliminate compulsory retirement at age 65).

The recommendation was taken up and supported by both major political parties.

Legislative Change in the Province of Ontario



In 2005, legislation was introduced to amend the *Ontario Human Rights Code* to extend protection from discrimination to workers 65 and over. In doing so the Minister of Labour noted that:

This legislation is a simple acknowledgement of what we already know: Skills, ability, commitment and drive do not suddenly evaporate when somebody turns 65.

Elimination of contractual mandatory retirement post McKinney



Ontario - December, 12, 2006

Newfoundland and Labrador - May 26, 2007

Saskatchewan - November 17, 2007

British Columbia - January 1, 2008

Nova Scotia - July 1, 2009

Canada (federal) - 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 announced plans to review the *Canadian Human Rights Act's* provisions.

Ontario Worker's Compensation and Mandatory Retirement



The worker's compensation scheme was protected from reforms to the *Ontario Human Rights Code*

Specifically, the legislation 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 seems at odds with the objective of the overall objective of the government.

Worker's Compensation and Mandatory Retirement



No clear explanation for this from the government, but there is evidence that employers were concerned that age based reforms to the Worker's Compensation would increase premiums.

However, there no data provided that liability or costs of the worker's compensation scheme would increase, or that existing liability costs were at all related to existing the age-based provisions.

Worker's Compensation and Mandatory Retirement



Other groups argued for the elimination of aged-based termination of significant benefits under Worker's Compensation legislation.

Most recently, the provisions of the legislation 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. He was paid loss of earnings benefits until age 65 as per the legislation. The worker has challenged the constitutionality of the decision arguing that he was planning to, and would have worked, past age 65.

Conclusions



The elimination of mandatory retirement in Canada is not yet complete. Most workers under federal jurisdiction continue to be bound by forced retirement provisions, and workers' compensation legislation in Ontario (and many other provinces) continue to assume that retirement is at or near 65.

In *McKinney* the majority found that mandatory retirement at 65 was justifiable discrimination because it had become an ingrained component of the organization of work, and the life cycle. Two decades later, the same rationale, even if flawed, is still in effect, but this time utilized by legislators.

Conclusions



However, it is just a matter of until the ageist and discriminatory provisions of legislation are challenged, reviewed and amended.

The experience of Ontario and other provinces in eliminating most requirements for contractual mandatory retirement, as well as the demographic and labour market conditions, suggest that politicians will act to revise worker's compensation schemes.