The Debate about Mandatory Retirement in Ontario Universities:

Positive and Personal Choices for Retirement at 65

by

John Munro (Department of Economics, University of Toronto)

Working Paper Presented to the Public Policy Committee of:

RALUT

(Retired Academics and Librarians at the University of Toronto)

22 January 2004

Revised: 2 March 2004

Revised: 8 June 2004
The Debate about Mandatory Retirement in Ontario Universities:

Positive and Personal Choices about Retirement at 65

John Munro (Department of Economics, University of Toronto)

An Historical Introduction to the problem of Contractual Mandatory Retirement (CMR) in Ontario

On 29 May 2003, the Conservative government of Ernie Eves introduced Bill 68: An Act to Amend the Provisions of Certain Acts Respecting the Age of Retirement, a bill designed to eliminate Contractual Mandatory Retirement (CMR). It received only ‘first reading’ and died on the Order Paper, when the Conservative government dissolved the Provincial Parliament in order to call a general election, which it subsequently lost. On 29 January 2004, the Globe and Mail reported that ‘Ontario is planning to end mandatory retirement for workers, shortly after the legislature resumes sitting in March, according to sources in the Liberal government’. So far [June 2004], the new Liberal government of Dalton McGuinty has not introduced any such legislation, though still intimating that it still plans to do so, sometime.

For many of us, the earlier announcement, made a year ago that the Conservative government would introduce such a controversial bill was a major surprise. We thought that the government had turned a deaf ear to pronouncements from the Ontario Human Rights Commission, long chaired by a former Conservative cabinet minister, Keith Norton, who had frequently campaigned for the abolition of mandatory retirement as a clear violation basic human rights (as enunciated in the Canadian Charter of Rights and Freedoms) and as an outdated custom that was economically unproductive and contrary to the general social good. 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 The only thing that's out of date is the idea that older people don't deserve the same respect and opportunities as everyone else.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’.

The Ontario Human Rights Code, in the version enacted in 1981 (and amended several times since

---


2 http://www.ohrc.on.ca/english/index.shtml
then), explicitly states in section 5(1) on Employment: ‘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 [my italics added], record of offences, marital status, same-sex partnership status, family status or disability’. But the following section 10.1(1) [formerly section 9(a)] severely qualifies that right by stating that, ‘in Part I and this Part, “age” means an age that is eighteen years or more, except in subsection 5(1) where “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 concerning age and other forms of discrimination: ‘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’. As Justice L’Heureux-Dubé commented in December 1990, ‘Ontario’s anti-discrimination Act is blatantly discriminatory’.

There has never been, of course, any legislation, provincial or federal, that mandates mandatory retirement. 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, amended in 1985) expressly forbids any such form of age discrimination (though with one

---


4 She also stated that ‘it is somewhat of an anomaly to find in a statute designed to prohibit discrimination a provision which specifically permits it’: contained in a dissenting opinion in to the Supreme Court decision, known as 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. See also n. 7 below.
qualification).\(^5\) In 1986, the federal government of Canada abolished mandatory retirement for its own civil service employment. But, currently, the only province that absolutely forbids the imposition of ‘contractual mandatory retirement’ is Quebec, which banned it in provisions of the Labour Standards Commission (in the Bill known as ‘Respecting Labour Standards’) in December 1983.

Four other provinces are sometimes but incorrectly included in a list of jurisdictions that have banned contractual mandatory retirement for college and university professors: Manitoba, New Brunswick, Alberta, and Prince Edward Island. In 1982, Manitoba did indeed impose such a general ban on CMR; but, in 1996, following a successful though bitter faculty strike at the University of Manitoba, the Conservative government of Manitoba amended its legislation governing the Universities of Manitoba, Winnipeg, and Brandon, to permit them to include CMR in their contracts, with the argument that age is a ‘\textit{bona fide occupational requirement}’ for academics.\(^6\) In 1982, New Brunswick had also 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 qualification).

\(^5\) Online version: \texttt{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. Section 15 states that: ‘(1) 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. See, however, clause (2), below, on pp.

\(^6\) See David MacGregor, ‘The Ass and the Grasshopper: Universities and Mandatory Retirement’, in this volume, n. 56; and Jonathan R. Kesselman, ‘Time to Retire Mandatory Retirement’, Department of Economics Working Paper, University of B.C.: draft version of 26 November 2003, p. 21, n. 59, citing section 61.1 of the University of Manitoba Act (1996 Amendment), the source of the quotation. But in the recently published version this note does not appear: Jonathan Kesselman, ‘Mandatory Retirement and Older Workers: Encouraging Longer Working Lives’, \textit{C.D. Howe Institute Commentary}, 200 (June 2004), 1-24; and Table 1, p. 2, lists Manitoba along with Quebec as the two provincial jurisdictions within which CMR has been abolished. I understand that Prof. Kesselman had to delete several notes and passages, those not closely related to his central arguments, concerning CMR in general in Canada, in revising the paper for publication. Though my own contribution is focused entirely on Ontario universities, I am heavily indebted to Professor Kesselman’s paper for much of the evidence cited in this paper on CMR; and I could not have written this without his original essay. See also: OCUSA Ontario Confederation of University Faculty Associations) ‘Mandatory Retirement Discussion Paper’ (August 2002), online at: \texttt{http://www.ocufa.on.ca/retirement/retire.asp}
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 major university since 1995.7

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, after Prof. Olive Dickason of the University of Alberta, on being forced to retire at 65, lodged a complaint with the Alberta Human Rights Commission, contending that her mandatory retirement violated the Individual's Rights Protection Act. The Commission found in her favour: that the termination of her position was not ‘reasonable and justifiable in the circumstances’, as required by the ‘bona fide occupational qualifications’ required for an exemption from the provisions of this act. The Court of Queen’s Bench upheld that decision, which was subsequently rejected by the Alberta Court of Appeal. A subsequent appeal to the Supreme Court of Canada (Dickason v. University of Alberta) was denied, on the grounds that ‘the objectives of mandatory retirement’, as contained in the University’s contract -- one ‘freely negotiated by parties with relatively equal bargaining positions’ -- ‘were stated to be the preservation of tenure, the promotion of academic renewal, the facilitation of planning and resource management, and the protection of “retirement with dignity” for faculty members’. Such grounds ‘are of sufficient significance to justify the limitation of a constitutional right to equality’.8

Many of the arguments put forward in deciding this case, discussed in other essays in this volume, were similar to those contained in the previously mentioned landmark legal decision, McKinney v. University of Guelph, issued by the Supreme Court of Canada in December 1990. Since this case is really that one that

---


has impeded any further steps towards the abolition of mandatory retirement in Canadian universities, and since it concerns universities in Ontario, the subject of this study, it deserves the most attention.⁹ In 1985, Prof. 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 opposed by their universities (and then by the Attorney General of Ontario), filed a law suit applying ‘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, Court of Appeal for Ontario rejected their suit, which was then appealed to the Supreme Court of Canada. Subsequently, in December 1990, the Supreme Court upheld the Court of Appeal’s decision, in a five to two decision, on three essential grounds.¹⁰ 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 individual 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 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’.¹¹ 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

⁹ See sources cited at note 4 above.

¹⁰ *McKinney v. university of Guelph* [1990] 3 S.C.R. 229. The judgment was written by Justice Gerard La Forest, supported by Chief Justice Dickson, and Justices Sopinka, Gonthier, and Corry; the dissenters were the two female Justices, Wilson and L’Heureux-Dubé.

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’. Those ‘reasonable limits’ to permit this form of age discrimination are essentially those enunciated in *Dicksason v. University of Alberta*, but will be considered later in their proper context.

The Constitution of the United States of America has no such ‘reasonable limits’, or ‘notwithstanding clauses’ or other qualifications limiting civil liberties – other than the common judicial observation (limiting the first amendment) that one may not cry ‘fire’ in a crowded theatre. In various stages, beginning with the Age Discrimination in Employment Act of 1967, the U.S. Congress, without challenge from the U.S. Supreme Court, 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 act to establish 70 as the minimum age of mandatory retirement for most workers (but exempting university professors, until amended in 1982); in October 1986, Congress prohibited mandatory retirement everywhere, again with the significant exception of university professors (whose employment was still permitted to continue until age 70). As Ashenfelder and Card remark 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. In 1993, Congress revisited this act, and voted to have this exemption expire, on schedule, on 31 December 1993 (as provided in the 1986 act). By that date, many American universities and colleges had already, quite voluntarily, eliminated their mandatory retirement provisions.

---


14 Ibid., pp. 957-80.
When Bill 68 was introduced into the Ontario legislature in May 2003, the presidents of most of the universities in Ontario reacted in alarm, purportedly requesting either an exemption or at least a seven-year delay. With the threat that the new McGuinty Liberal government will re-introduce this bill, the University of Toronto has now stated that it is willing consider a ‘phased in’ elimination of mandatory retirement, without stating what ‘phased in’ really means.

The arguments that Ontario universities employ to justify Mandatory Retirement.

(1) ‘to open employment and promotion opportunities for younger workers’

As Jonathan Kesselman notes in his recent paper, on ‘Mandatory Retirement and Older Workers’, this is ‘one of the most commonly cited arguments for mandatory retirement’, and evidently the key argument put forth in the 1990 Supreme Court decision. Its majority decision, written by Justice Gerard La Forest, stated that: ‘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 the restrictive clause s. 9(a) in the Ontario Human Rights Code, when it was enacted in 1981. La Forest’s 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 a 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.

15 Kesselman, Mandatory Retirement, p. 6; see n. 6 above.
(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’. 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.

Prof. Kesselman, however, firmly attacks the view that CMR is required to increase the employment of ‘younger workers’, by contending that the arguments adduced to support CMR 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 a given total amount of work’. He also cited the verdict of Professor James Pesando – one of those who provided the Court with many arguments to sustain CMR – that: ‘the argument that ending compulsory retirement would reduce the job opportunities available in the labour force is not substantiated by economic analysis’. As any economic historian would or should appreciate, the Canadian economy, with a continuously rising population, having grown from 18.224 million in 1961 to 31.310 million in 2002, provides an ever increasing demand for skilled and educated labour – and that certainly includes university professors, especially in that 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 Wilson observed in 1990, 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.

---


17 Kesselman, Mandatory Retirement, pp. 6-8; and James Pesando, The Elimination of Mandatory Retirement: An Economic Perspective (Toronto: Ontario Economic Council, 1979), p. 23. Pesando and Gunderson, however, did concede that this hypothetical situation might prevail in ‘closed systems’, the term used by La Forest, who certainly failed to substantiate his contentions.

At the same time, of course, nobody would contest the view that universities, along with similar 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 University of B.C. 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 UBC also lost four professors, none of whom retired, and thus all of whom found better opportunities elsewhere.\(^{19}\) Obviously, even within a ‘static state’ employment economy a university can receive ‘new blood’.

Finally, this argument to justify CMR 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 (before 1996) and Quebec has been that most professors retire around the age of 65; and currently in Quebec (2003), the average age of retirement, in all universities, is 63.5.\(^{20}\) Finally, Professor Kesselman

\(^{19}\) That includes Prof. Jonathan Kesselman, who left UBC to take up the Canada Research Chair in Public Finance, at Simon Fraser University.

cites a study ‘undertaken just several years after Manitoba and Quebec banned CMR’, which found ‘the effects on labour force participation rates of people 65 and over to be statistically insignificant’.\textsuperscript{21}

Exactly comparable data for the US, for which the age of mandatory retirement had been 70 (not 65), from 1978 to 1993, are not available. But a recent economic analysis of the effects of abolishing CMR in 1994 shows a fairly even distribution of age-specific retirement rates from 60 to 70: rising from 3.0 at age 60 to peak 18.1 at 65 (when social security benefits become available to most), then falling to 16.7 in 1969, and rising to 29.1 (but 75.6 pre-1994) at the former age of mandatory retirement, at 70, and remaining high thereafter (at 25.4 at 72, the last age investigated).\textsuperscript{22} The most interesting result is that ‘apart from ages 70 and 71 [i.e. the former age of mandatory retirement], retirement rates before and after 1994 were very similar’, so that ‘none of the differences ... is even close to [having] statistical significance’.\textsuperscript{23} In other words, the problem that abolishing CMR would thus pose in limiting employment of the young, even if the ‘lump of labour’ fallacy were true for universities, seems to be an inconsequential one. In her 1990 dissent to \textit{McKinney v. University of Guelph}, Justice L’Heureux-Dubé observed that a justification for using section 1 of the Charter to limit rights specified in section 15(1) must be based on the \textit{R v Oakes} ‘proportionality’ test, in terms of striking ‘a balance between the claims of legitimate but competing social values’, a test that CMR (as ostensibly justified in Ontario’s Human Rights Code, section 9.a) did not meet. In her view, ‘since the

\textsuperscript{21} Kesselman, \textit{Mandatory Retirement}, pp. 7-8, citing Frank Reid, ‘Economic Aspects of Mandatory Retirement: the Canadian Experience’, \textit{Relations industrielles}, 43:1 (1998), 101-13. His own economic analysis led him to conclude (pp. 8, 10) that ‘a ban on mandatory retirement would at most defer the average age for promotions of younger workers by several months. That hardly constitutes a significant blockage for the promotion of younger workers’. A specific study for universities, however, has yet to be done.

\textsuperscript{22} Ashenfelter and Card, ‘Mandatory Retirement’, p. 968, Table 2.

\textsuperscript{23} \textit{Ibid}... p. 967. Cf also, on p. 969: ‘The results... provide compelling evidence that the elimination of mandatory retirement [at age 70] led to large reduction in faculty retirement rates at ages 70 and 71, with little systematic change at other ages [my italics]. Moreover, the effects of uncapping [eliminating CMR] are similar whether we compare changes in retirement rates before and after 1994 at institutions that remain uncapped until the federal law change, or differences in retirement rates between capped and uncapped institutions in the early 1990’s’.
number of people who (a) attain that age [of 65], and (b) 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’.\textsuperscript{24}

\textbf{(2) to eliminate the need to monitor employment performance and productivity}

As Prof. Kesselman then notes, a closely related and indeed ‘a central argument for allowing CMR’ – in Canada, at the customary age of 65 – ‘is that the productivity of workers declines as they approach age 65 and in the years beyond’, or that their compensation rises faster than does their productivity, so that CMR permits employers to discharge such unproductive or costly workers gracefully and equitably ‘without the need for harsh and costly’ performance monitoring in order to determine when they cease to be valuable assets.\textsuperscript{25} In the 1990 \textit{McKinney vs University of Guelph} decision, Justice La Forest, asserted, with virtually no documentation, ‘that on average there is a decline in intellectual ability from the age of 60 onwards’,\textsuperscript{26} 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 Gunderson and Pesando, La Forest painted an even more dire picture of the likely consequences of abolishing CMR at 65: ‘dismissals of older workers would likely increase; monitoring and evaluation 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’.\textsuperscript{27} As Kesselman acidly comments, ‘it is


\textsuperscript{25} Kesselman, \textit{Mandatory Retirement}, pp. 8-11, and especially n. 18.


\textsuperscript{27} \textit{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., \textit{Eliminating Mandatory Retirement: Economic and Human
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'. In her rebuttal of la Forest’s arguments, Justice L’Heureux-Dubé made the same observation herself, and also noted that, in the U.S., university professors were not required to retire before 70 [i.e., in 1990, before the abolition of CMR for professors on 31 December 1993]. Therefore, why should Canadian academics be forced to retire so much earlier? Justice Wilson asked an even more pertinent question: 

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.

What is the current evidence on this pressing issue of academic competence and aging? Prof. Kesselman contends that ‘in empirical studies of the determinants of individual worker performance, there is little evidence that ability or productivity declines with age’; and that ‘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 somewhat reduced physical abilities’. 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

---


28 Kesselman, Mandatory Retirement, p. 8.


In my own case, with a university career extending from 1964 (age 26) to 2004 (age 66), 25 of my 77 publications of journal articles and essays (excluding book reviews, and earlier monographs, etc.), or 32.5 per cent, have appeared since I turned 60, in 1998; four more are now in press, and I am working on several others. Similarly, since 1998, I have delivered 17 or 24.3 percent of my lifetime total of 70 conference papers. Since 1993 (age 55), I have held four consecutive Social Science and Humanities Research Council grants (each for three years) and two University of Toronto Senior Connaught Fellowships, which finance the research, in Belgium and Great Britain, that produced these publications and conference papers. See: http://www.economics.utoronto.ca/munro5/1munrocv.pdf

Finally, Prof. Kesselman 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 phenomena: that ‘most workers who find their productivity declining tend to self-select into early retirement’. 31

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 provided 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 rising salary levels, combined with years of service, largely determine the amount of pension received at retirement, under both Defined Contribution and Defined Benefit schemes. One may also assume that ceteris paribus salary levels, especially at private universities, are very strongly correlated with academic merit and productivity, especially in terms of peer-reviewed articles and monographs. Even more interesting are the statistical comparisons between public research and non-research institutions on the one hand and private research institutions on the other. In the latter, which includes the

32 In my own case, with a university career extending from 1964 (age 26) to 2004 (age 66), 25 of my 77 publications of journal articles and essays (excluding book reviews, and earlier monographs, etc.), or 32.5 per cent, have appeared since I turned 60, in 1998; four more are now in press, and I am working on several others. Similarly, since 1998, I have delivered 17 or 24.3 percent of my lifetime total of 70 conference papers. Since 1993 (age 55), I have held four consecutive Social Science and Humanities Research Council grants (each for three years) and two University of Toronto Senior Connaught Fellowships, which finance the research, in Belgium and Great Britain, that produced these publications and conference papers. See: http://www.economics.utoronto.ca/munro5/1munrocv.pdf

31 Kesselman, Mandatory Retirement, p. 9, n. 24, 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’.
most famous Ivy League universities, only three percent of 60-year old faculty were still employed at age 73, when mandatory retirement was in force [to 1993]; but after its abolition, that proportion has risen to ‘30 percent or even higher’. In the 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 (producing more Nobel prizes than in any other country), can one doubt society’s gains by allowing such professor to continue research and teaching into their early seventies?\footnote{Ashenfelter and Card, ‘Elimination of Mandatory Retirement’, pp. 976-77. They also note that because their data comes from a period shortly after the end of mandatory retirement, on 31 December 1993, ‘we cannot reliably estimate survival probabilities beyond age 73’.
}

Most Canadian university administrators, however, seem to believe as idées fixes that academic performance does generally decline with age, especially 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. The majority of the Supreme Court in the 1990 McKinney decision 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.

Justice La Forest’s core argument in rendering his decision 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 with his other key argument, cited earlier: namely, that mandatory retirement ‘ensures a continuing, and necessary, infusion of new people,’
which objective, in ‘a closed system with limited resources .... can only be achieved by departures of other people’. Therefore, if mandatory retirement were to be abolished, tenure might also be abolished, because then ‘the imposition of a stricter performance appraisal system might be required’, one ‘likely requiring competency hearings and dismissal for cause’, which, furthermore, would ‘would be difficult and costly and constitute a demeaning affront to individual dignity’. Certainly many Canadian university administrators have long warned – indeed continue to threaten – that tenure would cease with the abolition of mandatory retirement, with these same dire consequences for the humiliated victims.

In her reply, 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’, furthermore contending that she also found it difficult to accept Justice La Forest’s argument concerning ‘the threat that an evaluation scheme will “constitute a demeaning affront to individual dignity”’ (at p. 284’).

Furthermore, she asked:

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...

As she also observed, ‘those jurisdictions which have eliminated mandatory retirement of university

---


36 I was disappointed to read the following comment attributed to my Economics colleague, Professor David Foot: “There will be no more coasting to retirement,” adds U of T economics professor David Foot. But worse, in his view, is that such a change could undermine the purpose of tenure, which is supposed to free professors from excessive supervision to ensure academic freedom’. Cited in Rosanna Tamburri, ‘Rethinking the Rules on Retirement’, in University Affairs, December 2003, p. 13, online at: http://www.universityaffairs.ca/pdf/past_articles/2003/december/retirement_rules.pdf. Why Prof. Foot thought that an abolition of mandatory retirement would lead to an end of tenure was not made clear.

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 removed 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 CMR was fully abolished in the U.S.; and today most American universities continue to thrive, with, on average, much higher salaries and research grants than are enjoyed by their Canadian counterparts.\textsuperscript{38} That historical evidence, combined with Justice L’Heureux-Dubé’s astute analyses, thus constitute a decisive refutation of La Forest’s core arguments for the 1990 Supreme Court decision. Needless to say, it also destroys the case for CMR in Canadian universities – i.e., outside of Quebec.

Needless to say as well — but yet it must be stated clearly – any provincial legislation to abolish CMR 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

\textsuperscript{38} 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): UC Berkeley (139.1), UCLA (138.9), Michigan (137.9), Virginia (136.4), Rutgers (134.4), Connecticut (132.0), Delaware (129.5), Georgia State (129.5), North Carolina (129.1), Illinois (125.4): from University of Toronto Faculty Association, News Bulletin (9 April 1999): http://www.utfa.org/html/newsbul/html/apr0999.htm. These values, however, may be somewhat distorted by then prevailing exchange rate, which, in June 1999, was $1.00 CAD = $0.68 USD.
normal age of retirement except for cause,’ and ‘after following certain procedures’, involving ‘due process’.  

Any such dismissals would be based on the evidence documented in the annual reports that 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, of course, is 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 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.

Although some may contend that student course evaluations may be unfair, since some students, guaranteed anonymity, may be vindictive for unjust reasons, these evaluations have provided a very valuable tool for faculty ‘monitoring’ and evaluation over the forty or more years that they have been in use. In any

---

39 See Martin Friedland, *University of Toronto: a History* (Toronto, 2002), p. 565. That then meant the age of 68; see n. 51 below.

40 At the University of Toronto, student evaluations of teaching were first undertaken by the Department of Political Economy [now the separate departments of Economics and Political Science] 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 (based on these reports), combined with Across the Board increases (COLA), commenced 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.
event, faculty members may produce other, and perhaps countervailing, documents to substantiate their achievements in both teaching and research (such as reviews of their publications). 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’. And so they should be, at any age. As Justice L’Heureux-Dubé herself observed, that is precisely the form of ‘monitoring’, almost universally employed in Canadian universities, that critics so fallaciously contend would be too costly or socially painful to administer. She also commented that: ‘the value of tenure is threatened by incompetence, not by the aging process’.41

One current chair (and a former Associate Dean of Arts) admitted to me that my arguments on this score were basically sound: namely, that the university does continually undertake the monitoring that could justify dismissals for cause; and that the University of Toronto has frequently used such evidence to convince incompetent professors to take early retirement, lest they be dismissed for cause. But he also contended that this course of action was obviously much more difficult to undertake than allocating annual merit-award increases. No doubt that is somewhat valid, since obviously dismissals of professors ‘for cause’ does involve considerable costs, over an often considerable period, in emotional distress, legal fees, and opportunity costs (time foregone that could be spend on more profitable pursuits).

Nevertheless, the costs involved in dismissing incompetent or simply unproductive professors, whether or not over the age of 65, hardly constitutes a significant argument for retaining mandatory

---

41 Cf her statement in McKinney v. University of Guelph [1990] 3 S.C.R. 229, pp. 426-7. Two other noteworthy comments: (1) ‘In fact, performance evaluations of faculty are an integral and ongoing part of university life, and it has never been suggested that this process threatens tenure, collegiality or academic freedom. Performance evaluations take place at the hiring stage, as well as in the process of determining whether to grant tenure, whether to promote tenured faculty, which tenured faculty to select for administrative posts and research grants, and whether and in what amount merit increases are to be awarded to tenured faculty’; and (2), ‘if the abolition of mandatory retirement results in a more stringent meritocracy, tenure is not depreciated. Its significance may actually be enhanced, as tenure will reflect continued academic excellence....’
retirement, simply because the occasions requiring such dismissals would still be few and far between, basically for three reasons, two of which have already been adduced. First, Ontario universities (and certainly 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’. Second, we must recall Prof. Kesselman’s arguments and evidence about ‘self-selection’: i.e., that the vast majority of such professors, who ‘could not make the grade’, would be most unlikely to continue teaching, and continue as full-time academics, after the normal age of retirement. 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. If the university really upholds CMR 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 continue teaching. But in fact, our department and so many others are so desperately short of

---

42 See above, pp. . Remarkably, Justice La Forest himself stated that the ‘estimates of workers who would voluntarily elect to work beyond the age of 65 vary from 0.1 to 0.4 per cent of the labour force, or 4,787 to 19,148 persons annually in 1985, rising to 5,347 to 21,388 in the year 2000’, citing an affidavit from Professor David Foot (University of Toronto): in McKinney v. University of Guelph [1990] 3 S.C.R. 229, p. 306. For reasons discussed below, the proportion of professors wishing to continue past 65 would be somewhat higher, as indicated in the American evidence cited earlier, in Ashenhelter and Card, ‘Mandatory Retirement’, pp. 975-9.
teachers or lecturers to hold necessary classes that virtually no offers to teach a course will be rejected. In our departments, the proportion of courses given by stipendiary lecturers, including retirees, ranges from 35 to 40 per cent. The only observable constraint is the supply of funds to pay what are, in fact, miserable and insulting stipends (now $5,000 per semester course).

(3) ‘to promote the university’s goal of greater diversity’

This is a novel argument that neither the Canadian Supreme Court (in 1990 and 1992) nor Kesselman’s paper ever considered; but it is certainly one proposed now by the University of Toronto. 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). Certainly increasing the ‘diversity’ of the university’s faculty is a laudable goal – if one could agree fully on what is meant by ‘diversity’ or the most desired components of ‘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-European origin. Furthermore, does the university really mean that, faced with scarcities in certain academic fields – scarce supplies of suitably trained applicants, with PhD degrees -- it will allow considerations of supposed ‘diversity’ to supersede considerations of intellectual merit, talent, and experience? In any event, not just males are currently subject to mandatory retirement at 65; and would Canadian universities now insist that those female academics who are forced to retire at 65 be replaced solely by younger females?

43 See the remarks of Prof. Angela Hildyard, Vice-President Human Resources’, at the UTFA-RALUT conference of April 2003, in Russell and Rea, Redesigning Retirement, pp. 14-15 [http://www.ralut.ca/proc.pdf]: ‘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 retirements to in an attempt to bring more diverse faculty on this campus. If there is no mandatory retirement it will slow down I think our ability to bring about those changes’.

44 See above, p. 000, and n. 12.
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, namely one that seems to have favoured males of European origin (though such a charge still has to be verified as one constituting deliberate discrimination). ‘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?’ 45

Unfortunately, however, these views would probably not pass muster with many 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’. 46 In the 1990 McKinney v. University of Guelph decision, the Supreme Court (Justice La Forest) 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’; 47 but it is significant the Supreme Court also did not refer to the arguments used to obtain that exemption from CMR for professors in the U.S. Age Discrimination in Employment Act (1986 amendment). It is also significant, we should remember, that the U.S. Congress, in reviewing this act in 1993, agreed that this same argument no longer provided a valid reason for maintaining the exemption from


mandatory retirement for university professors, which thus expired that 31 December.\footnote{See above, pp. \ldots; and also \textit{McKinney v. University of Guelph} [1990] 3 S.C.R. 229, p. 427, referring to 29 U.S.C. \S\S 631(d).}

\textbf{(4) Mandatory Retirement as a fiscal necessity.}

At the University of Toronto itself, retirement policies used to be much more flexible than they are now, or have been in the last three decades. In his admirable history of the University, Martin Friedland notes that, on the eve of World War I, the retirement benefits secured from the Carnegie Corporation ‘for academics at non-sectarian institutions’ were not available until a professor had reached the age of 70; and if, following the Great War, 65 became the customary age of formal retirement, university administrations nevertheless granted an exemption to most faculty members who wished to continue teaching, with full salary and benefits, to at least age 68 (or even 70).\footnote{Friedland, \textit{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’.} 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 \ldots without consultation with UTFA [University of Toronto Faculty Association]’, as stated in UTFA’s official history.\footnote{Nelson, \textit{Faculty Power}, pp. 155, 15. See also the on-line notes for Friedland’s \textit{History}, at \url{http://www.utppublishing.com/uoft_history/notes/notes_chapter30.pdf}: for p. 415, par. 1: ‘At the same time [as salaries were raised, under President Smith, in 1955] the official retirement age was raised from 65 to 68’.} John Evans had became the new President on 1 July; and the new Governing Council, marking a radical reorganization of university government, held its first meeting on 4 July.\footnote{Friedland, \textit{History}, pp. 543-54.} That ukase, whether from the new President or the new Governing Council, came as a shock to all of us. I myself considered it to be a very serious violation of my implicit contract with the University of Toronto, on being hired in 1968, since it was then clearly understood that I could continue as a full-time academic until the age
of 68 (provided that I received tenure, as I did in July 1970, and was not subsequently dismissed ‘for cause’); and I certainly felt ‘violated’ in the full sense of the word.

The ostensible or stated reason for this unilateral imposition of mandatory retirement at the reduced age of 65 was to permit the university to cope with the current financial stringency, which, of course, is always ‘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 leave. The blame for this fiscal crisis was laid – then as now and ever more – 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. 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, in 2004, still reap such financial gains from imposing mandatory retirement at 65? In our Economics department, and certainly in my own case, there does 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 my final salary at retirement, but, for about five years, will do only 60 percent of my teaching load: i.e., no more than three semester courses, instead of the five that I taught. That is the necessary part of the current

52 See Kesselman, ‘Time to Retire Mandatory Retirement’ (working paper version), p. 13, n. 36, citing Michael Krashinsky, ‘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. Kesselman believes that the current ratio is more like 1.5:1 – and it may well be even lower, for reasons given above. See also Nelson, Faculty Power, pp. 79-82, from the introduction of PTR (merit award increases) at the University of Toronto, in 1972.

53 See Friedland, History, pp. 560-61, 581-2: ‘By 1980, funding per student was 25 per cent below the average of all provinces’. 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 whose standard teaching load is only 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.  

Since I and many other retired colleague continue to teach and are still engaged in 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. Perhaps the university would like to believe that it is still getting ‘new blood’ with ‘fresh insights’ – and that is a matter than can hardly be debated here.

Is the fiscal argument, therefore, without any merit? No: the university does gain, at least by hiring me, as a retiree, on a stipendiary contract. It should be noted, first of all, that my department did not replace me, not in terms of the courses that I have taught, in European economic history; nor has it replaced six other economic historians who have either retired or died in the past ten years. If I had not agreed to continue teaching my two full-year undergraduate courses in European economic history (together covering the period from 1250 to 1914), no European economic history would be offered at all in this university, and would thus disappear, along with American and Asian economic history. For teaching the equivalent of four semester courses, I am paid, in total $20,000 for the academic year (about 15 percent of my former salary, though this

---

54 See Kesselman, *Mandatory Retirement*, pp. 8-10. In my department (Economics), I was the only one who retired last year; and this year (2004), none is retiring, while two will retire next year (2005).

55 See n. 30 above.

56 Professors Ian Drummond (deceased), Melville Watkins, Andrew Watson, Abraham Rotstein, Kenneth Rea, Scott Eddie; apart from myself, John Munro. In one sense, Professor Gillian Hamilton was hired as a replacement for Professor Abraham Rotstein; but she teaches her undergraduate course only at UTM (Erindale). Prof. Rotstein continues to teach Canadian economic history on the St. George campus, and is usually the only one offering this course (along with, on occasion, with another stipendiary lecturer who has never succeeded in finding full time academic employment).
percentage should be adjusted by the fact that I am no longer offering my graduate seminar).

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’. In other words, CMR 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).

Does this constitute ‘exploitation”? The word ‘exploitation’ is an unduly charged word, and one that we economists rarely use. For, obviously, I am not being compelled to teach, and certainly not for financial reasons, because my pensions and other sources of retirement income have proved, so far, to be quite adequate. In fact, I continue to teach because I love teaching, as well doing research, and I find it highly invigorating and rewarding (especially conducive to research, for the issues and problems raised in my courses). On the other hand, in forcing me to retire, the University (or my department) has also, by ‘customary law’, taken away from me and all other retirees one of the most important components of our previous academic life: a private office. Many of my retired colleagues agree that the single greatest cost that we have experienced from mandatory retirement at the University of Toronto was the loss of their offices. As one commented to me, he was made to feel as though he had become an ‘unperson’.58

I was, however, offered some though far smaller office space, and certainly far less adequate space, only on the condition that I do this stipendiary teaching. That space is a modest cubicle [3.0 m by 1.5 m], about one-fifth the size of my former office, located within the departmental ‘retiree’s room’, with two similar, open if lockable cubicles, with virtually no privacy, especially if one or more of us is interviewing

---


58 If the loss of one’s private office on retirement is a very widespread phenomenon in North American and European universities, it is not universal. My older brother, who was required to retire in 2000, at the University of B.C. (Economics), still keeps his pre-retirement office.
students or conversing on the telephone.\textsuperscript{59} Without the peace and quiet that I used to enjoy, and without ready access to my books and research notes, I certainly find such conditions a serious obstacle to my work, whether in revising my lectures or in doing research, or in writing my academic papers (except later at night, when I can work here undisturbed). At least, however, these circumstances do allow me to continue having daily, fruitful contacts with my departmental colleagues, and allow me as well as access to departmental amenities (fax, photocopying, mail-services, online computer access) and especially close access to the Robarts Research Library, the third or fourth best university library in North America.

Without resorting to that nasty term ‘exploitation’, one may certainly contend that the university has taken advantage of both my wish to teach and my need for some, if limited, office space, at a relatively very low cost and thus for its considerable gain. For, though at liberty to exercise alternative choices, I have rejected suggestions that I seek better paid remuneration for teaching, part-time at other Canadian universities, or full time in the U.S. Some things are more important than money. Yet I am not permitted to select what would have obviously been my first choice: namely, to continue teaching here, at the University of Toronto, for the next several years (until, say, 70 – the former age of mandatory retirement in the U.S), with full salary and benefits – and also with my former, private office. Needless to say – for surely the question will now arise – I would not draw upon my university pension until after I had chosen fully to retire, as is the situation with my American colleagues (or those whom I have canvassed).

Do I feel that I am a victim of age discrimination? Yes, for some of the reasons so eloquently voiced by both Justices Wilson and L’Heureux-Dubé in \textit{McWhinney v. University of Guelph}, even if I personally may be better off than many other forcibly retired academics (certainly financially), especially those female academics who, for various reasons, have had fewer years of university employment and lower salaries. In

\footnote{By far the most degrading, demoralizing, and indeed humiliating aspect of my forced retirement, in June 2003, was to be stripped of my office, and indeed forced to pack up all my papers and books unaided (apart from, of course, assistance from my wife and son).}
summarizing her conclusions about the nature of mandatory retirement, L’Heureux-Dubé stated 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.

She was even more eloquent in her dissent, two years later, in Dickason v. University of Alberta:

Forced removal from the work force strictly on account of age can be extraordinarily debilitating for those entering their senior years. Ageing is not a reversible process. Those yearning to carry on with their livelihood, career, and ambitions cannot have this aspiration stultified or decimated [sic] by some arbitrary scheme. 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. [Emphasis added, by Justice L’Heueux-Dubé]

That verdict leads us directly to the final issue in this debate.

(5) Mandatory Retirement as a Contractual Agreement:

As noted earlier, the proper term to be employed is ‘contractual mandatory retirement’ (CMR); and my colleagues Professors Morley Gunderson and James Pesando believe that mandatory retirement is socially justifiable on the grounds that it is a feature of so many freely negotiated labour. Their arguments, or those published in 1988, deeply influenced the majority decision in both McKinney v. University of Guelph [1990]
and in *Dickason v. University of Alberta* [1992]; and certainly, in the former, Justice La Forest justified CMR several times *inter alia* on these very grounds.63

In the case of the University of Toronto itself, this argument is invalid. The University of Toronto, as noted earlier, arbitrarily imposed mandatory retirement in 1972, by administrative fiat or *force majeure*, long before the faculty had sufficiently organized to gain the right to engage in effective collective bargaining. As Martin Friedland’s history of our university documents so well, such collective bargaining – after two votes of the faculty– was not achieved until the University of Toronto agreed, in 1977, to sign the Memorandum of Agreement (currently still in force); and it did so believing that the alternative was full union certification by the Faculty Association, with the consequent likelihood of faculty strikes or other serious disruptions. The Memorandum of Agreement does not permit the University of Toronto Faculty Association to go 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).64 As Prof. 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.65

Therefore, as far as the University of Toronto itself is concerned, the Pesando-Gunderson argument to justify on CMR on the basis of ‘freely negotiated contracts’ does not bear scrutiny. Consider these two scenarios. Suppose, first, that the University of Toronto had not (in 1972) imposed mandatory retirement at


64 Friedland, *History*, pp. 563-7, 584.

65 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.
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. In the vernacular of the vulgar, UTFA would have told the university administration ‘to get lost’. 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 CMR and it then passed ‘a resolution opposing mandatory retirement and urging a flexible retirement policy on the administration’.

Those resolutions have been endorsed by many subsequent UTFA Annual General Meetings, most recently on 15 April 2004 (when I myself was present, as a member). If the Executive and bargaining committee, under this same scenario, were to have defied their own resolutions and the will of the AGM, what price would they have exacted from the university administration to permit an imposition of CMR – not one, surely, that the administration would ever have been willing to pay?

Consider the opposite scenario. Suppose that, some time after 1985, the UTFA Executive had sought to bargain with the university to abolish CMR, 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 done, in effect) that the issue was and is not one subject to negotiation. But suppose, further, that the administration would have been willing

---

66 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’. http://www.caut.ca/english/about/policy/retirement.asp

67 The Memorandum of Agreement may be found as a document on the web site of UTFA: 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.
to negotiate this issue: what costly (and demeaning) concessions would they have demanded in return? As a victim of CMR, but as a continuing dues-paying member of UTFA, I myself would strongly recommend against making any significant concessions, in terms of reductions of salaries, benefits, and/or pensions, in order to achieve the desired objective of abolishing mandatory retirement, for that would also be unjust. It seems absolutely clear that the University of Toronto will not abandon its policy of mandatory retirement until forced to do so by provincial legislation – or by a truly desperate shortage of teaching staff.

In the light of this evidence, it is all the more amazing that Justice La Forest, and those supporting the majority decision in *McWhinney v. University of Guelph*, subscribed to and so enthusiastically endorsed these fallacious arguments about ‘freely negotiated contracts’ that supposedly permitted CMR 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 supported the appellants in that Supreme Court case (and the earlier court case heard in the Ontario Court of Appeal). Further one of the listed appellants in *McWhinney v. University of Guelph* is the York University Faculty Association. Did these good Justices (all but two) really believe that faculty organizations in Ontario universities were somehow, and improperly, reneging on ‘freely negotiated contracts’? Or did these Justices simply ignore their views and their published resolutions? Let us remember that this celebrated case concerned, and concerned only, Ontario universities.

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. Indeed Justice La Forest cited a resolution of the Canadian Labour Congress, of 1980 (confirmed in 1982), which explicitly stated that:

‘WHEREAS the organized labour movement has fought hard and long legislative battles to

---

68 Nelson, *Faculty Power*, p. 154.


establish the mandatory retirement age of sixty-five (65) years; BE IT RESOLVED that the Canadian Labour Congress oppose the erosion of the mandatory retirement system, and that the current permissive legal framework with regard to mandatory retirement be maintained, so that the unions that wish to accept mandatory retirement are free to do so and those that wish to eliminate it can do so through collective bargaining.

That remains the CLC position to this day; and recently Buzz Hargove has reiterated its opposition and that of the UAW (United Auto Workers) to any relaxation of current policies on CMR.⁷¹

Nevertheless, one may question whether two contracting parties, the employer and the union of employees, has 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:⁷²

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 advanced in this volume by Morley Gunderson, is that such age discrimination in employment can be justified on two linked grounds. 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’.⁷³ Surely both arguments must be contested, as having no judicial validity. The Charter, section 15, does not grade or evaluate the conditions of discrimination: the ones cited are all and

---

⁷¹ For a further discussion of this vital issue, see below, pp.


⁷³ Gunderson, ‘Mandatory Retirement’, p. 10: ‘in essence, mandatory retirement involves individuals [sic] entering into an inter-temporal agreement where they themselves agree to be bound by a rule that may constrain them at a later age’.
equally invalid, according to federal statute. 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 or religious discrimination? Second, members of a labour union, in agreeing to a contract that stipulates mandatory retirement for those over 65, are not (certainly not in most cases) making a decision that weighs their own individual present benefits over their own individual future benefits (i.e., 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. In her own dissent to *McKinney v University of Guelph*, Justice Wilson, in also arguing that the purported justifications for CMR do not meet the Oakes ‘proportionality’ test, stated that:

> even if it is acceptable for citizens to bargain away their fundamental human rights in exchange for economic gain (and I see some real dangers to the more vulnerable numbers of our society in this), the majority of working people in the province do not have access to such arrangements.

Prof. Kesselman also observes that Gunderson’s argument fails to distinguish between an individual contract, freely negotiated between that one individual and his/her employer, and a collective union agreement. The distinction is important, because in Canada ‘CMR 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).

---

74 Cf. the statement of the canonist Gilles de Lessines (1278) that ‘future things over a period are not estimated of such value as things collected in an instant [in the present]”: cited in John Noonan, *Scholastic Analysis of Usury* (Cambridge, MA, 1957), pp. 155-57.

and not by the rank and file. Furthermore, as Kesselman observes, ‘even if all CMR [contracts] 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’.  

This discussion now leads us to that final consideration, beyond the more narrow debate on CMR, about the nature and status of retirement, not just for university professors, but for society as a whole.

**Final Considerations: the link between normal and mandatory retirement**

First, is there a difference between the concerns of university professors, and say, auto-workers, or of other unionized workers – about mandatory retirement? At the April 2003 UTFA-RALUT conference on ‘Redesigning Retirement’, Professor John Myles suggested that there is indeed such a difference. On the basis of a computerized ‘Google’ search, he 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. 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, laborious, and tedious; and 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 UTFA, or any other faculty association or union in Canada (outside Quebec) that seeks to eliminate mandatory retirement, must strictly beware engaging in any form of linkage between the abolition of CMR and the age of normal retirement. We must therefore respect the views and concerns of labour union leaders and thus clearly understand that the primary reason why they are so opposed to the abolition of CMR

---


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 no later than 65, is most certainly bound to harm the public case for abolishing CMR. 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, might have seemed rational, when the Canadian Labour Congress enunciated it (as noted above) in 1980— and thus before mandatory retirement was abolished anywhere in Canada or the U.S. But given the now long historical experience with the abolition of mandatory retirement, especially outside the academic world, in Manitoba since 1982, in Quebec since 1983, and in the U.S. since 1986, do such fears have any rational foundations now, in 2004? Certainly not. 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 – ignoring the experience in Manitoba, Quebec, and the U.S. – 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. Why employers would hold such views to maintain mandatory retirement at 65, why they favour mandatory retirement, is too complex an issue to be resolved in this study (but one surely that involves historically typical stereotypes of the aged).

Therefore, one aspect of very serious concern that I find in Professor Kesselman’s otherwise splendid CD Howe Institute paper is the implication that society would gain economically from abolishing CMR, 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

---

78 See above, n.
schemes. Therefore – and this is by far the more ominous and least desired implication of his paper – society would again all the more, if the normal or standard age of retirement were raised from 65, to say, 68 or even 70.\textsuperscript{79} To repeat, whatever may the long-term economic merits and justification for such arguments, North American society today holds as sacrosanct the right to retire with full benefits at 65.

**What are the costs, for universities, in abolishing Contractual Mandatory Retirement?**

Will universities really suffer from the abolition of CMR? Surely the proof is in the pudding. Can 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 CMR? Until someone does so, then the cant emanating from Ontario university administrations should be ignored – or better, should be contested and refuted. As noted earlier, the current average age of retirement, estimated for all Quebec universities, after twenty years without CMR, is 63.5.\textsuperscript{80} Perhaps some may contend that Quebec universities have achieved that lower average by financial inducements to take early retirement – but the University of Toronto has, in the past decade, similarly offered such inducement for early retirements, for various reasons (including a desire to reduce the number of less desirable faculty, especially those who received \textit{de facto} tenure before the 1970s). No one has yet, to my knowledge, made a convincing case that the abolition of CMR in these jurisdictions has provided a net financial burden on their universities.

**What are the gains, for universities, in abolishing Contractual Mandatory Retirement?**

These may now be briefly summarized.

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. The Economics Department’s increasing reliance on stipendiary teachers has already been noted. We must also observe that many of these stipendiary

\textsuperscript{79} Kesselman, \textit{Mandatory Retirement}, pp. 14-17.

\textsuperscript{80} See n. 8 above.
teachers, tired after a full day’s work elsewhere, in the evenings; and their full-time jobs preclude some from fully and professionally preparing lectures. Some other stipendiary lecturers, even those with a PhD degree, lack full-time employment, because they have been deemed insufficiently qualified in seeking a permanent university position. Others, of course, are tenured university professors who teach on a ‘overload’ basis, with varying degrees of energy and enthusiasm.

Second, Canadian universities, in hiring those over 65, those who currently teach on a stipendiary basis, 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. Some of those teaching on stipends (whether under or over 65) have indicated that, given the miserable stipends being paid to them, they are not about to devote their full efforts and resources to such teaching (though, I hasten to note, that is not my own personal attitude). There is an old saying: ‘If you pay peanuts, you get monkeys’.

Third, universities would find that they would lose fewer highly talented professors to American (or Quebec) universities; for certainly many have left the University of Toronto for these universities 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.\footnote{I can now think of four who did so: Professor Roberta Frank (English), Professor Joseph Shatzmiller (History), Professor Larry Epstein (Economics), and most recently Professor Thomas Pangle (Political Science). Professor Pangle explicitly stated that his aversion to mandatory retirement was a key factor in his decision to accept an appointment at the University of Texas.}

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). Most of my colleagues agree that we have no hope, whatsoever, of hiring any professor from any university without CMR who is over the age of 50. Even if such professors may think, at the age of 50 or so, that they probably would retire, voluntarily, at 65, they all want to have the choice of
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 borne!
List of References:

Official Documents:

Canada, Government of: The Canadian Charter of Rights and Freedoms, as Schedule B of the Constitution Act, 1982 (79), and the Canada Act 1982 (U.K.) 1982, c. 11, on-line version:

http://www.justice.gc.ca/loireg/charte/const_en.html#recours


http://192.75.156.68/DBLaws/Statutes/English/90h19_e.htm

Province of Ontario: Human Rights Commission: on-line website at:

http://www.ohrc.on.ca/english/index.shtml

Reports of the Supreme Court of Canada


http://www.canlii.org/ca/cas/scc/1990/1990scc121.html,

(1) Dickason v. University of Alberta [1992] 2 S.C.R. 1103, whose text is reproduced in:


University of Toronto Faculty Association, News Bulletin (9 April 1999): on-line version:


University of Toronto Faculty Association, Memorandum of Agreement: online version at:

http://www.utfa.org/

Secondary Sources:


Friedland, Martin, University of Toronto: a History (Toronto, 2002).

Gunderson, Morley, and James Pesando, eds., Eliminating Mandatory Retirement: Economic and Human Rights (Toronto: Faculty of Management Studies, University of Toronto, 1980).


Gunderson, Morley, Banning Mandatory Retirement” Throwing Out the Baby with the Bathwater, C.D. Howe Institute Backgrounder no. 79 (Toronto, 2004).


Gunderson, Morley, and James Pesando, eds., *Eliminating Mandatory Retirement: Economic and Human Rights* (Toronto: Faculty of Management Studies, University of Toronto, 1980).


Gunderson, Morley, *Banning Mandatory Retirement” Throwing Out the Baby with the Bathwater*, C.D. Howe Institute Backgrounder no. 79 (Toronto, 2004).


Noonan, John, Scholastic Analysis of Usury (Cambridge, MA, 1957).


