The Mandatory Retirement Cases: Part II

THE SEARCH FOR REASONABLE LIMITS: IS *OAKES* RETIRED?

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Mandatory retirement is a conundrum from the point of view of both equality rights and social policy. Therefore, it is not surprising that the Supreme Court of Canada was split in three recent decisions about the issue.

The three companion cases concerned the mandatory retirement of university professor and administrative staff[1] and the denial of hospital admitting privileges to doctors who have reached the age of 65.[2] *McKinney* contains the most detailed examination of the issues. One ground of challenge in all three cases was that the policies of these institutions themselves violated section 15 of the *Charter*. A second ground in the university cases was that exemptions in the Ontario and B.C. human rights statutes allowing for mandatory retirement should be struck down.[3] Though the Court held that the *Charter* does not apply to universities or hospitals, it went on to find that the policies would violate section 15 but would be saved by section 1, if the *Charter* were applicable. The Court upheld the statutory exemptions using similar reasoning.

SECTION 15 ANALYSIS

Speaking for the majority in each of the cases, LaForest J. had little difficulty in determining that the policies and statutory exemptions were discriminatory for the purposes of section 15. Clearly, the policies of the institutions caused disadvantage based on age, a ground enumerated in section 15. Similarly, the statutory exemptions allowing mandatory retirement constituted differential treatment based on an enumerated ground and denied those over 65 the equal protection and benefit of the human rights legislation.

The Court had rejected the "similarly situated test" in *Andrews*,[4] and it is not surprising that it adhered to this position in *McKinney*. Somewhat more surprising was LaForest J.'s characterization of the case as one of adverse impact discrimination rather than intentional discrimination. The age distinction was made consciously and reflected an adverse judgment or stereotype about persons over 65 as a group. It would seem clearly to constitute intentional discrimination. Arguably, the intent issue is not important to section 15 analysis, since the section covers both intentional discrimination and unintended adverse effects. But the characterization was cited later by LaForest J. in his section 1 analysis as helping to justify a limit on the rights.

In addition to a finding of discrimination, earlier cases had held that section 15 applies only to the application of "law",[5] and this issue caused the Court some difficulty in the mandatory retirement cases. There was no problem with respect to the statutory exemptions, which clearly are law. But it was less clear that the mandatory retirement policies of the institutions, some of which were incorporated in collective agreements, constitute law.

The Court adopted a very broad definition of "law" for the purposes of section 15. LaForest J. said that a university policy adopted in the exercise of a statutory power or discretion would be covered. A term of a contract with a government entity, whether or not it amounted to "policy", would also be covered. LaForest J. added that all acts taken pursuant to powers granted by law would constitute "law" for the purposes of section 15.[6] Wilson J. was even more emphatic in stating that "discrimination engaged in by anyone to whom the *Charter* applies is redressed whether it takes the form of legislative activity, common law principles or simply conduct."[7] Thus, it seems very unlikely that the word "law" in section 15 will play any limiting role once one has found that the requirements of section 32, discussed by Katherine Swinton, have been met.[8]

SECTION 1

The Supreme Court of Canada has been divided for some time about the manner in which section 1 should be applied, and this division is reflected in the mandatory retirement cases. In *R. v. Oakes*, the court established a fairly strict test for determining whether a *Charter* right could be limited.[9] But later cases have raised doubts about the Court's continued adherence to this test.[10]

The mandatory retirement cases reflect a further erosion of the strict *Oakes* standards. Since the Court took a fairly similar approach in considering both the institutional policies and the statutory exemptions, I will focus on the latter here in the interest of brevity.

LaForest J. said that the balancing should not be "mechanistic" and that the competing values should be "sensitively weighed."[11] He found that the statutory objectives (preserving the integrity of pension plans and of allowing free bargaining in the workplace about all terms of employment, including seniority and tenure) to be pressing and substantial.[12] He also cited the fact that mandatory retirement schemes have created settled expectations.

In considering whether the means to achieve these objectives met the proportionality test, LaForest J. found that the exemptions were rationally related to these objectives and met the "minimal impairment" test. He said that in the circumstances of these cases, the question is whether the government has a reasonable basis for concluding that the legislation interferes as little as possible with the guaranteed right. Citing the need for

deference to the legislative and political judgment in light of the complexity of the issue and the fragmentary, conjectural nature of the available information, he found that this standard had been met.

LaForest J. also found that the effects of the limit were proportional to the objectives. He noted that the inequality did not arise from legislation about mandatory retirement but from a statute that afforded protection to those within a particular age. This legislation was intended, in his view, to protect those most in need, taking account of the other social programs available to those over the age of 65. He emphasized the right of the legislature to take incremental measures to deal with a social problem.

Wilson J. and L'Heureux-Dubé dissented, finding that the legislation was not saved by section 1.[13] Wilson J. conceded that the strict *Oakes* test is not always applicable, but she said that departures should only be made in exceptional circumstances, in particular, where the legislature must strike a balance between claims of competing groups and has chosen to promote or protect the interests of the less advantaged. She concluded that these cases did not present such circumstances, noting that a lower standard of scrutiny was not justified by the fact that the legislative purpose was to extend non-discrimination rights to at least some groups. She also noted that the statutory exemption excluded all complaints of age discrimination by workers over 65, including complaints about discriminatory terms and conditions of employment. The fact that the exemption was not limited to mandatory retirement policies supported her conclusion that it did not meet the rational connection branch of the *Oakes* test.

L'Heureux-Dubé J. also found that the exemption was too broad. In addition, she concluded that the purpose did not meet the *Oakes* test because it was based on false generalizations about the effects of aging. As well, she found that the effects of the exemption were disproportionate.

A key question is exactly why the majority departed from the *Oakes* standard in applying section 1. There are a number of possible explanations, which have quite different implications for the application of section 15 in the future.

LaForest J., quoting the *Irwin Toy* case, suggests that a lower standard is appropriate where the state interest involves the reconciliation of claims of competing individuals or groups or the distribution of scarce resources.[14] Where two individuals or groups can each assert a competing equality claim, it does seem sensible that one should not be given priority over the other just because it was the first to some before the court and the other is considered only at the section 1 stage.[15] However, the second justification — the allocation of scarce resources — is harder to defend. Since almost all government social programs allocate limited resources, and since such programs are often of greatest importance to disadvantaged individuals and groups, the result would be to afford the least protection to those groups that section 15 was designed to protect.[16]

A second explanation is that mandatory retirement results in a complex web of offsetting social and economic benefits and detriments that justifies a lower level of scrutiny. The situation is somewhat unique, it is true, in that a substantial proportion of those affected support mandatory retirement as a net benefit. Also, arguably the claimants were trying to have it both ways in challenging age discrimination while assuming that they would retain the benefits of seniority. In my opinion, however, it would be a dangerous trend for the Court more generally to attempt to assess all of the collateral effects of abolishing a discriminatory policy or to justify exclusion from one form of assistance (such as human rights legislation) on the ground it is offset by some other government benefit (such as income support for seniors). A serious attempt to do so involves exactly the type of complex social and economic analysis LaForest J. was trying to avoid. As the dissenters note, it also ignores the rights of groups who are not eligible for the offsetting benefits, such as women and members of minorities who do not have their share of the kinds of jobs that provide pension plans and lifetime tenure.

A third (and related) possibility is that a lower standard of scrutiny will apply to legislation such as human rights statutes that afford benefits rather than imposing prohibitions. That reasoning is also problematic since such laws are often designed to deal with disadvantage. As LaForest J. notes, governments must be given some leeway to deal with problems incrementally. But where the limitation on the benefit is explicitly on the basis of an enumerated or analogous ground and the excluded group is the one more at risk, it is not readily apparent why a lower level of scrutiny is appropriate, as the dissenters point out. Surely, no one would argue that the exclusion of members of certain races from human rights protection would be justifiable on the ground that governments must deal with discrimination one step at a time.

That example suggests a fourth explanation — that a lower standard of scrutiny will apply to age discrimination than to other grounds under section 1. LaForest J. cites the fact that, unlike grounds such as race and sex, there is a correlation between age and ability, at least at the extremes. He also notes that most of us pass through ages and thus are less likely to form settled prejudices. If this is the explanation, we may be moving toward something like the U.S. levels of scrutiny approach, through the mechanism of section 1.[17]

I have not exhausted the possible explanations, but this list demonstrates the variety of possibilities. Because we have so few Supreme Court of Canada equality decisions, it is tempting to treat each one as an important guide. However, generalizations based on the mandatory retirement cases may be suspect in light of the rather unique nature of the issue.

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(Notes continued on page 85)

other words, if some nationals are suspected of potential abuse, then all nationals are penalized with a visa requirement. A visa requirement is as blatant a discrimination on the basis of nationality as one can imagine. An innocent visitor is burdened with the requirement of obtaining a visa because the Government of Canada suspects all nationals of the country of the visitor of potentially abusing Canadian immigration law.

The problem with the *Charter* in this context is it provides no grip on the problem. Canadian immigration and visitor processing overseas discriminates. And the *Charter* does not prevent it.

The Federal Court of Canada has held, in a case decided in August of last year by Mr. Justice Muldoon, that in order to invoke the *Charter*, the person who brings the *Charter* case must be physically present in Canada.[25] The case was a case of sex discrimination, not race discrimination, but the principle would remain the same.

I have some difficulty with that decision. The Supreme Court of Canada held in 1985 that refugee claimants in Canada illegally, without status, could invoke the *Charter*.[26] If a person outside Canada cannot rely on the *Charter*, but a person in Canada illegally can invoke the *Charter*, then there is a legal incentive to enter Canada illegally simply in order to get the benefit of the *Charter*.

But if we assume the decision of Mr. Justice Muldoon is a correct statement of the law, then we must admit that the *Charter* fails not only as positive spur, but also as a negative brake. At least overseas, the Government of Canada can discriminate and the *Charter* will have nothing to say.

It may well be that a Canadian sponsor, or a Canadian assisting relative, can launch a *Charter* challenge when the foreign applicant cannot. But if there is no sponsor, or no assisting relative, the foreign applicant for entry to Canada can be a victim of discrimination and yet not have a *Charter* remedy.

The *Charter* has been important as an educational tool. Its value to Canada goes beyond its legal impact. Even if the *Charter* has not been a legal spur to action, it has been a practical spur. The problems I have mentioned are problems of incompleteness rather than a failure in what is already there. But the *Charter* is incomplete as an instrument in the battle against racism. It could be a better instrument than it is.

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1. Section 15(1).
2. *Andrews v. Law Society of B.C.* (1989), 56 D.L.R. (4th) 1 (S.C.C.).
3. Section 24(1).
4. *Schachter v. The Queen* (1990), 66 D.L.R. (4th) 635 (F.C.A.).
5. U.N.G.A. Res. 2200 (XXI) (1967) Art. 6.
6. 999 U.N.T.S. 171 (1966) Art. 20.
7. 660 U.N.T.S. 195 (1969) Art. 4.
8. Resolution 3074 (XXXVIII) 3 Dec. 1973, Article 1.
9. Canada, Commission of Inquiry on War Criminals, *Report*, Pt. 1: Public (Ottaw: Supply and Services, 1986) (Commissioner: Hon. Jules Deschênes) at 131-132.
10. Section 11(g).
11. *Supra*, note 9.
12. *Criminal Code*, R.S., c.C-34, s.504.
13. *Ibid.*, s. 2.
14. Barton and Peel, *Criminal Procedure and Practice*, 2nd ed., P-49.
15. *Supra*, note 12, s. 319.
16. Section 11(d).
17. Section 2(b).
18. (1988), 60 Alta. L.R. 1 (Alta. C.A.).
19. (1988), 28 O.A.C. 161 (Ont. C.A.).
20. *R. v. Keegstra*, [1991] 2 W.W.R. 1 (S.C.C.).
21. *Re F.R.G. and Rauca* (1983), 145 D.L.R. (4th) 638 (Ont. C.A.).
22. *R. v. Finta* (1989), 61 D.L.R. 4th 85 (Ont. H.Ct.).
23. Section 2(d).
24. *Re Education Act* (1987), 40 D.L.R. (4th) 18 (S.C.C.).
25. *Ruparel v. M.E.I.*, T-1322-88, August 8, 1990.
26. *Singh v. M.E.I.* (1985), 17 D.L.R. (4th) 422 (S.C.C.).

The Search for Reasonable Limits (Notes cont'd)

1. *McKinney v. University of Guelph, Harrison (Connell) v. University of British Columbia.* A third case, *Douglas/Kwantlen College Faculty Association v. Douglas College*, raised the issue of mandatory retirement at a community college, but the Supreme Court of Canada decision considers only the issue concerning the application of the *Charter*.
2. *Stoffman v. Vancouver General Hospital Legislature Building.*
3. See *Ontario Human Rights Code*, S.O. 1981, c.53, s. 9(a) and the *British Columbia Human Rights Act*, S.B.C. 1984, c.22, ss.1 & 8. *Stoffman, supra*, note 2, did not consider the human rights legislation since doctors were not employees of the hospital and thus would not come within the prohibition of discrimination by employers in any event.
4. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
5. *Ibid.* at 163-164.
6. *McKinney, supra*, note 1 at 30-32.
7. *McKinney, supra*, note 1 at 79.
8. Only Sopinka J. seemed to have doubts about the matter.
9. *R. v. Oakes*, [1986] 1 S.C.R. 103.
10. See, e.g. *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 992ff.
11. *McKinney, supra*, note 1 at 35.
12. He found the objective of providing employment for youth to be less convincing.
13. Cory J. also dissented in the *Stoffman* case, though he agreed with the majority's application of s.1 in the other cases.
14. *McKinney, supra*, note 1 at 37, quoting *Irwin Toy, supra*, note 9 at 994.
15. It is not clear, however, that all claims of competing individuals and groups raise issues of equality coming within section 15 protection.
16. See C.L. Smith, "Dimensions of Equality", paper presented at the Supreme Courts Conference on Constitutional Law, April 5, 1991, Duke University.
17. In this regard, presumptions about a correlation between ability and an enumerated or analogous ground of discrimination are troubling. In particular, it could weaken protection for those with physical and mental disabilities, especially if we did not take account of our historical prejudices and stereotypes with regard to the effects of a disability.