

*Images of Old Age in Canadian Law*  
*Revisiting McKinney*

M.A. Thesis - Legal Studies  
Carleton University

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## Abstract

This study examines the existence and influence of ageist images and assumptions in Canadian law and society. Contemporary images of old age are investigated from historical and bio-medical perspectives extending to an in-depth analysis of *McKinney v. University of Guelph*, the leading case on mandatory retirement and age discrimination. Misinformed perceptions of old age presented in *McKinney*, include images of age-stratified roles, and the expectation of physical and mental deterioration. A series of university objectives, such as tenure and academic excellence were put forward to interact with the definition of a retirement age of 65 and functioned to perpetuate the image of aging as deterioration, and as a lack of more highly valued, and more easily measured, youthful qualities. The thesis analysis indicates that negative images and assumptions about old age had a significant influence on the reasoning applied to the justification of mandatory retirement policies in the *McKinney* decision and the *McKinney* decision has in turn has served to reenforce and perpetuate those images and assumptions in law and society.

## **Special Thanks**

**I would like to express my sincere thanks to Professors Diana Majury and David Elliott for their tremendous patience and articulate guidance as I struggled to compose my many, and often tangential thoughts into a cohesive and convincing message. I also want to thank my wife Elspeth for keeping the faith and her patience until this work finally came to pass. Thank you all once again.**

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## **Chapter 1: Introduction**

The purpose of this thesis is to advance and explore the proposition that the contemporary image of old age is a social construction drawn from historically recent social norms and a narrow set of biological realities and that this negative social construction of old age is reflected in law. To do this, the study will examine the influence of images of old age on the issue of mandatory retirement. In particular, the thesis will focus on the approach to old age and mandatory retirement in the leading case in this field, the decision of the Supreme Court of Canada in *McKinney*.<sup>1</sup> This thesis does not intend to introduce new theory. Instead, the analysis may help to encourage a rethinking of existing theory and assumptions it reflects. As the discussion is developed, alternative scenarios and theories will be presented to challenge established images and to encourage a new conceptual framework for discussing old age.

Although *McKinney* focussed on the mandatory retirement debate of 1991, three recent social/legal studies<sup>2</sup> have found that the case remains the preeminent example of how

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1 *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, 76 D.L.R. (4<sup>th</sup>), 545. [Hereinafter *McKinney*; cited to D.L.R.], aff'g. (1987), 63 O.R. (2d) 1 (C.A.), 46 D.L.R. (4<sup>th</sup>) 193, 37 C.R.R. 44 aff'g (1986), 57 O.R. (2d) 1 (H.C.), 32 D.L.R. (4<sup>th</sup>) 65, 14 C.C.E.L. 1, Gray J.

2 (1) *Discrimination & Age: Human Rights Issues Facing Older Persons in Ontario*. Discussion Paper. Ontario Human Rights Commission, Toronto, May 2000. [Hereinafter, *Discrimination & Age*] This discussion paper was to solicit economic, sociological, and legal position papers from organizations representing the interests of senior citizens in Ontario, found that ageism in many

Canadian legal issues impact seniors. The studies all addressed perceptions and treatment of older Canadians, with a focus on the impact of law on society. Their conclusions could be reduced to three broad findings. First, they expressed a certain level of surprise at the degree of unacknowledged ageism<sup>3</sup> in Canada. Second, they found that ageism is

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forms was widespread throughout Ontario's society with the effect of predetermining a narrow set of roles and expectations for older citizens.

(2) M. Beaulieu, & C. Spencer, "Older Adults' Personal Relationships and the Law in Canada." (Ottawa: Law Commission of Canada, 1999). [Hereinafter, Beaulieu & Spencer] This paper came to a similar conclusions in their analysis of interpersonal legal issues that face older Canadians. Their focus on the individual and his/her relationships noted the way in which law contributes to a diminishing of individual roles in society and within the family.

(3) R. Klassen, & C. Gillin, "The Heavy Hand of the Law: The Canadian Supreme Court and Mandatory Retirement" Canadian Journal on Aging Vol. 18 No. 2, 1999, at 259. [Hereinafter, Klassen & Gillin] The gerontological perspective presented in this paper addressed some of the same issues as will be addressed in this thesis, but they approached the subject from the perspective of the legal/social effects while I intend to investigate underlying attitudinal causes. All three papers found that both the law and society in Canada hold a very negative and inaccurate view of what it means to become old which has the result of inappropriately limiting the potential of many elderly Canadians.

- 3 The definition used in this discussion, defines "ageism" not only as inappropriate generalization of negative age stereotyping and the resulting reductionism, but it also refers to the displacement, devaluation and/or revaluation of potentially positive virtues, attributes, qualities, aspects, narratives, characteristics and experiences of aging. For a fuller historical discussion of the definition and use of the term

not treated with the same social disdain as sexism, racism or any of the other major forms of discrimination. Third, they confirmed that negative inaccurate images and perceptions of old age have become legitimized in law. These studies suggest vividly how broadly held negative images and assumptions can interconnect to influence a variety of legal and cultural discussions of old age and generational justice. However, none of the three studies analysed the underlying images of old age that influenced *McKinney*. The objective here will be to extend this discussion by addressing the development and application of the underlying images that informed the majority reasoning in the *McKinney* decision.

The *McKinney* case resulted from a legal challenge by Professor McKinney and eight of his colleagues in 1991 before the Supreme Court of Canada. Among other things, McKinney argued that the mandatory retirement policy of the University of Guelph discriminated on the basis of age. He also claimed that because the *Ontario Human Rights Code*<sup>4</sup> only applies to employment protections for those between the ages of 18 and 65, it discriminates against those over 65<sup>5</sup>. The university's main argument was that

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see, Appendix: I p. 97.

4 *Ontario Human Rights Code*, R.O.S. 1980, c. 340. 4(1). [Hereinafter, *Code*]

5 Although young people face a multitude of concerns based on their age, this essay will almost exclusively deal with the experiences of those over age 65. Although this approach is clearly exclusionary, the limitation is required because of the confines of a thesis format and is consistent with the social, economic, cultural and legal constructs of aging presented herein. The

their mandatory retirement policy was necessary to maintain excellence in higher education and to preserve academic freedom. The Court held that, although mandatory retirement violated the s. 15 Charter equality guarantee in relation to age, the breach was justified under s. 1 of the Charter. Professor McKinney was thereby denied the right to be protected from age-based employment discrimination, and therefore his right to work.

*McKinney* raised two main legal questions: First, was the policy of mandatory retirement governmental and therefore within the authority of the Charter? This jurisdictional question does not relate to the subject of this thesis and is therefore not discussed in what follows. The second question raised is key to this discussion. Since all the judges agreed that mandatory retirement is clearly contrary to s.15. of the Charter, the question was what reasonable limits could be applied under section 1 to justify the denial of Charter protection? The following four propositions describe the main negative images and assumptions of old age the judges used to ground their analysis of the second question.

(1) The first of these images and assumptions is a widespread belief in the naturalness of age-stratified social roles, laws, customs, expectations and limitations. It will be shown

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selection of the specific age of 65 is consistent with statutory definitions of age used in the *Ontario Human Rights Code* which is one of the pieces of legislation under review in *McKinney*. The Code defines age as follows: "'Age' means an age that is eighteen years or more, except in subsection 4(1) [the provision protecting against discrimination in employment] where 'age' means an age that is eighteen years or more and less than 65 years." Code, *supra* note 4, 4(1).

that age-stratified images include a variety of social and legal norms that culminate in our conceptions of childhood, youth, adulthood and old age.

(2) Second, there is a belief in the inevitability of physical and mental decline as one ages. As will be shown, this image is strongly supported by the medical model which focusses attention on the physical and measurable nature of human aging. From this perspective mandatory retirement is seen as valid on the grounds that it humanely and impartially removes aging individuals as they inevitably become less competent to work.

(3) Third, there is a belief in the image of a natural intergenerational balance.

Intergenerational balance requires a natural and just sharing of limited resources that is satisfied through mandatory retirement. The assumption depends on the idea that seniors have had their chance and that mandatory retirement assures that younger workers will be given a fair chance to participate in the limited opportunities of the labour market.

(4) A fourth image or assumption is the concept of a reciprocal benefit in lieu of the right to work. Although mandatory retirement is a limitation of individual rights, this is regarded as less significant than its role as part of a series of policies intended to protect elderly workers. These policies are widely understood as important to the structure and predictability of the Canadian labour infrastructure. In the university setting, reciprocal policies are thought to include the academic tenure system which is seen as protecting declining older workers while eventually making way for younger workers. The

tenure/mandatory retirement trade-off is based on the need to constantly revitalise academe in exchange for protection from academic review. Retirement is portrayed as the desirable final outcome at the end of one's work career. From this premise, it is fair and natural to provide a pension system in lieu of the right to work. A composite of all of these assumptions, concepts and images has become widely accepted in Canadian society, and formed much of the justifying logic employed by the Court in *McKinney* to support the continuance of mandatory retirement.

The negative images of old age considered in this thesis will be drawn primarily from the key majority judgment of La Forest J. He held that because universities are not "governmental", they fall outside the *Charter*. Six of the seven judges in *McKinney* supported this conclusion. La Forest J. also held that the age 65 exemption in the *Ontario Human Rights Code* violated section 15 of the *Charter*, but was saved by section 1. Five judges agreed here. Since age is expressly prohibited as a ground of discrimination under the *Charter*, all judges agreed briefly that the age restrictions were discriminatory. It was the section 1 analysis that prompted the judges' images of old age. Here La Forest J.'s views also represented the majority of the Court. Dickson C.J.C.<sup>6</sup> and Gonthier J.<sup>7</sup> and Cory J. (separately)<sup>8</sup> concurred expressly with La Forest J. on this issue. Cory J.<sup>9</sup> did so

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6 Dickson C.J.C., *McKinney*, *supra* note 1 at 555.

7 Gonthier J., *McKinney*, *supra* note 1 at 698.

8 Cory J., *McKinney*, *supra* note 1 at 699.

9 Cory J., *McKinney*, *supra* note 1 at 699-70.

in general terms. L'Heureux-Dubé J. dissented on section 1. Wilson J. dissented on this issue and on the general application of the *Charter*. Although L'Heureux-Dubé J.<sup>10</sup> agreed with La Forest J.'s assertion that age was accompanied by a decline in mental ability, she<sup>11</sup> and Wilson J.<sup>12</sup> strongly opposed any rigid stereotyping of all seniors and criticized the arbitrary and adverse consequences of mandatory retirement in regard to section 15.<sup>13</sup> Although the two dissenting judgments resisted many of the negative images adopted by the majority, they were heavily outnumbered, and have had little impact on subsequent jurisprudence.

A brief presentation of current theoretical and methodological thinking on old age will provide background information on how a variety of disciplines address issues and data related to old age. Chapter Two will explain how information was collected, within what ideological sphere it was found, and how that ideological sphere affects the information found. The theories and models of aging will be examined to demonstrate how despite their variances, they all engage similar ageist images. Chapter Three will examine the historical origins of modern images of old age in order to provide context for the later discussion of the arguments found in *McKinney*. The images and assumptions to be

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10 L'Heureux-Dubé J., *McKinney*, *supra* note 1 at 685.

11 L'Heureux-Dubé J., *McKinney*, *supra* note 1 at 685-68; 690.

12 Wilson J., *McKinney*, *supra* note 1 at 610.

13 L'Heureux-Dubé J., & Wilson J., *McKinney*, *supra* note 1 at 610 in regard to section 15; 618-20; 687; 689.

examined will be taken from scientific, medical, legal, economic, social, linguistic and cultural practices that have contributed to and/or sustained current popular images of old age. Chapter Four will demonstrate how flawed images and assumptions of old age developed over Canada's history were interpreted and further legitimized into elements of fact in a 1991 courtroom. In the *McKinney* decision, the Court used a legal tool known as the "*Oakes* test"<sup>14</sup> to organize, filter and then analyse the many complex perspectives presented in the case. The Court's application of the *Oakes* test will be unpacked and critiqued. Chapter Five will look at several studies of post *McKinney* jurisprudence to assess the current status of *McKinney*. These studies confirm the author's understanding that *McKinney* was not an aberration, an isolated ageist rant, but continues to reflect contemporary legal thinking about age discrimination and older Canadians. In the concluding Chapter Six, alternative images of the possibilities of old age will be considered.

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14 *R. v. Oakes* (1968), 26 D.L.R. (4<sup>th</sup>) 200, 24 C.C.C. (3<sup>rd</sup>) 321, [1968] 1 S.C.R. 103. [Hereinafter, *Oakes*].



## **Chapter 2: Theoretical Background**

The primary objective of this thesis is to explore our modern social image of old age as reflected in law. In part this will be done by an analysis of the images and assumptions expressed in *McKinney*. But before the *McKinney* case is examined in detail it will be useful to have an understanding of the underlying general knowledge and social theories on the subject of ageing. Facts and theories discussed here and in *McKinney* were drawn from a variety of disciplines including law, biomedical science, history, science, industrial mechanics, linguistics, economics, sociology and cultural studies. A close examination of the source and patterns of facts, and the theories and images drawn from them can be as revealing as the facts themselves.

Investigations into the body of knowledge in Canada on age-related legal issues or “elder law” reveal that the Canadian literature is surprisingly limited. A recent literature review by Klassen and Gillian<sup>15</sup> found that as of 1999, *McKinney* was the only significant discussion of aging in Canadian case law and that only Laval University offered a specific course on law and aging. In contrast, the Americans have developed a considerable legal specialty on aging,<sup>16</sup> flowing from a 1965 Labour Department report

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15 Klassen & Gillin, *supra* note 2.

16 L. Frolik, “What is Elder Law? The Developing Field of Elder Law: A Historical Perspective” in L. Frolik (ed.) Aging and the Law: An Interdisciplinary Reader (Philadelphia: Temple University Press, 1999) at 4.

condemning ageist employment practices.<sup>17</sup> This report encouraged federal legislation designed to protect the employment rights of older Americans, and was implemented in 1967.<sup>18</sup> The Canadian literature is limited to doctrinal aspects of health law issues, retirement, mental capacity, guardianship, familial responsibilities, adult protection (elder abuse), substitute decision making, wills and finally probate law.<sup>19</sup> As Beaulieu and Spencer have observed:

Elder law practitioners have tended to work from a traditional (as opposed to critical) framework. Areas of substantive law that affect older adults the most in their personal lives have been subjected to very little critical analysis.<sup>20</sup>

In contrast, the discipline of gerontology offers a variety of perspectives or models on what it means to become old. Each of the following models has been very influential in popular thinking on aging. Each of them seems reasonable in their own right as they attempt to explain all facets of an aging person's life. However, each of these theories directs thinking in narrow ways that exclude other perspectives. Yet they must all be understood in order to appreciate how they influence our present awareness of aging, retirement and pensions. Aging, deterioration, retirement and pensions are so frequently

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17 U.S. Dept. of Labor, *The Older American Worker: Age Discrimination in Employment*, 1965.

18 *Age Discrimination in Employment Act* ss 621 (b) (1967). [Hereinafter ADEA]

19 Beaulieu & Spencer, *supra* note 2.

20 Beaulieu & Spencer *supra* note 2 at 31.

lumped together as objects of study that they have become locked in most people's minds as naturally linked concepts. Gerontological theories focus on the ideological, physical and economic bases for retirement and the choices available when one is retired. Social, cultural, political and economic theories focus on issues of deservedness, social structure, decreased participation and the economics of pensions.<sup>21</sup> There is an unquestioned assumption in all the models that retirement is the natural and desirable objective of old age in a diminished body. The retirement objective is rarely questioned. The origins of retirement are therefore seen as natural, inalterable and/or irrelevant. McDonald and Wanner found that:

...the development of the major social gerontological theories, through their exposure to mainstream structural-functionalism, have promoted a singular interest in the individual....if it is assumed that retirement is a natural, inevitable process, it is not necessary to develop an explanation to account for it. Historical constants require no explanation.<sup>22</sup>

Although aging never formed the central concern of any of the better known social theorists, they did often pay the subject at least limited attention. For instance, meta-theorist Marx<sup>23</sup> viewed retirement in terms of how it reinforces the dominant capitalist

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21 S. Katz, Disciplining Old Age: The Formation of Gerontological Knowledge (Charlottesville: University Press of Virginia, 1996).

22 L. McDonald, & R. Wanner, Retirement in Canada (Toronto: Butterworths, 1990) at 11.

23 C. Geertz, The Interpretation of Cultures (New York, Basic Books, 1973) at 5. Cited in Powell, Branco & Williamson The Senior Rights Movement: Framing the Policy Debate in America (New York,

ideology and provides a means of eliminating less productive workers with a minimal cost to capital. Retirement was also a means by which the masses could be duped into a false pension security. Feminist theorists have looked at the subject of pension policy, pointing out how pension payouts on the basis of income earned during the work cycle result in a further disadvantaging of women in favour of men. Their efforts have reminded us of how men have longer uninterrupted and better paid work histories which have been dependent on women accepting a supporting role.<sup>24</sup> Modernization theory<sup>25</sup> describes and justifies a reduction in the status of aged individuals. The reduction in status is based on an industrial and bio-medical model of declining health and physical capacities in an increasingly fast moving, demanding world, accompanied by employment competition from the young. Modernization theory sees retirement as a natural evolution, the appropriate response to the unidirectional movement to lower physical status resulting in diminished societal roles.

Gerontological theories also reflect a variety of approaches to issues of old age and

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Basic Books, 1996) at 8.

- 24 E.M. Gee, "Editorial: Policy and Research on Aging: Connections and Conundrums" in a special joint issue of the Canadian Journal on Aging/Canadian Public Policy - Bridging Policy and Research on Aging (Supplement March 1997 i-xviii) at ii.
- 25 R. Clark, "Modernization and Status Change Among Aged Men and Women" in International Journal on Aging and Human Development Vol. 36(3) 171-186, 1992-93.

retirement, most of which unconsciously address old age from the perspective of youth.

In the words of Hazan:

The study of ageing is dominated by the non-aged. This simple fact, most of the time taken for granted, covers a Pandora's box of commonplace, stereotypes, practical know-how, and sociological conceptions, all devised to render the aged into a culturally reified symbolic category that is socially accountable, yet sequestered from society. By and large, the host of knowledge on ageing produced by the non-aged is deemed to retain-and sustain-the difference in perspective on the borderline between life and death, as construed, respectively, by those on its verge and those desperate to avoid it.<sup>26</sup>

Among the better known of the gerontological theories are the following. Age-stratification theory,<sup>27</sup> holds that one's life course is a series of interconnected roles based on age, with behaviour defined in terms of the role occupied and the cohort group one belongs to. Life Cycle theory<sup>28</sup> is grounded in the social-structural roles of age-stratification theory. Life cycle analysis joins macro and micro theories to study the individual as a unit of society who is affected by his or her chronological age and who

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26 H. Hazan, From First Principles: An Experiment in Aging (Westport CT: Bergin & Garvey, 1996) at xi.

27 M. Young, & T. Schuller, Life After Work: The Arrival of the Ageless Society (Glasgow: HarperCollins, Glasgow, 1991) at 8.

28 A. Guillemard, "Re-Writing Social Policy and Changes within the Life Course Organization. A European Perspective" in Can. Journal on Aging Vol. 16, no 3, 1997 at 443.

develops in a life course which is defined by age specific roles and social norms.

Exchange theory<sup>29</sup> is based on exchanges which maximize rewards and minimize costs.

Success and power are determined by the resources perceived to be available to the individual. Perceptions of deterioration leave aging individuals in an increasingly poor power position relative to their employer; hence retirement becomes the only alternative

and is understood as an institutionalized exchange of past service for a retirement wage.

And finally, Political Economy theory<sup>30</sup> uses an approach to retirement which sees the embedded structural, political and economic forces as more determinant of policy than

chronological, biological/medical or individual considerations. Aging individuals are

seen as political entities with a declining ability to responsibly control or participate in

the direction of their own lives as they move outside of mainstream political and

economic structures. These theoretical perspectives tend to dominate discussions of

aging, often without being obviously employed. They can easily act to pre-determine the

outcome of discussions on aging without their underlying assumptions being apparent.

Three major methodological flaws permeate most of the above models and contribute

further to inaccurate perceptions of aging. The first methodological problem, that of "old

age reductionism," reflected researchers' failure to recognize the impact on individuals of

their passing through the events and conditions of their time (cohort groups). Such

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29 M. Kenyon, "Basic Assumptions in Theories of Human Aging" in Emergent Theories of Aging eds., J. Birren, & V. Bengtson, (New York: Springer Publishing Co., 1988).

30 Kenyon, *ibid.*

influences would include the impact of restrictive gender roles, lack of education, limited medical resources and wars. These factors would change people as they passed through their time frame, resulting in changes in how these people aged. The cumulative group cohort effect would also change the society around them. Yet until the recent "baby boomer" cohort, old people were simply categorized within the time frame of the researcher as all those over 65, despite the fact that this would have included several cohort groups. When they investigated the origins of images of old age, the American National Institute on Aging found most of the methodology, which claimed a cause and effect related to old age, to be highly suspect. A wide ranging research project found that "old age cannot be understood apart from earlier ages. In all the literature of our time, we had to counteract a kind of 'old age reductionism'."<sup>31</sup> They discovered that the usual narrow research focus failed to recognize the interrelationship between the changing lives of older individuals, and how those changes affected structures, and how reciprocally the changing structures changed lives:

As we classified and reclassified the accumulating evidence, we gradually identified two basic 'dynamisms': (1) the life-long aging of individuals in successive cohorts (or generations); and (2) the changing age structures in society. ...We have been learning far less about the structural changes and interventions that influence lives. ...[S]ocial structures are reduced to *contextual characteristics of individuals*; and the concept of 'structure,' if it

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31 M. White-Riley, "Aging and Society: Past, Present & Future" The Gerontologist 1994, Vol. 34, No. 4, at 436.

appears at all, typically refers to the structure of the life course.<sup>32</sup>

For instance, the modern pension system (affecting today's seniors and constituting a significant structural element of the current welfare state) was designed at a time when the cohort of women, from earlier in this century, was not permitted full access to the employment market (a cohort and structural change). Yet today's pension systems continue to reflect the presumption that a woman would be married and dependent on her husband until death.<sup>33</sup>

The second methodological problem relates to the effect of conflicting and misleading data results generated by treating older citizens as a homogenous category. Three of the most obvious popular distortions include the perception of seniors as financially well off, the presumption that seniors suffer from chronic health problems which are overburdening the health care system and the belief that diminished mental capacity is a normal outcome of aging. The presumption of homogeneity limits research as it ignores or disguises the individual's capacity for compensation or adaptation. Individual views of the world may be improved more by their experience and understanding of what they are perceiving than by their new glasses.

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32 White-Riley, *ibid* at 436.

33 Snell, J. The Citizen's Wage: The State and the Elderly in Canada, 1900-1951 (Toronto: University of Toronto Press, 1996) at 218.



The third methodological problem arises when the mis-information resulting from the first two problems becomes institutionalized as self-fulfilling facts and norms. Seniors are rarely considered until they demonstrate some negative characteristic presumably linked to their age - a feature such as declining health, disability, pensions, isolation, institutionalization or mandatory retirement. Common impressions of old age then confirm the characterization of this stage of life as one of relative dependency, minimal economic contribution, chronic illness and/or health care problems waiting to happen. These three methodological flaws make it difficult to separate the influence of stereotypical beliefs from the methodology which is instrumental to the maintenance of those beliefs.

Although these models have a common sense allure, one must also be aware of their youth-focussed limitations and age-negative commonalities. Whether the theories are guided by a positive or negative perspective on aging, they all focus either overtly or indirectly on the negative conditions or results of aging. They also tend to objectify elderly citizens, and to disempower them from participating in their destiny in all but token ways. This non-involvement of older citizens is endemic to images of aging. Questions raised by the issues of aging not addressed in these models hint at the expanse and interconnectedness of many of life's bigger questions and may reveal underappreciated potentials of the human experience. As Hazan discovered,

[t]he scope of fundamental issues embedded in the study of ageing encompasses some of the most intriguing dilemmas looming on the

horizons of our understanding. Many of those are eclipsed by convention and camouflaged by our own defences. The introduction of aging as a source of knowledge infusing and illuminating such topics might prove to be an intellectual boon but also an analytic bane.<sup>34</sup>

The pattern that emerges from this review is that all of the models ultimately rely on an underlying presumption of deterioration with age. From whatever perspective old age is discussed, it is seen as problematic, with each discipline supporting the others in their negative expectations. From an awareness of the theoretical perspectives of aging we will now undertake an historical investigation of the how our modern negative images of old age evolved. This investigation is the subject of Chapter Three.

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34 Hazan, *supra* note 26 at 18.

**Chapter 3: Origins of Our Modern Images of Old Age**

Before addressing how images of old age influenced thinking in the *McKinney* case, we need to first look at how our modern understanding of old age came to be. To do this we will look at how the concept of old age has changed in this century in conjunction with demographic changes that coincided with massive changes in culture, society, technology and industry. Analysis of the historical development of our modern images of old age will reveal how images have changed almost exclusively to negative images. Three particularly influential images that evolved during the last 100 years have linked the concepts of neediness, redundancy and bio-medical deterioration to our modern image of old age. We will start our investigation with the origins of modern concepts of old age as did Justice La Forest in the *McKinney* case. La Forest J. recognized that the point of departure was arbitrary:

It may be argued these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in “line drawing”...<sup>35</sup>

Before looking specifically at how we came to recognize age 65 as significant, we must first clarify how we as a culture came to unquestioningly accept distinctly different meanings to the various stages of life on the basis of chronological age. Most Canadians

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35 La Forest J., *McKinney v. University of Guelph* (1990), 76 D.L.R. (4<sup>th</sup>), at 654. (emphasis added)

are unaware of their total acceptance of the "life course"<sup>36</sup> or "age-stratification"<sup>37</sup> concepts which were formed during the modern period.<sup>38</sup> Most of us accept these ideas as simply the obvious and unavoidable impact of the biological progression of the human organism. Yet upon closer examination age-stratification can be seen as more than a neutral process of demarcation seemingly useful only for descriptive purposes. The age-stratification model defines and describes many of our modern understandings of social and legal roles and their related expectations which include: *Childhood* = dependency, protection, mandatory education, prohibitions on labour and sexual activity which extend into; *youth* = rights of passage, early responsibilities; *maturity* = responsibilities, family,

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36 G.H. Jr. Elder, "Perspectives on the Life Course" in Elder (ed.), Life Course Dynamics, Trajectories, and Transitions, 1968-1980 (Ithaca, NY: Cornell University Press, 1985). pp 23-29. & G.O. Hagestad, "Social Perspectives on the Life Course" in R. Binstock & L. George (eds.), Handbook of Aging and the Social Sciences (3<sup>rd</sup> ed.) (New York: Academic Press, 1990) at 151-204.

37 Young & Schuller, *supra* note 27 at 8.

38 Modernity is a grand social theory which describes how 20<sup>th</sup> century western society formed from the following concepts: the rise of secularism, industrialization, law centered in the people not a sovereign, liberal democracy, atomism, individual citizen units, individual rights freedoms, humanism, concept of continuous upward progress, urban phenomena, division of labour manifested in the structure of the patriarchal family, family is the final refuge of the private- everything else is public and an almost total commitment to "objective" science/technology. Modernity also embraces an acceptance of law as a good thing involving a faith in rules that have grown continuously with expanding social organization, legislation and regulation.

career; and finally *old age* = dependence, economic non-participation, presumption of illness, pensions, and an understanding that unemployment becomes retirement. The problem for older people is that while the images of the first three categories focus on development, enhancement and maximization of life, old age focuses on negative and regressive characteristics.

Even when the notion of an explicit decline has been avoided, it is still implicit in a fourfold classification...childhood, youth, maturity and old age, with old age standing in contrast to maturity.<sup>39</sup>

The age-stratified category of old age is the basis of our sense of what it means to become old in Canadian society, informing our understanding of intergenerational fairness, deservedness, responsibilities and justice. Meanings about old age evolved during our history and achieved normative validity as they were repeated through time and eventually became perceived as truth. Once believed, meaning becomes incorporated into culture, policy and law engendering an unassailable legitimacy. "Man is an animal suspended in webs of significance he himself has spun."<sup>40</sup>

### Demographic Transformation

The progression of age-stratification concepts was concurrent with the changes brought

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39 Young & Schuller, *supra* note 27 at 18.

40 Geertz, *supra* note 15 at 8.

about by modernity and the dramatic population changes of the 19<sup>th</sup> century. Not only were there very few people over the modern old age criterion of 65, but the general population was very young.<sup>41</sup> Large families, harsh conditions and limited medical care meant that few made it to middle age, and those who survived past then were not thought of as old, just lucky. Odd as it may sound, with modern advances chances are that if you are alive today, you will die when you get old, but in Canada's recent past, chances were that you wouldn't live long enough to get very old by any standard.<sup>42</sup> From a perspective of research, this has limited the amount of data available specifically related to issues of aging.

Historically, age has not been a major basis for group formation, there being little previous age-based conflict. In fact, it is only in the last one hundred or so years that people have seen finely graded age categories as socially meaningful.<sup>43</sup>

It is difficult to ascertain exact numbers of relatively aged citizens simply because they were not problematized as a significant area of interest; therefore little is known of their

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41 Hagestad, *supra* note 28.

42 An early British census from 1841 showed 4.4% of the population as over sixty-five, and by 1901 there was still only 4.7%. Cited in Hannah, L. Inventing Retirement: The Development of Occupational Pensions in Britain (Cambridge: Cambridge University Press, 1986) at 153. Estimates of the Canadian population over sixty-five in the same period were presumed much lower. White-Riley, *supra* note 31 at 436.

43 N. Guppy, "The Magic of 65: Issues and Evidence in the Mandatory Retirement Debate" (1989) Vol. 8 No. 2, *Canadian Journal on Aging* at 174.

lives. Until the latter part of the twentieth century few individuals survived into what we now consider old age. At the time of the Romans, life expectancy from birth was only 20 years; by 1900 North Americans could expect to live to between 45 and 50; but by 1999 Canadian men could expect to reach their late 70s and women their early 80s.<sup>44</sup> The lack of specific historical data on aging has been linked to two factors: the rarity of age as a defining criterion and the scarcity of elderly people in both real and relative terms. It is important, then, to look backward historically to understand how Canada came to culturally and legally draw the line at 65. We will start by looking for when old age first became significant enough to become categorized and recorded.

Around the period of the establishment of the Canadas, the role of older citizens was seen differently than it is today. A large percentage of Canada's broadly dispersed population was engaged in subsistence level agricultural activities<sup>45</sup>. The Canadian population was considered very young with older citizens a rare commodity and generally held in high esteem.<sup>46</sup> This because they often held title to their extended family's property and/or

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44 It is important to note, that not only are present day Canadians living longer, they are also much healthier during their old age. B. McPherson, Aging as a Social Process (Toronto: Butterworths, 1983) at 79.

45 Statistics Canada, Historical Statistics of Canada edited by F. Leacy, (Ottawa, Statistics Canada, Cat. CS11-516E, 1993).

46 Snell, *supra* note 33.

they were tradesmen and their experience was considered invaluable.<sup>47</sup> In Canada's pioneer setting a formal public education system was yet to be established. Aged pioneers would often be the only accessible repository of knowledge; hence they were necessary to educate the young through informal apprenticeship.<sup>48</sup> Even if physical deterioration affected an older farmer's senses of hearing and vision, he would still be better qualified than his young apprentice to smell the soil, look into the sky and know when to plant. Before there was modern technology, the value of old age was easier to recognise. Snell found that although there is some disagreement among historians, most hold that

...the status of the elderly declined across the nineteenth century. Prior to that time, the elderly were regarded as potentially useful members of society in which they were active participants. There was no presumption that the aged shared particular negative physical or social characteristics simply because of their advancing years.<sup>49</sup>

Cowgill found that, as the technical, scientific, social welfare, legalist and governmental nature of modernity became established, language and the related attitudes towards aging changed. "[T]he status of the elderly in a community was inversely proportional to the

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47 R. Clark, "Modernization and Status Change Among Aged Men and Women" in International Journal on Aging and Human Development Vol. 36(3) 171-186, 1992-93.

48 A formal program of primary education for the masses, did not become free in Canada until the 1870's, and compulsory during the 1880's.

49 Snell, *supra* note 33 at 36.



degree of modernization of the society."<sup>50</sup> A study of 51 nations by Clark,<sup>51</sup> detailing the effects of modernity, confirmed a past-positive status for old people on the basis of experience, respect, reservoirs of skills and property ownership. However, these norms diminished significantly with the shift to an industrial and science oriented urban culture. The findings of Clark and Cowgill indicate that recent meanings assigned to aging have been more than an ideological shift; they were in fact material in consequence. For example, the newly created social role of retirement acted to further devalue and reduce social roles and opportunities for older workers by linking pensions and dependence to developing images of old age. Since aged Canadians had never existed before in large numbers, it could be argued that the creation of the metaphor and the negative category of the "elderly" was one of the early social reconstructions of the period of modernity. This social reconstruction resulted in a new negative and devalued labelling of a once venerable period of life. In fact a 1912 British publication said that "the practice of viewing the aged as a separate class is modern."<sup>52</sup>

The family structure of that time was also much different than today's age-stratified nuclear paradigm where parents and children separate from grandparents and extended

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50 D.O. Cowgill, "A Theory of Aging in Cross-Cultural Perspective" in Aging and Modernization (eds.), Cowgill & Holmes (New York: Appleton-Century-Crofts, 1972) at 8-9.

51 Clark, *supra* note 39.

52 G. Porter, & F. Hirst, The Progress of the Nation (London, 1912). Cited in Snell, *supra* note 33.

family. In the pre-industrial agrarian society large families were common, with the births of children spread over a considerable span of time. This practice tended to blur the distinctions between separate generations. All members of the family, regardless of age, had to be productive and contribute to the micro economy of the family farm in a fashion suited to their individual capabilities. Age was not seen as a particularly important categorizing characteristic, that is, not until the compressing of the family structure into separate generations resulted in a significant reduction in the positive interdependent roles for older family members.

In postindustrial families with fewer children, the gap between generations became greater because the ages between children were more compressed. The combined result of these trends was a growing importance of peer associations and a decreasing significance of intergenerational relationships.

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By the turn of the century a society focussed on the economics of industrialization began to replace the extended agrarian family unit. The family, as the primary social and economic unit, was broken down from its role as a generalist organization, to become a collection of separate specialized roles.<sup>54</sup> Each individual had a specific set of responsibilities and expectations constructed around an age-stratified role. A new reality was forming which suited the needs of the industrialized world for trained workers with

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53 L. Whitton, "Ageism: Paternalism and Prejudice" in L. Frolik, (ed.) Aging and the Law: An Interdisciplinary Reader (Philadelphia: Temple University Press, 1999) at 21.

54 Snell, *supra* note 33 at 36.

specific characteristics. Young and Schuller explored the ubiquitous construct of age-stratification as a requisite component and necessary cog in the development of industrialized society. They looked at the formation of both mandatory education and mandatory retirement. They found that age-specific economic disengagement or non-engagement became the primary image for both young and old age categories. Whitton noted how state and industry supported age-stratification and created previously unheard of by-products.

The new duty of childhood, to attend on unpaid work in the schoolhouse and to avoid paid work outside it, was recognised and enforced by the State. A new stage of life was thereby legislated.<sup>55</sup>

Age-stratification then went further to redefine previously contributory working adults<sup>56</sup> into redundant dependents. The dramatic changes that evolved from state sanctioned age-

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55 Young & Schuller, *supra* note 27 at 8.

56 Statistics Canada's first records on old age reveal that as recently as 1921 (when it first recognized that there was a need to record old age as a separate category), 59.6% of all men continued working after age 65. But by 1951 only 39% continued to work, and only 11% were still working by the mid 1990s. These numbers correspond to the development of pension systems, mandatory retirement and increasing life-expectancy. Statistics Canada, 1971 Census, Vol. 3, catalogue no. 94-702. In the United States, 94 per cent of men aged 55-64 and 79 per cent aged 65-74 were employed in 1900; for those aged 75 or over, 55 per cent were in paid employment. N. Weiler, "Industrial Scrap Heap: Employment Patterns and Change for the Aged in the 1920s" Social Science History 13, 1989, 65-88, cited in Snell, *supra* note 33 at 6.

stratification became metaphors for making children into students, then at age 16 turning students into workers, and at age 65 “the magic wand of the state turns not coachmen into mice but men into old men..”<sup>57</sup>

Linguistic Reshaping of Images - Neediness - Industrialization - Medicalization

Recognizing the establishment of metaphorical equivalencies for various negative concepts and old age is crucial to understanding their influence on modern thinking about old age<sup>58</sup>. The language of age-stratification has become normalized through the metaphorical power of linguistics, going far beyond just how we use words, to extend dynamically to both reflect and determine meaning. Nuessel and Van Den Bergh discuss two principal theories in language as they relate to social causation through the use of metaphors. The first theory holds that language determines and prescribes culture, language then generates a material effect - *linguistic determinism*. The second theory maintains that language merely reflects and reinforces the cultural reality of its speakers - *linguistic relativism*.<sup>59</sup> While language related to old age has been affected by both

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57 Young & Schuller, *supra* note 27 at 8.

58 J. Schroots, “Metaphors of Aging and Complexity” in Metaphors of Aging in Science and the Humanities eds. M. Kenyon, J. Birren & J. Schroots (New York: Springer Publishing Co., 1991). p 222.

59 Nuessel & Van Den Bergh “Renaming: Vehicle for Empowerment” in Women and Language Learning and Teaching ed. J. Penfield (Albany, NY: State U of New York Press, 1987) at 134.

theoretical presumptions, the predominant influence has been deterministic.

Three deterministic social patterns were forming at the beginning of the industrial revolution which would have a significant impact on current images of old age. The metaphors of helpless old age as *neediness* which evolved into elements of the welfare state; the rethinking of human labour as a cog in industrial productivity within which older workers became the metaphor for *unproductive and/or redundant*; and finally the scientific biomedical conception of the human organism and the standardization of old age as a metaphor for *biological deterioration*. The first of these to be examined will be the linking of the concept of neediness to old age.

#### Image of Old Age Evolving Into Metaphors of Neediness/Helplessness

The concept of neediness was closely associated to concepts of helplessness, worthiness, charity and eventually social welfare. One influence on the linking of these concepts to images of old age came from institutions which were started before 1900 in many communities as an attempt to deal with small numbers of poor, presumed helpless, elderly persons for whom family support was unavailable.<sup>60</sup> These early organized and

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60 For a more detailed description of other supports available prior to the 20<sup>th</sup> century, which included indoor and outdoor relief programs, see D. Stone, Social Welfare in Ontario, 1791-1893: A Study of Public Welfare Administration (Toronto: University of Toronto Press, 1965), and R. Splane, The Disabled State (Philadelphia: Temple University Press, 1984).

most common forms of help came from private charities and houses of refuge. Originally they provided for poor, indigent old and infirmed individuals along with insane, imbeciles and orphans of the local communities. Here were the formal beginnings of a constructed linkage between various negative attributes and old age.

Poor laws and charitable institutions such as hospitals had long focussed on those who were physically or mentally disabled or incapacitated (whether through illness or impairment) - such as the 'crippled,' the imbecile, the dying - and on those who were consistently destitute. Old age itself was not a criterion for garnering social assistance, because old age was not yet socially constructed in such a way that it was automatically associated with dependency or incapacity.<sup>61</sup>

In Canada's capital an example of this linkage of old age to neediness, helplessness, charity and institutionalization started in 1865. Some of the wealthy ladies of the protestant congregations of Ottawa established the "Orphan's Home" residence,

...for the relief, support and education of orphans and other destitute children and the relief and support of destitute widows and for affording temporary refuge of female servants out of place.<sup>62</sup>

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61 Snell, *supra* note 33 at 37.

62 Presented by Charlotte Whitton in her opening remarks to the 1970 Annual Meeting of "The Bronson Home", previously the "Orphan's Home". "Female servants out of place" referred to the aging house servants and nannies of wealthy Ottawa families who would perish in the Ottawa cold if arrangements were not made for them.

Although "homes" like the Orphans' Home, later to be called the Bronson Home,<sup>63</sup> were not originally defined as specifically for old people, over time their aged "inmates" (as they were referred to) eventually displaced other groups turning "them *de facto* from poorhouses into nascent old age homes, with little direct intervention by way of public policy or legislation."<sup>64</sup> As institutions such as this grew and became normalized, they played a major role in concretely linking various negative constructs to images of what aging meant. By linking the misfortune of poverty to the developing construct of old age, these evolving old age homes became more than simply shelters. In their physical character, their language and their environment, these 'total institutions' gave prominent expression to the evolving views of old age which marked older individuals as not only poor, but also as helpless and incapable of contributing their full share as citizens. So powerful were the negative associations that, according to Snell's research, acceptance of institutional support had the effect of voiding an individual's electoral 'rights'. In fact up until the 1920s, Ontario explicitly denied to residents of houses of public or private charity,

...the right to vote, underlining such persons' loss of the full privileges of

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63 The "Bronson Home" for elderly women was split off from the "Orphan's Home" in 1930. As a seniors' residence for women, it continued until 1995 before being completely dismantled and its remaining assets transferred to other charitable purposes. The home's closing stemmed partially from the inappropriate (by contemporary government standards) "institutionalization" of poor, but otherwise often healthy elderly women.

64 Snell, *supra* note 33 at 45.

**citizenship... For the elderly to accept state aid was to concede that they were not full or equal members of the host society.<sup>65</sup>**

**The “homes” also participated in other concrete ways in the institutionalization of old age as a metaphor for neediness. In order to garner funds, they fostered and even exaggerated the idea of old age as a time of helpless “neediness.” An entire infrastructure constructed itself on the basis of two shifting social images. The first viewed old age less in terms of contribution and more in terms of need; the second saw old age less as an integral part of society and more as a special group, different from the rest.**

**Appealing to increasingly authoritative images of the elderly as weak, ill, helpless, and incapable of paid labour, administrators of poorhouses deliberately exaggerated the elderly character of their inmates to stimulate and sustain support.<sup>66</sup>**

**When one combined the funding needs of institutions fashioning themselves around a perceived need, with the bureaucracy of government, a powerful new metaphor evolved in which old age had to become synonymous with neediness/helplessness if funds were to be received. Once so defined within the bureaucratic infrastructures, the evolving image of old age gained new authority and self-justification.**

**These old age ‘homes,’ often still known locally by their earlier title of ‘poorhouse,’ were important substantial and visual statements of the**

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65 Snell, *supra* note 33 at 39.

66 Snell, *supra* note 33 at 45-46.



elderly's increasing public association with such characteristics as dependency, poverty, and helplessness.<sup>67</sup>

Given the growing image of helpless old people as a distinct set of people in need, and the increasing numbers of displaced older individuals, how was society to fulfill its Christian beliefs of charity while responding to these expanding needs? The solution to these expanding problems was of course to develop pension policies which we will see coincided with evolving needs of industrialization.

#### Development of Pensions, Industrialization and the Metaphor of Old as Redundant

Crucial to the modern image of mandatory retirement is our understanding of how pensions, the reciprocal element of retirement, developed. Canadians would not tolerate the practice of mandatory retirement unless it was countered by some fundamentally sound and naturally just reciprocal arrangement. It is popularly believed that mandatory retirement has the obvious reciprocal benefit to the retiree of a pension delivered in lieu of the right to work. Therefore it is important to see how our perceptions of retirement and the pension system evolved. The first well known reference to any kind of formal state supported retirement/pension system emanated from the Germans, as noted by La Forest J. in the *McKinney* case:

Bismark is generally credited with establishing 65 as the age for retirement

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<sup>67</sup> Snell, *supra* note 33 at 7.

when; through his initiative, Germany adopted a public pension plan for the aged. At that time, 65 would certainly have been considered 'old', the life expectancy in Germany then 45.<sup>68</sup>

In fact, Chancellor Bismarck established the retirement age at 70 as part of a general social welfare system in 1889.<sup>69</sup> It is commonly suspected by gerontologists and by La Forest J. that this age was chosen because the burgeoning science of demographics assured Bismark that few would live long enough to collect their pensions. The age of 65 was not introduced in Germany until 1916, when the great war was going badly and political support was desperately needed.<sup>70</sup> Again, it was easily predictable that few of the eligible men would survive to collect on their promised pension rewards. The reason beyond politics for Bismark's social initiative was to meet the demands of the rapidly growing industrial infrastructure for ever greater productivity. Germany was one of the world's earliest and most successful industrial powers and Bismark's so-called social initiatives were just what industry needed to support the new work paradigm.

The same pattern was seen in all of the countries of the developing industrial world.

Snell<sup>71</sup> has investigated the economics of old age in Canada in the first half of the 20<sup>th</sup>

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68 La Forest J., *McKinney*, *supra* note 35 at 657.

69 L. Frolik, & A. Barnes, "An Aging Population: A Challenge to the Law" in Frolik, *supra* note 53 at 31.

70 Frolik & Barnes, *ibid.*

71 Snell, *supra* note 33.

century and concluded that the retirement reality we know today was one very much constructed out of the perceived necessities of industrialization. The best known proponent of the new industrial model was Frederick Taylor.<sup>72</sup> At the turn of the century Taylor's model of work had an unfortunate and unexpected deterministic influence on aging workers:

...in particular that effective and productive work depended most importantly on physical efficiency and on the rapid repetition of simple tasks; by emphasizing mere physical ability and by de-emphasizing skills and knowledge, Taylorism attacked the primary weakness of older workers and undermined their greatest assets.<sup>73</sup>

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72 The efficiency model of work devised by Taylor propagated the concept that workers were simply supplemental to machines. The assumption was that the stronger and faster the person, the more machine-like, efficient and therefore profitable he would be. Work was designed around the specific physical capabilities of young men; those with characteristics different than young men seemed unemployable. The flaws in the paradigm would not be seriously challenged until the need to staff factories was met by women during the second world war. In contrast to the industrial age, Canada's current labour situation has changed significantly. The need for speed and brute strength has for the most part long since been replaced by the different demands of the service and information age. A growing need for intellectual capacity and the ability to manage machinery of the information economy has meant the strong young male ideal of the past is no longer the model around which to design work. In an ironic twist, the highest levels of unemployment in Canada are now suffered by young males.

73 Snell, *supra* note 33 at 27.

Initially older workers were needed in the factories because of shortages of labour. But as soon as immigrant and younger workers became plentiful, a new industrial paradigm was constructed. This new paradigm required the removal of older workers efficiently and with a seemingly just reciprocal element of humanity, while maintaining the loyalty and cooperation of younger workers. Matthews and Tindale<sup>74</sup> discovered that the indisputable logic for the retirement/pension system grew not from humanitarian values but out of three primary societal urgencies. First, more people were surviving into old age; second, increasing numbers of old people were being forced into poverty; and third, industrial employers had to reduce unemployment and increase productivity. Powell concurred, finding that pensions and retirement did not evolve out of benevolent convictions, but instead out of political necessity to address the problems of the aging poor and an industrial necessity to increase profit while reducing the numbers of unemployed.<sup>75</sup> This final objective was achieved by redefining unemployment as retirement for an entire class of people, thereby removing them from the statistics and the political consciousness. The term "retirement" was established by unions and industry to support the illusion that something good, or at least something fair and reciprocal was being done for older workers as they were forced from the workforce.

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74 K. Matthews & C. Tindale "Retirement in Canada" in M. Kyriakos & C. Cooper eds., Retirement in Industrialized Societies: Social, Psychological and Health Factors (Toronto: John Wiley & Sons, 1987).

75 L. Powell, K. Branco & J. Williamson The Senior Rights Movement: Framing the Policy Debate in America York, 1996) at 6-7.

Driven by newly authoritative perceptions of the inefficiency of older workers, capital and organized labour sought means by which the elderly could be easily removed from the office and the plant floor. Corporate capital developed private pension and retirement plans to ensure the loyalty of younger workers and to rid companies of unwanted older workers; the process of disengagement from older workers could be depersonalized and made less painful (at least to the company) by developing policies of automatic unemployment at a set age. To make this process more palatable, this mandatory, continuing unemployment would be known by the euphemism 'retirement.'<sup>76</sup>

Bauman<sup>77</sup> presented a challenging perspective on how industry, unions and the state combined to achieve their goal of reducing numbers of older workers while creating the image of a new positive social policy. He proposed the unfamiliar concept that pensions and retirement were not freely chosen or benevolent social programs but were actually normative social commands and controls portrayed as acts of necessity, goodness and protectiveness. He showed how mandatory retirement policies became normalized to the point where questions about their validity seemed to threaten the connected pension programs that had become necessary to so many. So normalized had the pension/retirement programs become that any possible alternative work models appeared to be unnatural, unreasonable, uneconomic or simply unwanted.

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76 Snell, *supra* note 33 at 6.

77 Z. Bauman, Mortality and Immortality and Other Life Strategies (Cambridge: UK Polity Press, 1992) at 196. Cited in H. Hazan, From First Principles: An Experiment in Aging (Bergin & Garvey, Westport CT., 1996).

This argument is hard for Canadians to accept because one of the most applauded and earliest achievements of the welfare state was its attention to “needy” elderly citizens in the form of pensions. However this image does not recognize that the majority of individuals affected were not actually poor enough to become eligible for pensions.<sup>78</sup> But they soon became “needy” enough as their former productive roles in society were eliminated through retirement. Ironically, the perception of a socially benevolent welfare state providing for older citizens was actually a product of creating that need which then had to be tended to.

Snell<sup>79</sup> investigated changes in attitudes and appraisals of aged people from 1900 to 1951. He found that there were issues common to all western industrialized nations that related directly to the formation of the constructs of the modern welfare state. During the 1940s, private pension plans and government annuity programs helped to redefine old age, not only providing financial support for those retired but also articulating and legitimating an image of old age in which old age and paid work were incompatible. Snell also found a growth in the public associations between old age neediness and industrial redundancy which evolved into the justification for the highly touted “citizens’ wage”. But he also saw that the apparent “justness” of the struggle to achieve a citizens’ wage could conversely be seen as a further linking of new constructs related to old age.

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78 See Appendix II. Historical Development of Public Pensions in Canada p. 109.

79 Snell, *supra* note 33.

These evolving constructs redefined and then devalued old age to make it metaphorically synonymous with neediness and redundancy in order to make old age an appropriate rationale for state aid. And once the metaphorical equivalence was established then the construct acted to ground thinking in other areas of Canadian culture and law.

### Development of the Medical Metaphor for Old Age as Deterioration

Beyond neediness and redundancy, the most powerful yet potentially misleading metaphorical image of old age emanates from the supposedly neutral medical perspective of old age equalling deterioration. The following discussion will point out how the medical perspective can be fraught with unintended limitations and assumptions that appear unassailable.

In modern Canadian society the power to define problems and then frame the implied public policy and legal agenda correlates strongly with the ability to employ scientific “facts”, paradigms and arguments. The ascendancy of science during the twentieth century created a modern order capable of overcoming many of the constraints of nature. Achievements in the realm of medical science have been particularly dramatic, contributing to a 50% increase in human life expectancy within the past 100 years. Partly due to the unparalleled success of the bio-medical paradigm, images and “facts” of human aging have come to be defined almost exclusively in bio-medical terms. An unconscious side effect of this extraordinarily successful paradigm has been the unforeseen

limitations imposed by the bio-medical characterisation of human aging<sup>80</sup>. Much of the authority for the industrial metaphors and the perception of neediness is grounded in the seemingly indisputable medically focussed social concern for how to deal with the “problems of an aging population” that “naturally” stem from medically defined physical deterioration. This grounding upon which old age has been defined as a problem and the subsequent agenda-setting process is worthy of re-examination. As Connell has said “To believe that we can understand the social world through a biological demarcation is to misunderstand the relation between bodies and social processes.”<sup>81</sup> More importantly, one must ask how the amazing increases in human life span have become popularly understood as leading unequivocally to worsening social, political, economic and inter-generational problems.

Before proceeding, it is important to clarify the term “medical model,” as it will be used throughout this discussion. The term is not a simple finite concept, but a constellation of hypotheses and methods, including a uniform system of observation, terminology, logical proofs, replication, research, measurement, rationalization and prediction. The medical model has grown in the last 100 years into a specialization within the scientific model. This latter model demands uniform systems of collection, analysis, theory creation and

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80 J. Birren, & C. Stacey, “Paradigms of Aging: Growth versus Decline” in Ethics and Aging: The Right to Live The Right to Die eds., Thornton & Winkler (Vancouver: U. of B.C. Press, 1988).

81 R. Connell, Masculinities (Los Angeles: University of California Press, 1995) at 43-45.



testing of hypotheses for findings which can be replicated and then contested on the basis of a uniform paradigm. The medical model achieved further legitimacy by building on the achievements in other scientific specialities such as physics, chemistry, botany and anthropology. Because the separate scientific disciplines utilize the same paradigm, they tend to reinforce and validate their interlocking findings and logic.<sup>82</sup> Katz<sup>83</sup> describes how for seniors, the resulting knowledge tends to be self-replicating, because it filters out or declares “unscientific” and/or “unprovable” data that might not be in accord with the rigours of science. Therefore medical research, like legal research, has a tendency to continually replicate and reinforce any flaws in its view of reality. Delgado and Stefancic coined the term “triple helix dilemma” to describe how solutions to unfamiliar problems

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82 The American National Institute on Aging investigated how far negative metaphors of old age had extended into medicine, sociology, anthropology and economics. They concluded that the prevalence of negative perceptions and metaphors of aging was overwhelming, displacing other perspectives and creating a negative reality despite modern knowledge. “Throughout the industrialised world, there is a ‘mismatch’ between the strengths of and capacities of the increasing numbers of older people, and the inadequate opportunities in society to utilize, reward, and sustain these strengths. As nearly three decades have been added over this one century to the average length of life, and as people grow older in new ways, the surrounding social structures have lagged behind. They are still geared to the needs of the much younger populations of a century ago.” M. White Riley, “Aging and Society: Past, Present, and Future” The Gerontologist 1994, Vol. 34, No. 4, at 445.

83 S. Katz, Disciplining Old Age: The Formation of Gerontological Knowledge (Charlottesville: University Press of Virginia, 1996).

arise out of established criteria:

...this sameness is created and maintained-namely, by professionally prepared research and indexing systems... These devices function like DNA; they enable the current system to replicate itself endlessly, easily, and painlessly.<sup>84</sup>

So just what are the negative images and presumptions of the medical model of human aging? Foner laid out some of the basic beliefs of the model and the influence they have on our modern understanding of aging as an exclusively degenerative biological process.

1. Biology is destiny; that is, aging is controlled and determined by biological processes.
2. The aging process, therefore, is immutable; it cannot be changed.
3. Aging is fundamentally a process of decline and losses.
4. Old people are basically all alike.

All of these assumptions are misleading; some are completely wrong.<sup>85</sup>

The idea that "biology is destiny" and that this destiny can only result in an immutable process of decline would be considered a restrictive view of humanity, if it had not become such a normalised means of differentiating what it means to become old. In comparison, over the past 100 years women continuously rejected the construction of

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84 R. Delgado, & J. Stefancic, "Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma" in Stanford Law Review Vol. 42, Nov, 1989, at 208.

85 A. Foner, Aging and Old Age: New Perspectives (New Jersey: Prentice-Hall, 1986) at 2-3.

their differences as being inferior to that of men. People of non-white racial origins no longer tolerate demeaning social constructions of their physical differences. Yet older citizens have been constructed in this century, not as whole beings, but instead, as a process of deterioration from a younger ideal. It has been said that science is limited by its measurement tools to only ask questions it knows how to answer. It doesn't ask what it doesn't know or is yet to understand. Friedan saw this pattern as she reviewed a large number of theorists who researched aging. She noted that the focus on scientifically established difference, based on decline from young to old, has become so accepted that any other model is effectively excluded as non-scientific.

Just as darkness is sometimes defined as the absence of light, so age is defined as the absence of youth. Age is assessed not by what it is, but by what it is not.<sup>86</sup>

The younger ideal is also an important part of the process of the medical model. In the development of medical science around old age there had to be a comparative standard or baseline for measurement, which of course was someone younger. The younger ideal is a very particular yet generally unacknowledged standard from which the medical model draws its scientific baseline. Tamaraus conducted a broad review of the literature and teaching materials used in medical practice and study. His research verified how medical science built an all-encompassing bio-physical theory of aging covering the physiological stages of the human life cycle including "prenatal life - ovum, embryo, fetus, birth,

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86 B. Friedan, The Fountain of Age (New York: Simon & Schuster, 1993) at 104.

postnatal life - neonatal period, infancy, childhood, early, middle later, adolescence, adulthood - senescence and death.”<sup>87</sup> He noted the common theme, that after entering adulthood, there is a brief period of stability where maximum strength and functional abilities are achieved. When this brief period in adulthood is reached, human physiology is seen to have reached its zenith. This period is followed by a gradual decline in homeostatic<sup>88</sup> equilibrium and reserves which eventually results in failure of one or more major physiological systems, then death. Tamaras identified in his review of medical text books that the baseline apex of human development, from which we are all compared, is a 25 year old male.

The mature years are considered a major life stage. They are characterized by great functional stability as connoted by the attainment of optimal, integrated function of all body systems. *Function in adulthood is taken as a standard against which to measure any degree of physiologic or pathological deviation. Most textbooks in human physiology take the mature 25-year-old, 77-kg, 170-cm-tall man as their model.*<sup>89</sup>

The laying down of a standard or a baseline of medically defined humanness is crucial

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87 Physiological Basis of Aging and Geriatrics ed. P. Timiras, 2<sup>nd</sup> (Boca Raton, Fl.: CRC Press, 1994) at 2.

88 The medical understanding of aging includes the concept of homeostasis-analyses of remaining physiological resistance to stresses and disease within an organism.

89 Timiras, *ibid* at 2. (Italics added)

because it determines which points of difference are highlighted. As Minow<sup>90</sup> describes, the categorization and comparison of selected traits of apparent importance will order further thinking about a group. This is due to the self-fulfilling prophesy that because those differences were chosen they then become intrinsically connected to the subject. Since the medical model of old age focusses narrowly on the physicality of aging, then aging becomes defined by physical degeneration alone and seemingly becomes the only characteristic that need be considered in future decisions by judges and policy makers. Unfortunately, the limitations and rigours of linear medical scientific research explain away or eliminate possible positive variations in human aging, and in doing so mask many of its most important characteristics, adaptations and potentials.

Unveiled, aging may not be so linear after all - it may be a dynamic, interactive process of increasing complexity characterized by unending emergent and adaptive properties. Like all such phenomena, the complexity that is human life brings to the fore qualitatively new characteristics which often seem to defy explanation.<sup>91</sup>

As noted earlier, the presumption that this standard evolved in a neutral manner void of political or personal preference is also important to the credibility of the construct

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90 M. Minow, Making All the Difference: Inclusion, Exclusion, and American Law (Ithaca: Cornell University Press, 1990). [Hereinafter, Minow, Making All the Difference]

91 J. Hendricks, "Bridging Contested Terrain: Chaos or Prelude to a Theory" Canadian Journal on Aging 1997, Vol. 16, no. 2 at 201.

especially when applied in a legal setting. Minow<sup>92</sup> noted that constructs extend and maintain themselves systemically partly due to a wide spread belief in an unstated assumption of a neutral perspective by those who have established authority. Particularly where the scientific model is employed, judges and the rest of society assume their beliefs and values are neutral and do not affect their perspective or resulting conclusions. Minow's research showed the inverse effect; the greater the acceptance and pervasiveness of an unrecognised perspective, the more it becomes systemic, invisible, self-propagating and powerful. Bio-medical constructs, which claim absolute neutrality, tend to have such a self-perpetuating nature, what Foucault refers to as a "clinical gaze".<sup>93</sup> The pervasiveness of such constructs subsumes, and co-opts even the affected individual into affirming the doctrines of the very system that limits their reality. The feminist movement highlighted the impact of the claimed neutral medical classification. The medical model was seen as a patriarchal model that holds the male, and a limited set of "male" characteristics, as representative of humanity. Within this set of assumptions, females were defined, devalued and dominated on the basis of their differences from males. Women were reduced to "other" because of their differences from men. Similarly old people's uniquenesses have also been reduced to "other" because of their differences from *young men*<sup>94</sup>.

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92 Minow, *Making All the Difference*, *supra* note 89.

93 M. Foucault, *The Birth of the Clinic: An Archaeology of the Human Sciences* (New York: Vintage, 1973).

94 C. Delahanty, *Truncated Lives: The Marginalisation of Old Women in Selected English Canadian Feminist*

Classification grounded on otherness can be a powerfully limiting factor that creates and then maintains a negative discourse on the basis of a specific set of criteria. Friedan<sup>95</sup> also observed that scientific and social research based its assumptions on a phallicentric view of the body. This view has selected and valued certain (stereo typically male) characteristics, while simultaneously devaluing all characteristics different than the self-serving male standard. The most pervasive assumptions, held that old people and women are frail, less intelligent and physically weaker than men. Aging bodies are seen to develop many of the same devalued characteristics as have previously been attributed to the female body. Whether these differences emanate from a person's sex or from their advanced age, they are defined as different than the young male archetype, and therefore of less value. Such assumptions about women were widely held and formed a large part of the "logic" and "justification" for patriarchal regulation, institutions and power relationships. Similar negative assumptions grew out of the medical image of an aging, deteriorating body. These similar negative impacts for women were recounted by Smart:

...where chaotic female bodies enter, it is presumed that meaningful, rationale behaviour stops...it is assumed that where bodies are, minds are not... Law has been part of a process of providing quite specific cultural meanings to women's bodies...moreover, law has sexualized women's bodies and rendered them unreliable and too prone to nature.<sup>96</sup>

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Texts (M.A. Thesis, Carleton U., 1992) at 14.

95 Friedan, *supra* note 85.

96 C. Smart, Feminism and the Power of Law (London: Routledge, 1989) at 93 & 103. Reprinted in Dawson, ed. Relating to Law: A Chronology of Women and Law

Old people have also acquired the image and presumption that they become chaotic in their deterioration; rational behaviour is assumed to diminish and the mind to fade, if not stop. Estes found that the problematization of the "frail", "weak" and "less intelligent body" became formalized into an expectation of institutionalization because of a grounding in the "objective medical model" of aging.<sup>97</sup> Being defined by one's deficits leads many to conclude that there is an unavoidable connection between physical deterioration and the use of institutions. Institutions were no longer based on the previously described image of need, but on the now prevalent notion of physical deterioration. The linking of old people to institutionalization has engendered an associated set of images that have had an insipient and far reaching effect of confirming negative expectations of old age. Negative concepts of institutionalization which have become linked to old age include dependence, deterioration, decay or malfunction. These negative concepts extended into an understanding of old age as a metaphor for progressive disability. As Wendell has described, being viewed by society as disabled, attributes to the individual a complex of meanings that go far beyond the obvious physical realm and into the realm of morality and virtue.

When you listen to this culture in a disabled body, you hear how often

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in Canada 2d ed. (North York: Captus Pr., 1994) at 15.

97 C. Estes, & E. Binney, "The Biomedicalization of Aging: Dangers and Dilemmas" (1989) Vol. 29, No. 5, The Gerontologist at 139.



health and physical vigour are talked about as if they were moral virtues. People constantly praise others for their 'energy,' their stamina, their ability to work long hours. Of course, acting on behalf of one's health can be a virtue, and undermining one's health can be a vice, but 'success' at being healthy, like beauty, is always partly a matter of luck and therefore beyond our control.<sup>98</sup>

Negative parallels to illness and disability were also noted by Friedan who found most data on aging was filtered and weighted to reflect the problems of the oldest and most sickly. "Many prevailing ideas and facts about aging and the aged come from studies of the sick and institutionalized"<sup>99</sup> As a result, the well known complex of problems and effects of institutionalization have come to be inappropriately associated with old age. This correlation occurs despite the fact that most elderly individuals are never

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98 S. Wendell, "Toward a Feminist Theory of Disability" (1989) 4 *Hypatia*, 104-124. Reproduced in D. Majury, Health Law (Ottawa: Carleton U. Pr., 1994).

99 Introduction to the Study of Human Aging (Rockville, Md.: National Institute of Mental Health, U.S. Dept. of Health, Education and Welfare, 1971) at 17. Quoted in Friedan, *supra* note 85 at 72.

institutionalized, or they will only be so for the very last stages of their lives.<sup>100</sup> It is also important not to confuse the fact that many people in long term institutional care facilities are not there because of their age, but because of disease. Yet within the medical world, some see physiological problems and aging as more than linked concepts, they are treated as equivalent concepts, with the process of aging itself considered as a disease:

Many diseases that lead to death in the perinatal period - period of high risk - have been conquered in developed countries, including the US. Today most deaths from disease occur in the elderly, in whom diminished function makes the accumulation of pathology less tolerable than in the young. Indeed, some diseases occur almost exclusively in the old, and this linkage of pathology with old age justifies the argument of some investigators that aging itself is a disease.<sup>101</sup>

The linkage between old age and medically defined degeneration has become so compelling that those who are old and healthy are often perceived not so much as healthy, but simply as, not yet sick. This perspective not only inaccurately portrays old age essentially as a disease, but it almost completely displaces alternative positive

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100 In 1991, 8.1% of Canadians over 65 were living in institutions (mostly special care homes). They made up 58% of the total institutional population, which means 42% were not seniors. Another factor to consider is that rates of institutionalization don't increase significantly until one reaches the 85 plus group: 2.7% of 65 to 74 group, 10.4.% of the 75 to 84 group, but 36% of the 85 plus group are institutionalized. C. Lindsay, A Portrait of Seniors in Canada 2<sup>nd</sup> ed. (Ottawa: Statistics Canada, 1997) at 27 & 33.

101 Timiras, *supra* note 78 at 4.

perspectives and any sense of agency to affect an individual difference<sup>102</sup>. How can the possibility of continuing growth, evolution or development in old age be imagined, if old age has become an authoritative metaphor for deterioration, neediness and redundancy? More importantly to this thesis, how could the court and society ignore such powerful images about old age? This question leads us to our analysis of how the Court considered and/or applied these images and assumptions in their decision in *McKinney* which is the subject of our next chapter.

#### **Chapter 4: Images of Old Age That Take on Legal Meaning in *McKinney***

As previously noted, *McKinney* was chosen as a demonstration case for this discussion, because in it all of the judges accepted that mandatory retirement is clearly discriminatory, and undertook a detailed examination of whether this discrimination was justified. La Forest J. stated simply and clearly why it was unquestionably discriminatory:

Mandatory retirement policies discriminate on the basis of age contrary to s. 15(1) of the Charter. They impose a burden, taking away work on the basis of a personal characteristic attributed to an individual solely because of his association with a group.<sup>103</sup>

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102 Katz, *supra* note 82.

103 La Forest J., *McKinney v. University of Guelph* (1990), 76 D.L.R. (4<sup>th</sup>), 546.

The main question for the Court then became how this discrimination could be justified under section 1 in the interests of a free and democratic society. Section 1 of the Charter allows individual or group rights to be curtailed if the offending practice can be justified as a “reasonable limit” to rights in the greater interest of the state and society. The section 1 analysis of this case allows us to see how the Court judged the validity of the many conflicting assumptions, facts and images of old age previously mentioned. The analysis proceeded in two parts. The first looked at the objectives brought forward by the university claiming mandatory retirement was necessary to excellence in higher education, academic freedom, youth employment and predictable retirement policies. The second part looked at the objectives and values attributed to the *Ontario Human Rights Code*<sup>104</sup> which included stability of retirement policies as elements of broader labour relations and inter-generational distribution of resources. Although these two inquiries address different legal questions, the Court employed essentially the same set of images and assumptions about old age to analyse them both.

To sort through the many issues, a common legal tool used by the Court in this and many other section 1 cases is known as the “*Oakes test*”.<sup>105</sup> The test is comprised of a series of questions which are used to filter through conflicting rationalizations, claimed objectives and perceived concepts of proportionality as they relate to the creation and continued use

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104 *Ontario Human Rights Code*, R.S.O. 1980, c. 340. 4(1).

105 *R. v. Oakes* (1986), 26 D.L.R. (4<sup>th</sup>), 200.

of practices like mandatory retirement. The *Oakes* test in *McKinney* raised four generic questions for the court to consider. These questions are adjusted here to organize and simplify the issues as they are applied in this thesis.<sup>106</sup> The first question asks: Are the objectives of the offending practice or legislation of pressing and substantial importance? The second question is a three-branch test of proportionality. With respect to university retirement, the first branch asks if the limiting practice of mandatory retirement is carefully designed and rationally connected to the university's stated objectives. If it is, the branch then asks if the university's mandatory retirement policy impaired the rights of the professors as little as possible given the pressing and substantial importance of the retirement policy. The final branch asks if the discriminatory effects of the policy are so severe as to outweigh the pressing and substantial objective of mandatory retirement. Most of the objectives put forward by the university to justify continuance of their mandatory retirement policy were listed together in one paragraph by La Forest J.

The universities advanced a combination of intertwined purposes to justify their policies of mandatory retirement which have been put into place by collective and other agreements and pension plans. The central objectives of these policies, they say, are intended: (1) to enhance and maintain their capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal; and (2) to preserve academic freedom and the collegial form of association by minimizing distinctive modes of performance evaluation. These combined objectives, I have no doubt, meet the "objectives test". Certainly, excellence in higher

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106 The analysis here will focus mainly on the issue of university mandatory retirement policies in *McKinney*. The *Ontario Human Rights Code* question involved similar but distinct issues.

education is an admirable aim and should be fostered. The preservation of academic freedom is also an objective of pressing and substantial importance.<sup>107</sup>

Universities throughout the world would no doubt share these goals. They would surely argue that their continuance is of pressing and substantial importance and necessary to the purpose, even the definition of a university. The problem is not with the university's lofty goals; the problem is whether or not these goals have very much to do with their policy of mandatory retirement. Accordingly, our analysis will move directly to the first question of proportionality and explore to what extent negative images of old age may have impacted on the careful design and/or the rational connection between the limiting policy of mandatory retirement and the stated objectives of the university. The question to keep in mind for this discussion is: Of all the possible ways the Court could have chosen to interpret the issues, how often did they chose interpretations that reflected the negative images of old age discussed in Chapter 3? The analysis of *McKinney* in this Chapter will be divided into three sections. Each section will correspond to one of the three questions raised by the *Oakes* test.

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107 La Forest J., *McKinney*, *supra* note 102 at 648-649.

**A: *Is Mandatory Retirement Carefully Designed and Rationally Connected to Its Objectives?***

In this first section we will look for evidence of the impact of negative images of old age raised by the *Oakes* test by asking: Did images of old age affect the analysis of the careful design and rational connections as they relate to mandatory retirement policy? Several key images and assumptions in *McKinney* that will be challenged here include the following: (a) There are clear roles we all follow in life, and retirement is the natural conclusion to one's working life. (b) Mandatory retirement was freely contracted and provides considerable benefits to retired workers. (c) A policy of predictable mandatory retirement is a natural and fair system which helps old people plan their future. (d) Older professors suffer from declining intellectual capacities. (e) Older professors contribute less and/or poorer quality work. (f) Old professors need to be evaluated because they are declining. (g) Young competent professors are displaced by old incompetent professors. (h) Universities must have the youngest and brightest to succeed.

As indicated in Chapter 1, the analysis will focus on the majority judgement of La Forest J. As noted there, La Forest J.'s section 1 reasoning carried the support of five members of the seven-judge Court. For the purposes of this exposition, La Forest J.'s broad language will be organized in a format where it is easier to analyse the objectives of pressing and substantial importance that he asserts the university was claiming. The objectives quoted above have been arranged into a series of sub-objectives which

culminate in the two primary global objectives of excellence in higher education and the preservation of academic freedom. Not as clearly stated, yet definitely underlying these objectives, are the implied objectives of the university's right to contract predictably with the union and promoting youth employment. Breaking these objectives down into more manageable concepts for analysis brings us to the following objectives:

Preservation of the right to contract and predictable financial planning.

Provision of employment opportunities for younger workers.

Faculty renewal.

Enhancement and preservation of academic excellence.

Preservation of academic freedom and collegial association.

Minimization of faculty supervision and demeaning faculty performance reviews.

In addition to these specific university objectives are the broader objectives of Canadian society in general. These include national concerns about what would happen to labour relations if mandatory retirement was abandoned, employment for younger workers and the concerns about predictability of retirement and pension programs for the wider population. La Forest J. often points out these broader social objectives as he refers to the maintenance of a free and democratic society plus their national social and economic implications. It is from this broader perspective that we will first look for evidence of the impact that negative images of old age may have had on the rationale and/or design of mandatory retirement policy and in turn on their acceptance by the court.



In referring to either the university's or society's objectives, La Forest J. offers surprisingly few references to direct evidence or research to support the design or rationale of mandatory retirement policies. One exception is the report of the [Canadian] Special Senate Committee on retirement, whose title seems to champion the popular image of retirement - "Retirement Without Tears". Unfortunately, it seems that La Forest J. may have given more credence to the title than to the text of the report. For when one reads the full text, one sees that the report strongly denounced the widespread use of mandatory retirement. In fact the report unequivocally condemned the policy, concluding that "mandatory retirement on the basis of age involves an infringement of human rights, economic waste and misconceptions about the relevance of age."<sup>108</sup> The Senators took the view that the assumptions on which mandatory retirement is based are deeply flawed. The objectives were misguided and many of the negative effects were, at least in part, a self-fulfilling consequence of the policy.<sup>109</sup> The authors of the report arrived at the following conclusions preferring flexible retirement as a possible alternative:

By encouraging people to remain active in the workforce beyond age 65, the social security and related costs of maintaining an aging population are reduced and the production of goods and services is increased. Flexible retirement can thereby make a real contribution to reducing the social cost

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108 Senator David A. Croll, *Retirement Without Tears*, (Ottawa: Ministry of Supply and Services, 1982) at 12.

109 The report suggested that many of the negative characteristics attributed to old age could equally be attributed to the life-limiting impact of retirement.

of supporting the rapidly growing older population.<sup>110</sup>

Although the Senators would surely agree with the university's objectives, their analysis does not support the university's contention that a mandatory retirement policy was either a rationally connected or a well designed means to achieve those objectives. How could the Court and the Senate arrive at such opposite conclusions about the same issue? The answer to that question would be that the Court and the Senate start with different definitions of what it means to be old. Put simply, the Court focussed on the problems of old age noted in the last chapter and the Senate focussed on the possibilities of old age. From these two totally different starting points there emerged two very different perspectives of what it means to become old and what policies are justified given those divergent meanings. A starting point to understand these divergent positions is to look at the ways old age can be defined as different from other ages.

### Rationale of Difference

It may at first seem obvious, but it is important to be clear throughout this analysis that the popular perspective of old age, as a material point of difference, is only meaningful if it is compared to a younger age. Without this comparison to youth, the widespread image of old age as a state of deterioration from youth would have little meaning. Minow points out, that as individuals we are each equally different from one another, yet specific group differences take on meaning when made in comparison to some other group characteristic

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110 Senator Croll, *ibid* at 129.

which has been understood as the norm. "A short person is only different in comparison to a tall one."<sup>111</sup> What this focus on specific differences ignores, is how:

We often assume that 'differences' are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits. Each of us is different from everyone else in innumerable ways. Each of these differences is an implicit comparison we draw. And the comparisons themselves depend upon and reconfirm the selection of particular traits as the ones that assume importance in the comparison process. An assessment of difference selects out some traits and makes them matter; indeed, it treats people as subject to categorization rather than as manifesting multitudes of characteristics.<sup>112</sup>

Instead of an awareness of the analytical bases for treating old people differently, there seems to have been an unconscious reliance on many of the negative images discussed earlier in the historical section, images that flowed from misconceptions about neediness/helplessness, age-stratification, industrialization and a narrow biomedical perspective. These images of difference validate, even seem to necessitate, mandatory retirement. The divergences between the Senate Report and the Court's view start with a most basic determination about the relevance of age and whether older citizens can be defined as a group with heterogeneous characteristics that fundamentally differentiate them from younger citizens. While the Senate recognized that old age significantly changes a person, they did not assume that the previously mentioned negative images and

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111 Minow, *Making All the Difference*, *supra* note 89 at 22.

112 Minow, *Making All the Difference*, *supra* note 89 at 50.

devaluations are the necessary outcome of those changes. Conversely the language used by La Forest J. treated aged individuals as a homogenous group sharing a basic characteristic of deterioration. While La Forest J. does admit that there are individual differences between old people, his admissions are couched in language that treats those who did not fit the negative image as aberrant and unrepresentative of the normal detrimental effects of aging.<sup>113</sup>

Rational Connections to the Preservation of the Freedom to Contract and Predicable Financial Planning

Given La Forest J.'s acceptance of seniors as a homogeneous group, we will now look at how the different nature of this group was argued to be rationally connected to the objectives of mandatory retirement policy. There is one element of the university's argument which underlies all of the others and should therefore be addressed first: the objective of preserving the freedom of contract.<sup>114</sup> In order for the university to pursue its primary objectives of excellence in higher education and the preservation of academic freedom it must first be assured of a stable environment in which the freedom to contract

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113 La Forest J., *McKinney*, *supra* note 102 at 646, 647, 658, 659, 660.

114 I refer here to the freedom to contract in the Marxist sense, which is the presumed freedom to contract one's labour that is necessary to the notion of capitalism.

is preserved.<sup>115</sup> The freedom to contract appears unassailable in both its design and rational connection to many of the university's objectives which combine into the broad objective of excellence in education.<sup>116</sup> Freedom to contract and the presumptions of the contractual process are assumed to be in the interest of both the university and the professors. This presumption was clearly stated in the original Ontario High Court decision referred to by La Forest J. "In the present context, he saw mandatory retirement as a 'creature of contract, negotiated in good faith for the parties' own economic and other benefits'".<sup>117</sup> The contract objective is claimed to demonstrate that mandatory retirement is not an imposed policy, but a policy fought for by the academic union in the best interests of its members. La Forest J. quotes from the Court of Appeal to describe the design and rational connection of the university's right to contract and the highly interconnected nature of contract predictability to the goals of both the professors and the university:

**One of the primary objectives of s. 9(a) was to arrive at a legislative compromise between protecting individuals from age-based employment**

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115 The issue was also raised by the Ontario Government in defence of s. 9(a) Code. "The Attorney-General has sought to justify the section on the ground that it preserves freedom of contract." Wilson J., *McKinney*, *supra* note 102 at 626.

116 Freedom to contract was assumed to be connected to the tenure system, seniority provisions, pensions, and the setting of retirement age.

117 Gray J. Ontario High Court, 32 D.L.R. (4<sup>th</sup>) 65, 14 C.C.E.L. 1, 57 O.R. (2<sup>nd</sup>) 1., La Forest J., *McKinney*, *supra* note 102 at 630.

discrimination and giving employers and employees the freedom to agree on a date for the termination of the employment relationship. Freedom to agree on a termination date is of considerable benefit to both employers and employees. It permits employers to plan their financial obligations, particularly in the area of pension plans and other benefits. It also permits a deferred compensation system whereby employees are paid less in earlier years than their productivity and more in later years, rather than have a wage system founded on current productivity. In addition it facilitates the recruitment and training of new staff. It avoids the stress of continuous reviews resulting from ability declining with age, and the need for dismissal for cause. It permits a seniority system and the willingness to tolerate its continuance having the knowledge that the work relationship will be coming to an end at a finite date. Employees can plan for their retirement well in advance with dignity.<sup>118</sup>

The degree of inter-connectivity is important as it implies that all parties willingly agreed to mandatory retirement, entering into it on a variety of levels all of which are seemingly important and interdependent. La Forest J. points out in his historical review that the concept of mandatory retirement was initially developed and agreed to by the workers as part of the private right to contract. He also recognized, as was earlier described, that the concept of retirement contained elements that would not have been knowingly agreed to by workers, elements that were established to meet the needs of industry and younger workers, and not necessarily the needs of older individuals.

...it was also designed to remove older people from the labour force in the interests of maintaining employment for younger workers during the

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118 La Forest J., *McKinney*, *supra* note 102 at 545.

Depression years.<sup>119</sup>

The early history of retirement and pension policy reflected many other social injustices of the early 20<sup>th</sup> century. Key among those injustices was the practice of systemic exclusion which would have left many groups outside the freely negotiated process. The largest group affected by such exclusionary customs was women, as was forcefully pointed out by Wilson J.<sup>120</sup> Even when restricted to just the university's initial mandatory retirement policy negotiations, there would have been negotiations between a group of male university professors and their universities. The contracting parties would have followed the norm of the day and negotiated to pay the few women in their negotiating group, less money for the same work. The few women who had employment would suffer the impact of such lesser pay and benefits as an exaggerated negative effect on their eventual pensions.

A retirement and pension system established to meet the needs of industry and the employment of younger men meant that other significant groups of people were also left outside of the "freely negotiated" process. Unmentioned in *McKinney* were the "freely negotiated" labour limitations placed on communists, non-Protestants, homosexuals, people of colour and individuals with disabilities or of the First Nations. The history of how these groups have been systemically and routinely disadvantaged was among the

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119 La Forest J., *McKinney*, *supra* note 102 at 657.

120 Wilson J., *McKinney*, *supra* note 102 at 626-627.

primary motivations for s. 15 of the Canadian Charter. Given that age is a protected category in s. 15, shouldn't the Court have been more alert to the fact that retirement was created to placate industry and was based on negative group perceptions? And shouldn't the Court also have considered the possibility that these rights may have been lost as opposed to negotiated away, just as they were for the other groups?

Arrangements that assign the burden of 'difference' to some people while making others comfortable are historical artifacts. Maintaining these historical patterns embedded in the status quo is not neutral and cannot be justified by the claim that everyone has freely chosen to so.<sup>121</sup>

Despite all the possible historical interpretations of the freedom to contract, the implication *La Forest J.* draws is that the workers must have wanted this limitation of their rights:

About one half of the Canadian workforce occupy jobs subject to mandatory retirement, and about two-thirds of collective agreements in Canada contain mandatory retirement provisions at age 65, which reflects that it is not a condition imposed on the workers but one which they themselves bargained for through their own organizations.<sup>122</sup>

There are two further reasons to question whether seniors would freely chose mandatory retirement. First, was the workers' purpose to negotiate away their right to work, and

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121 Minow, *Making All the Difference*, *supra* note 89 at 53.

122 *La Forest J.*, *McKinney*, *supra* note 102 at 658.



second, can one freely contract away rights about which one has no knowledge or foreseeable alternatives? No evidence is provided anywhere that workers actually wanted to eliminate their right to work, but it is clear that all workers wanted fair pensions and to end disagreeable working conditions and terms of employment. The image is that the "choice" of mandatory retirement is what everyone would chose as a way out of the drudgeries of a long and agonizing working life. While this may have once been true of industrial line workers, it is not necessarily true of many modern jobs, including that of professor. The intended choice of the workers' contractual negotiations was the right to stop the drudgeries of unfair working conditions at a predetermined age<sup>123</sup> and the assurance of fair pensions - their intent was not the elimination of the option to a future right to work. The loss of the right to future work was a choice that only benefited the employers' desire to permanently rid themselves of old workers.

As to the second question: How can one freely contract away rights about which one has no knowledge or options? While it is true that no one would have perfect knowledge of the consequences of what they are negotiating, misguided assumptions and images about old age are unusually prevalent. Assumptions upon which contracts were freely entered into included the following images: a belief that families will be available or willing to provide support to the retired person; the assumption that fair pensions could or would

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123 C. Gillin, & R. Klassen, "Retire Mandatory Retirement" Policy Options (Institute for Research on Public Policy, July-August 2000 Vol. 21 No. 6) at 59. [Hereinafter Gillin, & Klassen, Retire Mandatory Retirement]

take the place of employment; assumptions that everyone would want to retire and/or could afford to retire; negative perceptions of the effects of aging held by employers and employees and a belief in the image of a zero-sum inter-generational justice on the basis of age-stratified roles where surrendering one's job to a younger person is seen as the right or natural thing to do.

Assumptions that the status quo is natural, good, and uncoerced make proposed changes seem to violate the commitment to neutrality, predictability, and freedom.<sup>124</sup>

There is the additional logical problem of how a young individual could understand the full implications of negotiations about retirement. To a younger worker the choice of retirement might seem the only reasonable option. There could be no real choice if nothing other than retirement was understood to be possible or available. The only people who would have actually understood the full implications of retirement were those who had already retired. But once retired they were no longer a part of the bargaining unit and therefore had no say.

In addition, the claimed "freedom to contract" was significantly limited by government policy which preordained some key terms. Government pension policy is a concrete example of how the image of age 65 is fixed via governmental policy. Government policy starts early in a worker's life and labour negotiations to institutionalize the

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124 Minow, *Making All the Difference*, *supra* note 89 at 70.

correlation of age 65 with retirement. La Forest J. provides numerous references to mandatory retirement as a part of freely negotiated private and public labour contractual arrangements in his arguments that imply mandatory retirement is not an instrument of government. However, closer examination reveals that there is no freedom to contract for an exception to the federal pension plan, and to argue otherwise ignores the institutionalized influence of this non-negotiable intervention by government. The most dominant and consistent components of all "freely" negotiated retirement contract calculations are on the basis of a formula that combines the workers' contribution, employers' contribution and the government pension payout. Even if an individual chooses to retire early, his or her payout formula will be determined by either a lower payout or the employer must compensate for the lack of government pension contributions and top up the pension until age 65. The government program that controls and regulates the Canada Pension Plan (under its various names) has become one of Canada's largest and most influential single budgetary expenses.<sup>125</sup> The reality of all labour agreements, both private and public, is that the government-legislated portion of these contracts dominates the final retirement package.<sup>126</sup> Pension policy is highly

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125 The raising or lowering of CPP payments is one of the government's more powerful fiscal instruments that can be used nationally to stimulate employment or to impact on inflation.

126 Currently in Canada there is discussion about raising the retirement age above 65 in order to "save" the public pension system. When this change is inevitably adopted, all public and private contracts will need to be renegotiated. Such a renegotiation will have social and economic impacts far greater than dropping mandatory retirement and will no doubt be the centre of many

controlled by government policy, and freedom to contract is virtually non-existent on this point.

### Tenure as Justification for Mandatory Retirement

Beyond the generic issues raised by the freedom to contract, the first argument specifically about rational connections deals with tenure. La Forest J. relied on the argument that mandatory retirement is essential to the tenure system. This, in turn, was claimed to be necessary to the objective of excellence in higher education. Tenure is described as involving a series of sub-objectives which include the achievement and maintenance of academic excellence, avoidance of supervision and embarrassing evaluation and an assurance of predictable employment opportunities for younger workers. All these are seen as crucial in the achievement and maintenance of academic excellence and excellence in higher education.<sup>127</sup> La Forest J. understands mandatory retirement to be an interdependent and necessary element of the tenure system, despite an acknowledged lack of evidence to support these causal links. The only support for this belief appears to stem from confidence in the image of deterioration, and an acceptance of existing age-stratified role expectations. La Forest J. admits that there is a lack of supporting evidence for the connection between the tenure system and the sub-objectives of avoidance of supervision and embarrassing evaluation as causally linked to mandatory

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future inter-generational political debates.

127 Each will be addressed more fully later.

retirement:

...the desire is to maximize academic freedom by minimizing interference and evaluation. Elimination of mandatory retirement would adversely affect this for there could well be an increase in evaluation and attempts to dismiss for cause, *though it must be said that evidence on this point is lacking*. The general situation is well stated by the Court of Appeal, at p. 246: The policy of tenure in university faculties is fundamental to the preservation of academic freedom.<sup>128</sup>

How can La Forest J. make the logical connection that assumes mandatory retirement is necessary for tenure to continue? Because mandatory retirement is a relatively new concept,<sup>129</sup> and because tenure is a long established norm of academia, one could safely assume that the concept of tenure existed long before the idea of mandatory retirement was envisioned. Therefore it is hard to understand how the values of tenure could not continue without mandatory retirement, just as they did before the concept was even anticipated. From a historical perspective, it seems valid to speculate that mandatory retirement is merely an administrative convenience added to the tenure system over the latter part of the 20th century. But that does not mean that it is necessary to the objective of tenure. Arguably it is merely coincidental. Evidence that the connection is weak exists in numerous other jurisdictions, including the United States. The Americans have legislated against mandatory retirement and have found that they can still maintain tenure

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128 La Forest J., *McKinney*, *supra* note 102 at 649-650. (emphasis added)

129 See Appendix II. Historical Development of Public Pensions in Canada, p. 109.

systems. In fact, La Forest J. knew that three Canadian provinces, representing a significant portion of Canada, had already legislated against employment discrimination on the basis of age, without the over 65 exemption contained in the *Code*:

...Quebec, New Brunswick and Manitoba, have now gone further and prohibited age discrimination in employment altogether.<sup>130</sup>

The university's rational connection argument implies that a tenure system is the only possible solution to the problems above, and that the tenure system is in turn dependent on mandatory retirement. But how do the universities explain other models of employment with similar or comparable demands that do not depend on mandatory retirement policies? Other professions need to be able to assure high standards, attract young workers, provide security of employment and the "freedom to allow free and fearless search for knowledge and the propagation of ideas."<sup>131</sup> How do they protect the creative freedoms of their professionals without being tied to a system of tenure, for example journalists, engineers, architects, authors, jurists, artists, arbitrators, ombudsmen and doctors, lawyers and scientists in the private sector? In many instances, these professions are not subject to mandatory retirement. It is difficult to understand how the university's argument was upheld in the face of so many other possible interpretations.

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130 La Forest J., *McKinney*, *supra* note 102 at 659.

131 La Forest J., *McKinney*, *supra* note 102 at 649.

Academic Freedom as a Justification for Mandatory Retirement

As La Forest J. pointed out, the tenure system has several component elements or objectives. One of the most important of these is the objective of preserving academic freedom which is seen as not only necessary to achieve academic excellence, but also as having broader social implications. "Academic freedom and excellence are essential to our continuance as a lively democracy."<sup>132</sup> The rationale behind both of these objectives is predicated on the image of deterioration caused by old age. But once again, a problem arises when one tries to confirm a causal connection between mandatory retirement and the objective of academic freedom. Wilson J., dissenting in *McKinney*, cited evidence which questioned the tight link La Forest J. drew between academic freedom and excellence in education. Wilson J. cited the Bissell Commission:<sup>133</sup>

...calls for a rethinking of tenure as a means of protecting academic freedom, suggesting that it has more to do with job security than academic freedom.<sup>134</sup>

La Forest J. presented a confusing and contradictory connection between mandatory retirement and the objective of academic freedom. A curious advantage he cites as positively contributing to academic freedom, is the way in which tenure and mandatory

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132 La Forest J., *McKinney*, *supra* note 102 at 652.

133 Bissell Report of the Commission on the Government of the University of Toronto (Toronto: 1970) at 27.

134 Wilson, J., *McKinney*, *supra* note 102 at 596-597.

retirement would allow a professor to be unconcerned about his or her performance in later life.

They need not be unduly concerned with a 'bad year' or a few bad years, or that their productive capacity may decline with the passing of years."<sup>135</sup>

Here La Forest J. seems to suggest that the protected freedom to perform badly and deteriorate with relative impunity is an advantage of the tenure system. He expands on this concept by linking it to a seniority system which seems to further systematize a means by which lower quality work will be protected from scrutiny:

It avoids the stress of continuous reviews resulting from ability declining with age, and the need for dismissal for cause. It permits a seniority system and the willingness to tolerate its continuance having the knowledge that the work relationship will be coming to an end at a finite date.<sup>136</sup>

In fact, the images marshalled by the Court in support of mandatory retirement, could just as easily be recombined to reach a different conclusion, if one based the evaluation on different images and expectations of old age. Different perspectives could produce alternative outcomes which will be discussed in greater detail in the concluding chapter. For example, there could be a mentoring of young professors by older professors. More flexible work models could allow for variations in work, retirement or retraining time that

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135 La Forest J., *McKinney*, *supra* note 102 at 652.

136 La Forest J., *McKinney*, *supra* note 102 at 658.



could start at an age of choice depending on ability and financial circumstance. This would allow for graduated part-time or task and time-sharing models to allow more people to enter custom-tailored tenured positions. Many options are possible as long as people are willing to think beyond the limits of the traditional work-week model developed for the industrial age labourers.

**Faculty Performance Reviews and Supervision as a Justification for Mandatory Retirement**

The paramount reason for mandatory retirement in a tenure system is the thinly veiled presumption of intellectual deterioration due to advanced age. La Forest J. articulates his understanding of a rational connection between mandatory retirement and the tenure system, and claims that academic freedom extends from this connection to the joint concepts of minimizing supervision and avoiding performance reviews:

Mandatory retirement is intimately tied to the tenure system. Its elimination would adversely affect the desire to maximize academic freedom by minimizing interference and performance evaluation, because there could well be an increase in evaluation and attempts to dismiss for cause. ...Mandatory retirement is not wholly detrimental to the group affected; it contributes significantly to an enriched working life for its members by ensuring a large measure of academic freedom with a minimum of supervision and performance review.<sup>137</sup>

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137 La Forest J., *McKinney*, *supra* note 102 at 546.

The entire argument for protecting against embarrassing performance reviews emanates from a presumption that elderly professors would either require supervision, or they would fail evaluation reviews. The Court of Appeal articulated this concept which was cited by La Forest J. to support his position:

It avoids the stress of continuous reviews *resulting from ability declining with age*, and the need for dismissal for cause.<sup>138</sup>

The key concept that ties together many of the rational connections between the university's objectives and mandatory retirement is a total acceptance of the medical model image that people deteriorate as they age. This is very tightly linked to tenure because a belief in diminishing intellect would mean that there must be a predictable or testable end to the protected tenure status in order to assure a continuing standard of quality in academia. That end is understood to be mandatory retirement. The appropriateness of this logic is difficult to understand as there is never a definition presented as to the make up of any standards of excellence which could be tested or verified as objective. There was no standard test applied to the elderly professors involved in the case because there was no standardized test in existence. In the case at hand, La Forest J. recognized that Professor McKinney and the other professors involved in the case did not demonstrate any of the expected negative images of old age and that their individual performances were unassailable:

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138 La Forest J., *McKinney*, *supra* note 102 at 658.  
(emphasis added)

The appellants' competence has never been seriously questioned: they are highly qualified academics. The sole ground for their retirement is that they have reached the mandatory age of 65.<sup>139</sup>

Non-Rebuttable Presumption of Incompetence

The mandatory nature of retirement is predicated on an irrebuttable presumption that older individuals will be mentally diminished. It is impossible for an individual to defend themselves against this assumption. As noted above, this concern seems particularly relevant as none of the individuals in *McKinney* fit the expectation of mental deterioration. In fact McKinney and his fellow professors were not only specifically referred to as competent, but were recognized as "highly qualified academics."<sup>140</sup> They were never given the opportunity to rebut the accusations about their competence. Incompetence was assumed because of their membership in a particular group despite the recognized facts of their personal attributes. "There is evidence accepted by the courts below that on average there is a decline in intellectual ability from age 60."<sup>141</sup>

When discussing whether a law that denies individuals their rights is justified, La Forest J. points out that the parties seeking the limitation have the onus of proof to show that

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139 La Forest J., *McKinney*, *supra* note 102 at 629.

140 La Forest J., *McKinney*, *supra* note 102 at 629.

141 La Forest J., *McKinney*, *supra* note 102 at 546.

their cause is valid:

The approach to be followed in weighing whether a law constitutes a reasonable limit to a Charter right has been stated on many occasions... *The onus of justifying a limitation to a Charter right rests on the parties seeking to uphold the limitation.*<sup>142</sup>

But in *McKinney* the Court's acceptance of the image of incompetence in old age removes the need for a system to evaluate a forgone negative conclusion, therefore the facts become irrebuttable.

#### Evaluation Already Exists

La Forest J.'s presumptions about how the tenure system functions to achieve academic freedom also implied that there is no existing evaluation of faculty. If there were to be evaluation instead of mandatory retirement, the university argued that they would have to reorganize to introduce evaluation policies only for older faculty and that that would be an unusual and demeaning (because of the image and expectation that many would fail such tests due to old age) intrusion. But in reality academia is a constantly self-regulating experience which includes competition for research resources, maintaining personal status within departments and the academic community, formal student evaluations,

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142 La Forest J., *McKinney*, *supra* note 102 at 647. (emphasis added)

informal feedback, day-to-day demands of teaching and ongoing maintenance of professional accreditation standards, competitive and academic demands to continuously create new knowledge, critique existing knowledge and the need to “publish or perish”. These evaluation pressures and systems are already familiar to faculty and therefore not demeaning to older academics. Such policies are also not age-specific because they are designed to maintain academic excellence throughout the university structure. Some of these existing evaluation procedures are formalized with real consequences while others are less so. If it was felt that more evaluation was necessary, the existing non-age specific practices could provide a basis or guidance for possible new programs on the basis of extending and expanding current practices. La Forest J. recognized the existence of some concrete evaluative practices already in place within academia:

...members of a faculty begin their careers in university in their late 20s to mid-30s and with retirement age at 65 this means that they continue on staff for some 30 to 35 years. ...*Rigorous initial assessment is necessary as are further assessments in relation to merit increases, promotion and the like.*<sup>143</sup>

Yet he still maintained his negative expectations of old age and his idealized view of the nature of tenure systems. From these beliefs he asserted that academic freedom is linked causally to mandatory retirement:

Mandatory retirement is not wholly detrimental to the group affected: it

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143 La Forest J., *McKinney*, *supra* note 102 at 649.  
(emphasis added)

contributes significantly to an enriched working life for its members by ensuring a large measure of academic freedom with a minimum of supervision and performance review...<sup>144</sup>.

At the time of *McKinney* there was little in the way of concrete evidence to test the validity of a formal evaluation system because as noted, no such system existed to test the irrefutable presumption of deterioration beyond age 65. If there was to be a formal system to allow professors to challenge the presumption of incompetence, as an alternative to mandatory retirement as is often suggested, how could such an evaluation system be structured? A recent McGill University study<sup>145</sup> that evaluated their elderly medical professors demonstrated that La Forest J.'s negative expectations about old age were shared by many in academia. But the McGill study results, which confirmed the expectations of other studies,<sup>146</sup> determined that the evaluation process was based on an assumption of deterioration. And this raised the question of whether an ageist society would be able to evaluate the unique characteristics and values of older individuals. Moreover, would the tests only evaluate characteristics that are understood by the limited

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144 La Forest J., *McKinney*, *supra* note 102 at 546.

145 P. McLeod, T. Meagher, M. Abrahamowicz, Y. Steinert, & D. Boudreau, "When Academic Physicians Age: Perceptions, Concerns, and Recommendations of Senior Faculty Members at McGill University" *Annals Royal College of Physicians & Surgeons Canada* Vol. 33, No. 5, August 2000 at 282.

146 M. Young, & T. Schuller, *Life After Work: The Arrival of the Ageless Society* (Glasgow: HarperCollins, Glasgow, 1991) & L. McDonald, & R. Wanner, *Retirement in Canada* (Toronto: Butterworths, 1990).

experience of younger testers? In the McGill study, the authors' presumptions led them to expect that their subjects would be concerned and/or suffering from a series of negative age related burdens which included:

...declining skills as medical practitioners and because of information overload in the medical sciences. We also anticipated that many would be concerned about keeping up with new technology, especially as it relates to research and to clinical diagnoses. Declining productivity, imminent withdrawal from a stimulating environment, and loss of recognition were other concerns that we assumed would be prevalent.<sup>147</sup>

The study further confirmed a normalized and systemic youth-oriented testing bias plus a negative view of senior academics. Both of these presumptions were proven unsupportable by the data:

While it is common for university administrators to address issues related to the pressures on new faculty members, little attention has been given to the incentives, concerns, and interests of older faculty members.<sup>148</sup> This may reflect negative generalizations about the productivity of senior academics, and a developing "cult of youth" at universities.<sup>149</sup> Yet research on the impact of advancing age on the productivity of academics

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147 McLeod, et al, *supra* note 144 at 282.

148 C. Mathis, "Academic careers and adult Development: A Nexus for Research" Current Issues in Higher Education No. 2, Faculty of Career Development. Washington: American Assoc. for Higher Education, 1979: 21-4.

149 M. Levine, Age Discrimination and the Mandatory Retirement Issue (Baltimore: Johns Hopkins University Press, 1988: 105-17.)

has yielded mixed results indicating that age is a poor predictor of performance.<sup>150</sup>

Contrary to the narrow youth paradigm of negative expectations, the McGill research revealed many complex unpredicted positive characteristics that often would not become apparent until old age. These more difficult to measure and complex late onset skills included the following:

...clinical judgement, clinical problem solving ability, appreciation of quality of life issues, humanistic skills, and interactions with other health-care workers have improved or increased during the last five years of their careers. ...69 per cent of respondents report increased or improved ability to emphasize concepts in the last five years of their careers. Many respondents cite lecturing ability, fund of biomedical knowledge, comfort giving feedback, use of student-centred teaching strategies, role modelling ability, and ability to challenge learners as having improved. ...most respondents note improvements or increases in eight of the 10 areas in administration.<sup>151</sup>

#### Exceptions to the Mandatory Retirement Logic

Yet another serious flaw in the presumption of incompetence due to age and its connections to tenure relates to who is being measured. As previously stated, a fundamental and supposedly rational connection supporting mandatory retirement holds

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150 McLeod, et al, *supra* note 144 at 282.

151 McLeod, et al, *supra* note 144 at 284.



that, on average, there is a measurable decline in human capabilities as workers reach 65 (La Forest J. believed it was age 60<sup>152</sup>). The popular medical model image of this loss as a difference sufficient to justify mandatory retirement is crucial to the common sense rationale supporting mandatory retirement's design and application. The reality this presumption ignores begs a very basic demographic question. If there truly is a meaningful link between chronological age and factors such as health, intellect, imminence of death and capacity to do a job, then why don't retirement policies require men to retire earlier than women? Since male life expectancy is significantly shorter than female, would not the aging paradigm predict a delayed negative impact for women at age 65? Demographic studies from Canada<sup>153</sup> and around the western world show that women live at least five years longer than men.<sup>154</sup> Surely within the age negative paradigm the onset of death would be indicative of a culmination of degenerative factors including intellect. If the policy is validly based on physiological differences, then why does it completely ignore the female characteristic of superior longevity? Failure to

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152 La Forest J., *McKinney*, *supra* note 102 at 546.

153 "The experience of old age has become, more than ever before, a women's reality. There are now about 138 women for every 100 men over 65 in the general population. At upper ages, the ratio rises gradually. There are 274 women for every 100 men aged 90 and over." The National Advisory Council on Aging The NACA Position on Women's Life-Course Events (Ottawa: Supply & Services Canada, 1993) at 8. Based on, Statistics Canada. Age, Sex and Marital Status (Ottawa: 1992. Catalogue No. 93-310.)

154 See Appendix VI, p. 101 "Demographics of Aging Canadian Women" for more complete listing of age/gender related differences.

recognize this has resulted in an irrational retirement process which marginalises the superior female longevity by assuming that women will only live as long or be as productive as men.

A further exception and/or oversight in the determination of a rational connection between mandatory retirement and the objective of academic excellence arises from the capacity of the judges to decide the case. If the objective of maintaining academic excellence is truly rationally connected to some unavoidable fact of diminishing intellectual capacity, then the decision of the judges reveals an interesting flaw in the legal argument. If it is true, as has been accepted by the Court, that the intellect diminishes beyond the age of 60, then should not most of the judges have disqualified themselves on the basis of incompetence due to their own advanced age and resulting diminished intellect?

...three of the justices who decided *McKinney* were 65 or older, and the mean age of all the justices was precisely 65...<sup>155</sup>

It has been said that practices of ageism, and sexism before it, are so pervasive as to be invisible. Supreme Court Judges make up one of the smallest and most influential groups of citizens in Canada and the demands on their intellect are unquestionably essential to the complex operations of our free and democratic society. Just as university professors

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155 Gillin & Klassen, *Retire Mandatory Retirement*, *supra* note 122, at 61.

must have the intellect to create and maintain academic excellence, clearly the intellectual capacity of Supreme Court Judges should also be beyond reproach. Intriguingly, only two pieces of legislation in Canada<sup>156</sup> include in their designs a provision protecting against forced retirement up to age 75. Ironically these acts specifically protect the right to work of elderly Supreme Court Judges and Senators through to age 75. For the judges, this ensures that the intellectual experience, maturity and judgement, which took a lifetime to amass, will be protected and preserved. In the case of the Senate, advanced age provides the country with sober second thought - also a characteristic associated with advanced age.

#### Work for the Young as a Justification for Mandatory Retirement

Presumptions of degeneration of older workers and avoidance of an evaluation process were not the only reasons the Court supported the concept of mandatory retirement. There was also the frequently raised link between mandatory retirement and the tenure system with the objective of opening up opportunities for younger workers. Yet La Forest J. clearly says the youth employment objective should be given little weight because it presumes young workers are somehow more deserving than old workers.

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156 Both Judges and Senators were protected under the *British North America Act* of 1867 to serve for life. This was amended by Parliament to age 75 in 1965 for Senators. Senate Reform Canada Library of Parliament, Research Branch 1986, Supply & Services, #96 Back grounder. Supreme Court Judges terms were amended to age 75 under the *Supreme Court Act*, R.S.C. 1970, c. s.19, ss. 9(2).

The objective of reducing youth unemployment should not be given much weight. The objective of forcibly retiring older workers in order to make way for younger workers is discriminatory, since it assumes that the continued employment of some individuals is less important to them and of less value to society at large than is the employment of other individuals solely on the basis of age. ...The job opportunities made available through mandatory retirement should not be accorded a central role in the debate.<sup>157</sup>

Despite this admission that the youth employment objective is discriminatory and based on invalid presumptions, La Forest J. infers that youth employment is a valid inter-dependent and or stand-alone objective. La Forest J. makes this contradictory assertion throughout the case as he links the importance of youth employment to numerous other objectives. How can an objective which has been declared discriminatory and worthy of only limited weight, be later declared as crucial to so many other objectives? Several of La Forest J.'s statements are listed to demonstrate the influence the preservation of youth employment had on the analysis of mandatory retirement. Some of these statements reflect the images of deterioration and of the justness of age-stratified roles:

Mandatory retirement provides work opportunities for the young, and staff renewal is vital to the university and society.<sup>158</sup>

In addition it facilitates the recruitment and training of new staff.<sup>159</sup>

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157 La Forest J., *McKinney*, *supra* note 102 at 546-47.

158 La Forest J., *McKinney*, *supra* note 102 at 546.

159 La Forest J., *McKinney*, *supra* note 102 at 658.

Faculty renewal is required if universities are to stay on the cutting edge of research and knowledge.”<sup>160</sup>

Ramifications relating to the integrity of pension systems and the prospects for younger members of the labour force were the predominant concerns.<sup>161</sup>

Another important objective of s. 9(a) was the opening up of the labour market for younger unemployed workers. The problem of unemployment would be aggravated if employers were unable to retire their long-term workers.<sup>162</sup>

Mandatory retirement also ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence.<sup>163</sup>

Several of these statements of La Forest J. imply the additional presumption of a zero-sum economic logic. The university’s claim they have limited resources, such that expenditures in one area mean depletions from another area. This is extended to argue that the only way to employ young workers is to reduce expenditures by eliminating older workers through forced retirement:

*In a closed system with limited resources, this can only be achieved by*

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160 La Forest J., *McKinney*, *supra* note 102 at 652.

161 Gray J. Ontario High Court, 32 D.L.R. (4th) 65, 14 C.C.E.L. 1, 57 O.R. (2<sup>nd</sup>) 1. Quoted by La Forest J., *McKinney*, *supra* note 102 at 631.

162 La Forest J., *McKinney*, *supra* note 102 at 658.

163 La Forest J., *McKinney*, *supra* note 102 at 546.

departures of other people.<sup>164</sup>

...in a closed system with limited resources like universities, there is a significant correlation between those who retire and those who may be hired.<sup>165</sup>

The zero-sum replacement concept is repeated or implied many times through the case.

La Forest J. recognizes weaknesses in the correlation between retirement and new job creation and that there is not a one-to-one relationship between hiring and retirement.

Despite his doubts, La Forest J. continues to analyze the evidence in a manner that sees mandatory retirement as the only possible way for the university to finance the hiring of younger workers:

There are, it is true, conflicting arguments and evidence about the effect of mandatory retirement on faculty renewal. There is evidence that losing faculty to retirement does not generate new jobs for younger faculty. There is also evidence that this is not always the case and that often the correlation is not an even one-to-one basis, *i.e.* it does not necessarily follow that for every faculty member who retires, a new one is hired. That there is some correlation, however, cannot on my view of the evidence be denied in a closed system like a university. It is a question of resource allocation and some resources are obviously freed when a teaching member retires.<sup>166</sup>

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164 La Forest J., *McKinney*, *supra* note 102 at 650.  
(Emphasis in the original)

165 La Forest J., *McKinney*, *supra* note 102 at 653.

166 La Forest J., *McKinney*, *supra* note 102 at 651.

Several other questions of fact raised by these statements include: Why is a university a “closed system” with a supposedly exclusive didactic relationship between mandatory retirement and the university’s limited resources? Are there not a myriad of other possible ways a university can manage its costs other than by retiring its teachers?

Secondly, why is a university a closed system more than any other economic entity? And thirdly, how could mandatory retirement alone be such a powerfully important variable that it, above all other variables within the university, could somehow threaten the entire structure? Have the Court’s stated correlations between mandatory retirement, tenure and youth employment considered all the possibilities, or only those that rely on negative images of old age?

Other factors that are ‘significantly correlated’ to the hiring of new professors include, tuition levels, availability of private and government grants, provincial and federal political agendas, staff to student ratios, increasing or decreasing enrollment levels, reputation of the university, the perceived social-political necessity for higher numbers of university graduates, over-supply of qualified professorial candidates, availability and demand for particular specialities and the availability of research facilities and equipment. These factors were not being considered in the zero-sum equation of a the supposed closed system. Only the relationship between mandatory retirement and young professors seems to influence the equation.

...the young must be deprived of the opportunity to contribute to society through work in the universities as part of the cost of retaining those

currently employed on an indefinite basis.<sup>167</sup>

A final reason La Forest J. offers to force the retirement of old professors in favour of young ones, is what he sees as a need for a better mix of ages among professors.

Again, the fact that the young would suffer some measure of deprivation were mandatory retirement abolished would mean that students in turn would, to that extent, be deprived of younger faculty members and of that better mix of young and old that is a desirable feature of a teaching staff.<sup>168</sup>

On the face of it, pluralism of ages would seem a valid objective. But La Forest J.'s evidence shows that only a small number of professors would continue past 65,<sup>169</sup> so how would his objective of age plurality be met by eliminating one age group from the mix altogether? If pluralism of ages was truly the objective, shouldn't the university be searching for ways to encourage the few older professors to stay on to provide the desired mix as was suggested in the McGill study?<sup>170</sup>

#### Image of Young Workers Making Better Use of Scarce High Tech Resources

Regarding the zero-sum issue of scarce resources, La Forest J. makes reference to the

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167 La Forest J., *McKinney*, *supra* note 102 at 653.

168 La Forest J., *McKinney*, *supra* note 102 at 653.

169 La Forest J., *McKinney*, *supra* note 102 at 667.

170 McLeod, et al, *supra* note 144.



significance of limited public and private investment in research facilities at universities:

Universities comprise some of the outstanding research facilities that are essential to push forward the frontiers of knowledge. These have been acquired over the years by the expenditure of significant private and public funds...<sup>171</sup>

Interestingly, many of the funds to which La Forest J. refers would have been raised on the basis of the prestige and research of the very people who are now been forced to retire. A second implication of this perception of limited funds is that all university research is of a modern expensive technological variety. It should be remembered that only a small portion of university centered research and new knowledge is connected to technology-based research facilities. Entire departments and disciplines (such as humanities, philosophy, history, sociology, law, languages, archeology, art and music) require only limited high tech resources and supports. Instead they depend on accumulated intellect, creativity and library-based research.

The focus on expensive high tech research facilities employs two images that are questionably related to old age. The first is that universities are focussed only on "youth oriented" high tech research objectives, and the second, that younger minds would somehow make better use of these expensive high tech tools. La Forest J. expressed this negative association between expensive research resources and old age by saying that "...there is a need not only to encourage the best use that can be made of them, but to

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<sup>171</sup> La Forest J., *McKinney*, *supra* note 102 at 653.

adopt policies to give access to as many as can benefit from, and contribute to society by their use.”<sup>172</sup> The implication here is that young researchers will make the best use of these limited facilities and contribute more to society than older out of date researchers who might displace them. Again the negative image of old age is intimated to press an otherwise erroneous connection. An entirely different approach to both the issue of older professors and the use of high tech resources, was suggested by the McGill study of medical professors. The study suggested keeping older teachers because their skills could move beyond the limitations of high tech tools to a different plane where

...maturity made them better teachers capable of comfortably guiding learners at the bedside; emphasizing concepts and problem-solving; *recognizing technology as merely an adjunct*; and stimulating students to think.<sup>173</sup>

### The American Experience as a Justification for Mandatory Retirement

The final rational connection argument La Forest J. relies upon to support mandatory retirement is his understanding of the American experience. Among La Forest J.'s numerous claims of American support, he cites the fact that many American universities exist without mandatory retirement even though they continue to use a tenure system. It is difficult to understand how La Forest J. can be aware of American evidence that

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172 La Forest J., *McKinney*, *supra* note 102 at 653.

173 McLeod, et al, *supra* note 144 at 285. (Emphasis added)

mandatory retirement is clearly not necessary to support a tenure system and still maintain that it is necessary. Given this position it is hard to imagine what evidence would be convincing.

It is true that many universities and colleges in the United States do not have mandatory retirement but have maintained a tenure system. That does not affect the rationality of the policies, however, because mandatory retirement clearly supports the tenure system.<sup>174</sup>

Because it is up to those seeking the limitation of rights to prove the necessity of their position, La Forest J. should have pressed the Canadian university to explain how the tenure system can survive in American universities without mandatory retirement. Instead, it appears that La Forest J.'s analysis was weighted towards acceptance of the status quo, despite irrefutable American evidence to the contrary.

Another questionable matter is La Forest J.'s treatment of the American case law. In his argument to demonstrate that mandatory retirement was not an instrument of government and therefore not subject to Charter protections, La Forest J. cites several American cases.<sup>175</sup> These cases were used to provide historical American support for the notion that it is difficult to establish that heavily regulated and/or funded institutions like

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174 La Forest J., *McKinney*, *supra* note 102 at 650.

175 *Greenya v. George Washington University*, 512 F.2d 556 (Dist. Col. Cir., 1975) and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) and *Blum v. Yaretsky*, 457 U.S. 991 (1982).

universities can be seen as instruments of government policy.<sup>176</sup> However, La Forest J. did not mention that none of the cited cases actually related to the issue of mandatory retirement. The reason no Supreme Court level cases were cited that specifically related to the issue of mandatory retirement is obvious. Mandatory retirement is a prohibited practice under the *Age Discrimination in Employment Act* of 1967, (ADEA).<sup>177</sup>

American efforts to counteract age discrimination started in the 1950s, gaining strength and support from the 1960s civil rights movement. In 1965 a report from the department of labour "The Older American Worker: Age Discrimination in Employment" strongly urged the need for direct legislative action. The result in 1967 was an Act that reflected the civil rights spirit of the time. As stated in its preamble the *ADEA* was designed by Congress, not only to protect against mandatory retirement but also to shift the paradigm:

...to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment...the theme of the *ADEA* is to shift [the] focus away from chronological age and age-related barriers.<sup>178</sup>

The Americans have gone much further than just attempting to counter the common

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176 La Forest J., *McKinney*, *supra* note 102 at 643.

177 *Age Discrimination in Employment Act* ss 621 (b) (1967).

178 Preamble of the *Age Discrimination in Employment Act*.

ageist image of diminishing ability, they have moved to encourage employers to meet the challenges of aging individuals in the work place. The *ADEA* legislation also extends its protections against discrimination based on age to include protections in areas of promotions and medical examinations as well as prohibitions against mandatory retirement. The prohibitions against mandatory retirement are extensive.

Employers are prohibited from requiring employees within the protected age group from retiring because of their age. Thus, no seniority system or employee benefits plan can permit the forced retirement of any individual because of age. The law's prohibitions extend to all new and existing systems and plans that force or permit involuntary retirement.<sup>179</sup>

On the basis of a uniquely American attitude towards rights, and fuelled by an active seniors' movement, the Americans followed a much different drummer than Canada. The American Congress made sure that the scope of the *ADEA* was broad enough to make certain that few loopholes could be engaged to avoid it. The Act went so far as:

...extending its proscription of arbitrary age discrimination in employment to all employment practices, including promotion, compensation, termination, and hiring decisions. Specifically, the *ADEA* prohibits qualifying local, state, and private employers from refusing to hire, discharging, or otherwise discriminating against older workers with respect to the compensation, terms, conditions, or privileges of

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179 G. Tichy, "The Age Discrimination in Employment Act of 1967" in L. Frolik (ed.) *Aging and the Law* (Philadelphia: Temple University Press, 1999) at 60.

employment 'because of age'.<sup>180</sup>

By 1978, amendments were passed to the *ADEA*, raising the federal retirement age from 65 to 70 and abolishing mandatory retirement for federal civil servants. Those eligible for protection included all employers "engaged in an industry affecting commerce"<sup>181</sup> with more than 20 employees that worked for more than 20 weeks annually. The following comments were presented in the Canadian Senate report describing how the American Congressman Claude Pepper, who introduced the amendments pointed out that:

[a]ge-based retirement arbitrarily severs productive persons from their livelihood, squanders their talents, sears their health, strains an already over-burdened Social Security System, and drives many elderly persons into poverty and despair - ageism is as odious as racism or sexism.<sup>182</sup>

Further American legislation was enacted in October of 1990 extending and tightening bans against mandatory retirement. The *Older Workers Benefit Protection Act* strengthened protection to include stringent requirements even on severance and settlement packages that might be used to circumvent direct legal prohibitions against mandatory retirement.

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180 T. Querry, "A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After *Hazen Paper Co. v. Biggins*" in Frolik, *ibid* at 55.

181 Querry, *ibid*.

182 Senator David. A. Croll, *Retirement Without Tears*, (Ottawa: Ministry of Supply and Services, 1982) at 12.

Another omission in regard to the Americans, that was known in 1991, was the US position on 'early' retirement. The US statistics showed the same trend to earlier retirement that La Forest J. relied on.<sup>183</sup> Yet again, La Forest J. took this information as support for continuing mandatory retirement, but the Americans realized that this trend would bankrupt their social security system in the not too distant future. Therefore in 1984 they announced their plan to raise the eligibility age for public pensions from 65 to 67. This plan started to come into effect in the year 2000. They also announced plans to reduce the early retirement option which had been available at age 62. La Forest J.'s failure to lend more weight to the preceding factors suggests that he may have been influenced by the view that age-based restrictions such as mandatory retirement are the natural outcome of old age and therefore form the general norm. Those who hold such a view would be less likely than others to recognize alternative approaches.

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183 La Forest J., *McKinney*, *supra* note 102 at 650.

**B:    *Does Mandatory Retirement Impose More Than a Minimal Impairment?***

In this section we will look for evidence of the impact of negative images of old age on the next phase of the questions raised by the *Oakes* test by asking: Does the policy of mandatory retirement impair seniors rights as little as possible? The following key images and assumptions were raised in context of this question. The impairment of seniors' rights is unavoidable because it is a legitimate response to deterioration in old age. Age-stratified roles for young and old are just and natural; therefore old workers must make way for younger workers. Retired persons receive fair and adequate pensions in lieu of the right to work; therefore the effect of forced retirement is minimal. Union-negotiated contracts associated with mandatory retirement will benefit all older citizens. Retirement is natural and desired by most people. Those who want to continue to work would cause significant economic disruption to the majority who want to retire. All these images of old age are used in support of arguments for the continuation of mandatory retirement and will be shown to have more than a minimal effect on the lives of seniors in Canada.

**Generational Justice and Whose Minimal Impairment is Being Analysed?**

The analysis of the impact of mandatory retirement on the rights of seniors contains a disturbing demonstration of how omnipresent yet invisible negative age paradigms can be. In his minimal impairment analysis La Forest J. seems to simply reiterate near-



identical arguments and issues previously presented under the rational connection question. In so doing he does not actually focus on the key question of asking how mandatory retirement impairs the rights of older Canadians. Rather his analysis seems to be directed by an age-negative paradigm which inverts the issue and asks instead how the rights of younger Canadians would be impaired if mandatory retirement were abolished. The age-negative paradigm aids this thinking with the simple assumption that old people have deteriorated to the point where they are too old to work. If one is too old to work then extending one's term of work further into old age would be unnatural. Worse, it would impair the rights of younger workers. La Forest J. seemed to agree with this image when he described why Charter protections provided to other groups should not apply to old people in the same way. He declared that unlike the grounds for other groups, old age is inherently linked to deterioration in abilities:

It must not be overlooked, however, that there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin with there is nothing *inherent* in most of the specified grounds of discrimination, *e.g.*, race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age.<sup>184</sup>

If La Forest J. accepted the underlying image that people over age 65 are too old to work, then the issue of minimal impairment of their right to work implies a very different problem for the Court. Under this way of looking at mandatory retirement, the

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184 La Forest J., *McKinney*, *supra* note 102 at 660. (emphasis added)

supposedly diminished older worker is seen in direct competition with younger workers. A particularly clear example of this paradigm came from quotations of Minister Elgie provided by La Forest J. Because these statements were made in the legislature, the Minister was able to use more forthright language than would normally be used by the Court. He was at the time moving the second reading of the *Ontario Human Rights Code* in the Ontario Parliament, the very piece of legislation under review in *McKinney*. In his comments, Minister Elgie said the issue of mandatory retirement is about protection of opportunities for young workers, not protection for older workers:

...we must be sure that we do not interfere with the hiring and personnel practices, and with the problem of youth employment, by acting very hastily over an issue that we have strong emotional feelings about. ...One cannot address this issue without thoughtful consideration of the real issues - the demographic issues, youth unemployment issues... Those are things that have to be considered. ...Let us not pretend that there is any disagreement about the principle.<sup>185</sup>

This language shows a clear belief in the fairness and naturalness of the image of generational justice, an image which was used in *McKinney* to explain that mandatory retirement causes only minimal impairment to the old compared to the young. This view is by no means uncommon as Beaulieu and Spencer discovered. Their review of Canadian case law and legal literature on the subject of aging showed the prevalence of the image of generational justice.

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185 La Forest J., quotes Ontario Hansard, May 15, 1981, at 743, *McKinney*, *supra* note 102 at 663.

The phrase 'generational justice' encompasses two concepts. First, it describes the relative justice in the distribution of wealth and income between living generations, and more particularly what comprises justice between the young and the old. In a broad policy sense, generational justice comes into question around income distribution in the form of old age security payments. The issue is often cited as raising serious issues of justice, of transferring income from the young to the old. Or put another way, just how much can the old take before they do an injustice to the young.<sup>186</sup>

What appears important in this generational justice paradigm is the clear didactic argument that impairing the rights of seniors is necessary to protect the rights of younger Canadians. La Forest J. struggles with this concept as he often notes then discounts the degree of impairment of seniors' rights.<sup>187</sup> In the end he favours the position that it is more important to allow a division of limited resources favouring the young. The concept is similar to that described above by Minister Elgie. La Forest J.'s analysis leads one to the conclusion that there must be a zero-sum choice made between the needs of younger and older workers. So instead of looking at the impairment of seniors' rights, the argument is focussed on rationalizing a hierarchy in which the rights of the young naturally and justly take precedence.

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186 M. Beaulieu, & C. Spencer, "Older Adults' Personal Relationships and the Law in Canada." (Ottawa: Law Commission of Canada, 1999) at 42-43.

187 La Forest J., *McKinney*, *supra* note 102 at 653, 662, 672-73.

Underlying La Forest J.'s zero-sum conception of justice between the generations is a belief that those with pensions who are removed from jobs will suffer less than those who are prevented from getting jobs because of too many older workers. "Those over 65 are by and large not as seriously exposed to the adverse results of unemployment as those under that age."<sup>188</sup> In his statement below, La Forest J. gives some recognition to the fact that not everyone has adequate pensions, and that work has a value over and above its purely economic significance. But again, limited weight is accorded to evidence of seemingly unavoidable impairment suffered by many seniors. Instead, economic arguments supporting the status quo, the young, and the university are favoured:

...there is no question that while social security and private pension schemes may afford some financial redress, many older people have need of additional income, a situation that is becoming more apparent as people live longer. Besides, as I have indicated earlier, work cannot be considered solely from a purely economic standpoint. In a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth. I need not pursue this further, however, for as the respondents argued, there are several intertwined objectives of these provisions and it is in terms of these combined objectives that the legislation must be assessed.<sup>189</sup>

La Forest J. further expands on this preference for protection of young workers in references to maintaining social and economic balances which are necessary to the very fabric of a democratic society. Even attempts by the United Nations to encourage old age

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188 La Forest J., *McKinney*, *supra* note 102 at 662.

189 La Forest J., *McKinney*, *supra* note 102 at 662.

positive policies<sup>190</sup> are interpreted in a way that the young must first be attended to before there will be room for the luxury of accommodating older workers:

The truth is that, while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits. The careful manner in which the General Assembly Resolution on the rights of the aged is framed is worth noting. Its recommendation discouraging discriminatory practices in employment based exclusively on age is prefaced by the words that this be done "whenever and wherever the overall situation allows."<sup>191</sup>

As a justification for denying one group's rights over another, La Forest J. refers to the importance of mandatory retirement in maintaining a social balance. This implies that a simple dichotomous relationship exists between the ages, with the young clearly the more highly valued.<sup>192</sup> Yet La Forest J. says little about and/or discounts the actual impact on older citizens who are to be deprived of their rights to continue to participate economically, which is clearly more than a minimal impact. There is only a brief

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190 "Question of the Elderly and the Aged" Report of the Secretary-General, U.N. Doc. A9126 (1973), a report that emphasised "respect for the dignity and worth of the human person" and encouraged states to "discourage, whenever and wherever the overall situation allows, discriminatory attitudes, policies and measures in employment practices based exclusively on age."

191 La Forest J., *McKinney*, *supra* note 102 at 660.

192 La Forest J., *McKinney*, *supra* note 102 at 651, 653 & 658.

recognition that almost all seniors will be forced to retire; yet only some young workers<sup>193</sup> will get a job as a result.

Pensions - Is Their Impact on Seniors Lives Minimal?

A large part of the rationale for looking at the risk to young workers instead of the impairment of older workers comes from the age-stratified presumption that because seniors receive a fairly negotiated pension in lieu of the right to work, the effect is minimal. This is an extension of the generational justice argument which dates back to the beginnings of mandatory retirement. La Forest J. acknowledges that at least part of the original rationale for retirement was to prevent older workers from displacing younger workers. He dates the earliest justification to the 1930s and the beginnings of mandatory retirement pension policy:

This measure was undoubtedly aimed at providing some security for the aged, but it is also designed to remove older people from the labour force in the interests of maintaining employment for younger workers during the Depression years.<sup>194</sup>

Another important objective of s. 9(a) was the opening up of the labour market for younger unemployed workers. The problem of unemployment would be aggravated if employers were unable to retire their long-term

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193 La Forest J., *McKinney*, *supra* note 102 at 651.

194 La Forest J., *McKinney*, *supra* note 102 at 657.

workers.<sup>195</sup>

Disregarding for the moment the fact that only 50% of the work force is covered by negotiated pensions,<sup>196</sup> it still seems reasonable to expect that the Court would have many questions about just how much impairment is suffered when old people lose their right to work. For example: how much pension income can people expect after they lose the right to supplement their income, how long will they have to depend on their pension savings before they become totally dependent on government, and what is the impact of federal pension and taxation policy on a fixed income? There is no evidence that La Forest J. looked at the first two questions, probably because he again made an age negative assumption that these things were inevitable and therefore beyond the issue at hand. But research and political comment related to the third question were available describing how pensions had been trimmed since 1989 in a taxation process referred to as "social policy by stealth".<sup>197</sup> Writings by Auton described the government's efforts to disguise their old-age-specific tax policies following the resounding public reaction to deindexing of old age pensions. Instead of deindexing, the federal government instituted a less obvious process of automatic benefit adjustments. Downward benefit adjustments were achieved via a regulatory process that automatically repeated itself without having to go

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195 La Forest J., cites Court of Appeal, at at 245, in *McKinney*, *supra* note 102 at 658.

196 La Forest J., *McKinney*, *supra* note 102 at 667.

197 G. Auton, "Old Age Policy in Canada: A Critical Look at the Partial Indexation of the Income Tax and Social Welfare Systems" M.A. Thesis McMaster University, Hamilton, 1998.

before Parliament, thereby remaining politically less problematic. What the government did, to progressively cut pension costs without incurring political costs, was to set up a partial indexing formula. Since the early 70s, pension payouts have been pegged to inflation, but each year from 1989 the results of the partial indexing formula have frozen pension increases, effectively cutting back payouts. The automatic formula only raises pensions when inflation exceeds 3% and then it pays 2% less than inflation. Since inflation has hovered around 3% or less for the last ten years, virtually no increases have been realized, effectively cutting the payouts every year.

A further negative impact has been felt in the claw-back level which is also partially indexed. The original \$50,000 level has not increased yet the buying power of those 1989 dollars has decreased, effectively lowering the claw-back rate and decreasing payouts in real dollars every year for 10 years. The original contracts entered into by unions and workers agreed to retirement policies that assured them some form of inflation protection. The "social policy by stealth" circumvented those contractual agreements and has been causing a slowly diminishing level of economic independence for those who agreed to forced retirement since 1989. The alleged minimal impairment of mandatory retirement was in fact much more regressively severe than suggested by the cursory examination of the issue by the Court.



50% Benefit From the Reciprocity of Mandatory Retirement and 50% Are Impaired

As stated above, there was a further issue related to minimal impairment that should have been sufficient to strike down the practice of mandatory retirement on the merits of this point alone. La Forest J. points out that 50% of the Canadian work force is covered by employment contracts that offer predictable pensions in exchange for the loss of the right to work. But mandatory retirement causes economic impairment well beyond the people who will receive reciprocal contractual benefits in exchange for the impairment. The policy's reach was agreed to by the Attorney-General for Ontario who argued in the case for continued use of the university's policy recognizing its effects went society wide and "...that the analysis under s. 1 should not be restricted to the university context."<sup>198</sup> Yet La Forest J.'s analysis seems to neglect the rights of the other 50% of the labour force who receive no assured private pensions in exchange for mandatory retirement. The question this raises is, how justifiable are the so-called benefits of pension-associated mandatory retirement if they only have a positive impact on half of the retired population? What value do the remaining 50% receive, since they do not receive the reciprocal benefits of the generous union pensions, nor did they have any voice in the negotiations? In fact the unrepresented and unprotected 50% are significantly impaired and limited in their future right to work because of the benefits received by those lucky enough to be in more lucrative jobs.

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198 La Forest J., *McKinney*, *supra* note 102 at 661.

Women Impaired Disproportionately by Mandatory Retirement

Gillin and Klassen say that the average age of retirement in 1970 was 65 years of age. They note that this dropped significantly to an average age of 62 by the mid 1990s. La Forest J. pointed out that the trend in Canada has been steadily moving towards earlier retirement<sup>199</sup> but he seems to have accorded little weight to the growing numbers who want to continue their careers, and to the many others who are not financially capable of retirement:

[m]andatory retirement continues to be a concern for two groups of workers: those in the secondary labour market, and those with higher education. For those groups, mandatory retirement is usually a euphemism for forced unemployment.<sup>200</sup>

Although there has been a trend to increasingly earlier retirement (both voluntary and through buyouts), for the most part, the trend only benefits elderly men. In fact, because of economic concerns, mid-life and older women have significantly increased their numbers in the US and Canadian workforce over the last 20 years.<sup>201</sup>

An important trend in the last few decades has been the decline in the workforce participation of men aged 55-64. Between 1976 and 1995, the

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199 La Forest J. *McKinney*, *supra* note 102 at 666.

200 Gillin, & Klassen, *Retire Mandatory Retirement*, *supra* note 122 at 59.

201 "AARP Global Aging Report: Aging Everywhere", (AARP, Washington, DC, 1999).

proportion of these men with jobs fell from 74% to 54%, although in the last few years this figure has increased slightly (to 56%). In contrast, the share of women in this age group participating in the paid workforce has increased since the mid-1970s. In 1998, 36% of 54-65 year old women were part of the paid workforce compared to 30% in 1976.<sup>202</sup>

The reason the positive effects have gone mostly to men is the end result of a life time of systemic advantages. This most significant heterogeneous factor was given little weight by La Forest J., the universities or the unions. The impact of this original design oversight was a "freely negotiated" mandatory retirement system that amplified a myriad of gender based differences, locking them into a male biased pension system.<sup>203</sup>

Retirement policies are oblivious to how old age becomes a repository of the social and economic events we each experience in our younger lives.<sup>204</sup> Wilson J. was very forceful

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202 *Statistical Snapshot No. 25: Gender Differences in Low Income*, Health Canada, Division of Aging and Seniors. <http://www.hc-sc.gc.ca/seniors-aines/pubs/factoids/en/factoid.html>. Cited in *Discrimination & Age: Human Rights Issues Facing Older Persons in Ontario*. Discussion Paper. Ontario Human Rights Commission, Toronto, May 2000, at 11.

203 In 1995 Canadian women aged 55-65 had an average income of \$18,078 compared to \$35,628 for their male counterparts, women aged 65-74 had an average income of \$16,157 compared to \$28,540 for men of the same age; from *The Canadian Seniors Policies and Programs Database*: Government of Canada. <http://.sppd.gc.ca/statspack/english/income.html>

204 In 1993, women received only 58.8% of what men received as benefits under CPP/QPP. C. Young, "Invisible Inequalities: Women, Tax & Poverty" (1995) 27 *Ottawa L.R.* 99 citing *Work in Progress: Tracking Women's Equality in Canada* (Ottawa: Canadian Advisory Council on the Status of Women,

in her dissent on this point.<sup>205</sup> For women, the cumulation of economic effects and disadvantages included in mandatory retirement can be staggering.

As studies employing the life course perspective<sup>206</sup> show, what happens to people in old age is a reflection of, and indeed an exaggeration of, what happened to those same people when they were younger, or throughout their life course. And that, in turn, reflects the effects of public policy directed at people who are not yet old. For example, women who have interrupted job histories due to their taking on of family responsibilities throughout their lives - child care, "husband care," and/or elder care - end up poor or near-poor in later life because of employment/labour, family, health, and pension policies based on a male-employment model that implicitly denies domestic work as a social and economic contribution. Policies that are seemingly not aging-related in objective often have aging-related consequences.<sup>207</sup>

When one considers the economic disadvantages endured by women, removing the

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1994) at 44.

205 Wilson J. McKinney, *supra* note 102 at 626-27.

206 G.H. Elder, "Perspectives on the Life Course" in Elder (ed.), Life Course Dynamics, Trajectories, and Transitions, 1968-1980 (Ithaca, NY: Cornell University Press, 1985). pp 23-29. & G.O. Hagestad, "Social Perspectives on the Life Course" in Binstock & George (eds.), Handbook of Aging and the Social Sciences (3<sup>rd</sup> ed.) (New York: Academic Press, 1990) at 151-204.

207 E.M. Gee, "Editorial: Policy and Research on Aging: Connections and Conundrums" in a special joint issue of the Canadian Journal on Aging/Canadian Public Policy - Bridging Policy and Research on Aging (Supplement March 1997 i-xviii) at ii.

Charter protection on age will have the effect of furthering and legitimating systemic gender discrimination. The only option women will have to counter a life-time of economic disadvantages will be the option to continue working in later life. Weakening Charter protections for age will impair women's rights by weakening gender protections through the back door.

Who Would Want To Continue Working?

Another unrecognized preference for the rights of organized labour over those who are non-unionized lies in the consideration of who are these people who want to continue working? La Forest claims that the impairment of rights is necessary to the universities and the economic security of our democratic system.<sup>208</sup> Yet when he examines the evidence upon which this image is founded, he acknowledges the previously mentioned trend towards early retirement, and that the actual numbers of people who threaten the system and chose to remain working is infinitesimal.

The estimates of workers who would work beyond the age of 65 vary from 0.1% to 0.4% of the labour force, or 4,787 to 19,148 persons annually in 1985, raising to 5,347 to 21,388 in the year 2000 (Dr. Foot's affidavit). And the likelihood is that a disproportionate number rank among the more advantaged in society.<sup>209</sup>

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208 La Forest J., *McKinney*, *supra* note 102 at 648 & 664.

209 La Forest J., *McKinney*, *supra* note 102 at 667.

If the number of people wanting to continue working is small then what could be their effect on the university or on society as a whole? This question was asked before *McKinney* was decided by the prestigious Conference Board of Canada<sup>210</sup> in a widely distributed report on the implications of mandatory retirement. It demonstrated that the economic presumptions used to establish the university's rational connections were not based on objective data. The results of this research effectively countered many of the Court's zero-sum arguments by demonstrating that there would be no discernable effect from dropping mandatory retirement. Dunlop's research asked several questions that should have been crucial to the Court or anyone else trying to establish an objective understanding of the impact of abandoning mandatory retirement policies. How many individual Canadians are actually affected by mandatory retirement policies? What is their financial status/security? What are the possible ramifications to employers and employees of changes to the status quo? Dunlop's study demonstrated that the mandatory retirement debate was based not on solid facts, but on inaccurate stereotypical economic presumptions and misinformation. The research project was the largest ever attempted; surveying 222 companies and government departments who collectively employed over 14% of the Canadian work force. It used demographic and economic variables to statistically analyze existing employment and pension participation patterns. It then extrapolated future retirement patterns on the basis of past experience and predicted economic conditions and legislative policies. The findings showed that if

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210 D. Dunlop, Mandatory Retirement Policy: A Human Rights Dilemma? (Ottawa: Conference Board of Canada, 1980).

mandatory retirement policies were abandoned, they would affect less than 1/10 of 1% of the work force in any given year. The majority of older workers, for reasons of health, early retirement plans or death never face mandatory retirement. Dunlop's conclusions predicted no impact to national productivity, pension costs or the need for income support programs to meet the needs of retired citizens if mandatory retirement policies were dropped.

Given the extensive evidence that only limited numbers of seniors would continue to work, one must ask how much impairment this small number of people could inflict upon the economy, the social fibre, the stability of labour relations, the ability to plan retirement, youth employment and the quality of our education system, all claimed rationalizations for mandatory retirement. Or is the degree of impairment to society only an unfounded age negative image with no real foundation as Dunlop's and Foot's studies suggested? Despite the recognition that the numbers involved are minuscule, La Forest J. continued to reason that mandatory retirement is important to a broad series of interconnected rules and systems. Notwithstanding his own acceptance of the facts of small numbers, La Forest J. repeats the negative image as if it were some kind of virus which unleashed would surely spread uncontrollably from the university to threaten society:

...while s. 9(a) cannot be looked at in the discrete setting of the university, it serves as a microcosm that throws important light on what is a widespread labour market phenomenon involving 50% of the workforce

and undoubtedly affecting other areas by a kind of osmosis.<sup>211</sup>

In fact La Forest J. has little in the way of concrete evidence that abandoning mandatory retirement will negatively impact society. He relies on admittedly weak data, the presumptions, and positions of the universities and his own personal speculations and images of old age which he maintains despite significant contrary evidence. He ignores the evidence from other jurisdictions that have already struck down mandatory retirement noting that none of the dreaded effects were realized, but then he goes on to discredit and ignore their significance. Given that the impairment of the right to work is so important in modern society and that the possible benefits from this policy are questionable at best, it is hard to see how continuing mandatory retirement can be justified as either a proportional or a minimal impairment of the right. And for the many Canadians who had no say in the negotiations and will receive no reciprocal benefit, mandatory retirement is an infringement of rights that clearly fails the test that the limitation "...must impair the right as little as possible..."<sup>212</sup>.

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211 La Forest J., *McKinney*, *supra* note 102 at 667.

212 Dickson C.J.C., *R. v. Edwards Books & Art Ltd.* (1986), 35 D.L.R. (4<sup>th</sup>) 1 at 41. Quoted by La Forest J., *McKinney*, *supra* note 102 at 649.



**C: Do the Effects of Mandatory Retirement Outweigh the Loss of Rights?**

After considering if the means and objectives of mandatory retirement were rationally connected and if the impairment was minimal, the final stage of the *Oakes* test addresses the following question. Are the negative effects on seniors' rights greater than the possible benefits of mandatory retirement?<sup>213</sup> The images and assumptions about old age that permeate this section of the analysis are similar to those of the previous section: Retirement is natural and desired by older workers which is a positive effect. Seniors' rights are not negatively effected because retirement is a legitimate response to deterioration in old age. The effects resulting from mandatory retirement for most older citizens are considered to be positive. Retirement policy only affects those 65 and older.

As we have seen, *McKinney* was influenced by a perspective that analysed older workers' right to work past 65, and weighed this against the interests of younger workers, the university and the society. The most significant image underlying this paradigm is a presumption that the negative effects are a natural and inevitable consequence of old age. Therefore the question of negative effects flowing from mandatory retirement did not make sense to those who believed the negative images of old age. La Forest J. seems to be voicing this simple idea when he uses just one paragraph to discount the need for this

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213 "...effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgement of rights." Dickson C.J.C., *Edwards Books*, Quoted by La Forest J., *McKinney*, *supra* note 102 at 649.

stage of the *Oakes* test to see if the effects of mandatory retirement outweigh the objectives of the policy:

It is evident from what I have said in relation to the “minimal impairment” that the effects of the universities’ policies on mandatory retirement are not so severe as to outweigh the government’s pressing and substantial objectives. In the present circumstances, the same factors have to be balanced in dealing with deleterious effects and I need not repeat them.<sup>214</sup>

What we see in this analysis is a narrow paradigm which limits argument and underestimates the nature of the effects of changes and losses caused by mandatory retirement. What has remained completely unquestioned is the naturalness of retirement. Retirement and old age are perceived as synonymous, unavoidable and natural, something beyond the influence of law or policy. Analysis was so limited in scope that the only real questions for the Court seemed to be the timing of retirement. The question of the validity of retirement itself was never raised. If the test of effects included questioning the validity of the age-stratified concept of retirement, then the subject may have been more fully discussed. In other words, if we start from a presumption that older citizens do not automatically suffer the myriad of negative images and implications previously noted, then what is the effect of disregarding individual capacities and forcing unemployment at an arbitrary age? Questions raised by such a reexamination include the following. Is retirement a practice that responds to the deteriorating state of seniors or is retirement actually a cause of that deterioration? Do the negative presumptions about

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214 La Forest J., *McKinney*, *supra* note 102 at 654.

seniors extend to middle aged workers? What is the affect on society of the loss of retired workers productivity? Do the negative images of old age affect other facets of society beyond the question of mandatory retirement?

Is Retirement a Response to Deterioration or A Cause of Deterioration?

The image of an aged visibly deteriorating body containing a deteriorating mind seems to be nothing more than common sense. So firmly are we locked into this image of advancing age causing mental deterioration that other possible causal factors for mental deterioration are given little consideration. As previously stated, one of the effects of *McKinney* has been to extend the common sense link between old age and mental deterioration into a legal link. Cotterrell confirms how the effect of pervasive ideas can reach beyond a simple impression to manifest themselves in law where they act to:

...interpret all empirical data in conformity with pre-established values and treat this data as fully confirming accepted understandings of reality.

...What this suggests is that insofar as law contributes to current ideology it helps to provide the conditions for its own acceptance as 'common sense'.

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But what if we consider another bit of 'common sense' which relates to exercise and health, the popular medically supported idea that we must 'use or lose our muscles? It

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215 R. Cotterrell, "Introduction" The Sociology of Law (London: Butterworths, 1984) at 174-175.

has been discovered recently that this rule also applies to our brains.<sup>216</sup> Brains do shrink and change with age, but there is no actual scientific evidence that this directly causes a problem. Common writes "To this day, a connection between decreased mental function and brain cell loss has not been proven"<sup>217</sup> In fact, many of the world's great leaders, artists, scientists and jurists performed their best work using aged-shrunken brains. There is also emerging evidence and advice<sup>218</sup> on how to maintain memory and general brain function in old age, advice that strongly recommends that mental activity and social involvement should be continued; "As one researcher put it: brains seem to be the ultimate use-it-or-lose-it machine."<sup>219</sup> If it is true that unemployment causes significant reduction in mental activity,<sup>220</sup> could we not make the common sense argument that mandatory retirement is actually a causal factor in the loss of mental capacity<sup>221</sup> instead

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216 L. Common, "Now, Where Did I Put My Glasses?" Canadian Assoc. For Retired Person: FiftyPlus (Toronto: Kemur Publishing Co., June, 2000) at 13.

217 Common, *ibid* at 13.

218 G. Reker, E. Peacock, & P. Wong, "Meaning and Purpose in Life and Well-being: A Life-span Perspective" in Journal of Gerontology 1987, 42(1), at 44-49.

219 Common, *supra* note 207 at 10.

220 C. D'Arcy, "Aging and Mental Health" in Marshall, V. (Ed.), Aging in Canada (2<sup>nd</sup>. ed.). (Toronto: Fitzhenry & Whiteside, 1987).

221 "Adults with hobbies that exercise their brains with activities like reading, jigsaw puzzles or chess, are 2 ½ times less likely to have Alzheimer's disease... Dr. R. Friedland said that 'just as physical activity strengthens the heart, muscles and bones, intellectual activity strengthens the brain against disease.' These

of a reaction to it? And if that is true, then does not mandatory retirement have a negative effect that extends well beyond the objectives or value of the policy?

Effects of Negative Images of Old Age Hurt Workers as Young as 45

So powerful is the age-equals-deterioration image that its negative effect extends down the age scale to impact people long before they reach retirement age. Recent changes in employment policies provide evidence that shows how ageist attitudes have spread down the age scale to effect those as young as age 45. For example, the Human Resources Centres of Canada's (HRCC) age classification for an "older worker" has been lowered to age 45 in response to employment difficulties these workers experienced from negative perceptions of aging. A study of the HRCC counsellors researched the difficulties most commonly experienced by older workers over 45 during employment searches. While lack of job-search skills and awareness of employment services were cited as problematic, there were also perceptions similar to those used to justify the decision in *McKinney* of youth displacement, and images of limited capacity:

...an equally important barrier, according to counsellors, is discrimination by employers. Some of the negative perceptions that employers are believed to hold include: older workers should step aside so that younger

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findings support other studies showing that brain power unused is brain power lost." March 6, 2001 Proceedings of the National Academy of Sciences, Press Release, "Hobbies Reduce Alzheimer's, Study Finds" Associated Press, *The [Toronto] Globe and Mail* (6 March 2001).

people can get jobs, and/or older workers' lack the physical strength required for many jobs. ...One of the biggest barriers to employment for older workers is the often inaccurate perceptions of potential employers.<sup>222</sup>

A demonstration of the degree of penetration of these images is their acceptance by those in the pre-65 age category. The HRCC study showed that some pre-65 unemployed workers display a sense of helplessness as they end up incorporating age negative images into their lives. The affect on these workers is that they eventually surrender to a self-perception as old workers beyond usefulness.

The reality of these barriers is shown in the mixed outcomes for older clients, with many abandoning their job search and leaving the labour force either for self employment or for retirement.<sup>223</sup>

#### Effects on Society of the Loss of Economic Productivity From Older Persons

Another way to analyse whether the harmful effects of mandatory retirement are greater than the importance of the intended policy objectives is to look at how the industrialized world is having to rethink its age-negative images as demographics force a re-rationalization of attitudes and policies. The United Nations found that the past logic of retirement will not fit the evolving needs of a rapidly aging world. Their study of eight

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222 "Just Released - HRCC Survey Findings" Options 45+, *One Voice*, May-June 1997, vol. 2, no. 2. Ottawa, Canada at 5.

223 HRCC Survey, *ibid* at 5-6.

industrialized nations on "Replacement Migration"<sup>224</sup> points out there will have to be dramatic increases in immigration to ward off economic disasters resulting from the productivity loss of too many workers retiring. The UN study showed that forcing otherwise healthy elderly workers out of productive economic activity, will affect the crucial ratio between those working and those being supported. The ratio would shift from its current level of four to five income-earning people for each retired person, to two workers for each retired person by 2050. In Canada "This trend is significant as the majority of government transfers and purchases are made to or for Canadians age 65 or older, while the majority of taxes are paid by those of working age."<sup>225</sup> The levels of population would decline in all of the countries in the UN study. Germany's population would shrink by 11%, while those over 65 would increase from 16% to 20%. Japan would lose 17% of its population and seniors would increase from 17% to 32%, and Italy would have its population drop 28% while those over 65 would rise from 18% to 35% - more than 1 in 3. The UN predicts that these calamities will be upon us if the present retirement age of 65 is not soon raised to 75. It also points out that the alternative strategy of increases in immigration will be very difficult politically for all developed countries. This leaves the obvious option of rethinking retirement and especially mandatory retirement, or face the "...tectonic demographic shifts that are barely

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224 J. Chamie, "United Nations *Development Update* No. 31" June-July 2000 cited in *Intercom: Educating & Advocating For Older People's Rights*, International Federation of Aging, Aug. 2000, vol. 7, no. 4 at 7-8.

225 *Discrimination & Age*, *supra* note 201 at 10.

discernable on a year-to-year basis, but that by the century's mid-point will have far-reaching social and economic implications..."<sup>226</sup>

Inaccurate Images of Retirement Extend to Negatively Affect Future Policies

Changes researched by Guillemard,<sup>227</sup> confirm that throughout the industrialized world, the age-stratified image of retirement at sixty-five is already increasingly becoming an experience of the minority. It's not that people are working longer; it's more the case that they are being dis-employed at ever younger ages and ever increasing rates. Myriads of employment factors are even now excluding many from the imagined norm of a "man" working all his adult life to support his family, then retiring. Downsizing, reorganization, part-time or shared work, self-employment, contract and contingent employment and the feminization of work are all acting to reduce or re-order the workforce, particularly in the upper-middle ages. These forms of dis-employment are impacting on more and more workers in all fields, who are then leaving the workforce before sixty-five. Few of these workers will have managed to establish viable pensions linked to negotiated contracts (which usually include a mandatory retirement reciprocity component) and yet industrial, economic and legal policy (as in *McKinney*) continues to be formulated on the basis of an image of old age that presumes workers will retire willingly to a comfortable pension.

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226 Chamie, *supra* note 223 at 8.

227 A. Guillemard, "Re-Writing Social Policy and Changes within the Life Course Organization. A European Perspective" in Can. Journal on Aging Vol. 16, no 3, 1997 at 443.



Although for many, the pattern of employment defended by La Forest J. is becoming an image of times gone by, it is an image that continues to influence policy development. Disturbing policies have emerged from this continued ignorance of shifting patterns of employment. Guillemard catalogues how European countries are altering and expanding non-age related social welfare programs to accommodate involuntary “early retirees” too young to be covered by pensions. Unemployment and disability insurance programs are being altered so that they can reclassify reluctant early retirees. New classifications determine these dis-employed citizens to be either “systemically unemployable,” and characterized as appropriate for unemployment insurance (fortifying the image of redundancy), or they are encouraged to portray their age as being linked to a physical disability so they can be seen as eligible for disability insurance programs (fortifying the image of deterioration). Such policy convolutions end up institutionalizing negative images of old age in their attempts to ensure personal financial survival. The intended non-ageist policy strategy is then illegitimately constructed into a legal linkage between unemployability, disability and old age. Perhaps the most frustrating paradox is that these artificial ad hoc welfare categorizations are being adopted at a time when older individuals are actually significantly healthier, more active and better educated than ever before.

**D: Conclusion of the Oakes Test Analysis**

Generally, then, it appears that negative images of old age did have an influence on the Court's application of the *Oakes* test in *McKinney*. The evidence does not show a willful application of ageist beliefs; in fact the opposite is true. Yet that is the essence of the power of the image of old age. If one lives in a society that does not recognize its ageist beliefs, one is likely to propagate those beliefs unknowingly as one participates in the norms of that society.<sup>228</sup> Minow has argued that such an unrecognized partiality will lead to a socially accepted yet unstated assumption: the unstated assumption that one can be neutral and see or judge with no perspective. As a result, says Minow "we treat the person doing the seeing or judging as without a perspective, rather than as inevitably seeing and judging from a particular situated perspective."<sup>229</sup>

Minow's point is that the greater the pervasiveness of an unrecognized perspective, the more it becomes invisible, self-propagating and powerful. This kind of normalizing force has been seen in South Africa by whites against blacks and here in Canada by white middle class males against women and a host of other subjugated groups. In all of these instances, the racist and/or sexist norms were maintained as justified in the main, because they already existed as inter-dependent and inter-connected norms of supposedly just

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228 B. Friedan, The Fountain of Age (New York: Simon & Schuster, 1993) at 104.

229 M. Minow, Making All the Difference: Inclusion, Exclusion, and American Law (Ithaca: Cornell University Press, 1990) at 52.

societies.

Similarly, the assumption of a neutral perspective allowed negative images of old age to affect the deliberations in *McKinney*. As we have seen, despite a recognition of specific weaknesses in his arguments, La Forest J. depended on the existing status quo of age-stratified inter-dependent norms of youth employment, assumptions of deterioration, and the existence of retirement/pensions policies currently in use as a justification for their continued existence. He assumed that the existing policies, and the assumptions upon which they are based, have evolved and are working to the benefit of the state and the satisfaction of most Canadians. He concluded that therefore they must be valid.<sup>230</sup> La Forest J. did question the validity of many elements of the university's case as he strove for judicial neutrality. On several occasions he cited or commented on evidence that countered the common negative images of old age.<sup>231</sup> Yet unexpressed negative images of old age seemed to discount such acknowledgements as aberrant or not fully relevant. Therefore this thesis suggests that the negative images of old age described earlier had a much more than irrelevant effect on the analysis in *McKinney*. We will now test this observation by looking at the legal and policy record since *McKinney*.

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230 La Forest J., *McKinney*, *supra* note 102 at 658.

231 La Forest J., *McKinney*, *supra* note 102 at 646, 647, 658, 659, 660.

**Chapter 5: Images of Old Age in Law Since *McKinney***

The thesis will now look at evidence of whether and how the negative images of old age adopted and legitimated in *McKinney* affected the jurisprudence, policy development and regulatory practices that followed this landmark case. It has been over a decade since the decision and these broad questions cover much ground. Three research projects have already addressed these questions at length. These projects are the source for much of the discussion that follows. The research from all the studies came to three similar findings. First, in Canada there is a high degree of unrecognized ageism; second, ageism is not accorded the same degree of disdain as other forms of discrimination; and third, the negative images and presumptions of ageism have been legitimated and reinforced by the Canadian legal system.

The studies were published by three prominent Canadian social/legal authorities. The Ontario Human Rights Commission discussion paper<sup>232</sup> investigated old age as a human rights issue from a broad economic, sociological, and legal perspective. The Law Commission of Canada report by Marie Beaulieu and Charmaine Spencer<sup>233</sup> analysed how the law treated older Canadians within the context of their personal relationships.

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232 *Discrimination & Age: Human Rights Issues Facing Older Persons in Ontario*. Discussion Paper. Ontario Human Rights Commission, Toronto, May 2000.

233 M. Beaulieu, & C. Spencer, "Older Adults' Personal Relationships and the Law in Canada." (Ottawa: Law Commission of Canada, 1999).

And the Canadian Journal on Aging presented an article by Klassen and Gillin<sup>234</sup> that showed how *McKinney* marked a highly restrictive period for seniors' rights in Canada. In all three papers, the law was found to have a negative and/or limiting influence on the lives of Canadian seniors, playing "a substantial role in making identities seem fixed, innate, and clearly bounded."<sup>235</sup>

### Ontario Human Rights Commission - Social/Legal Effects

Legal verification of any one element of a negative age paradigm acts to strengthen all of the conceptually inter-related elements of that same paradigm. Evidence of this was discovered by the May 2000 Ontario Human Rights Commission investigation into age discrimination.<sup>236</sup> The Commission found specific evidence of how the legacy of *McKinney* was reaching beyond retirement issues into the debate about economics of health care planning. The report cited Curtis who suggested that (supported by the age-based discrimination legitimized in *McKinney*) other forms of age based discrimination may also be upheld by the Supreme Court:

...it is clear that it would not be impossible for a government to adduce the evidence required to uphold a discriminatory user fee law [based on age]

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234 R. Klassen, & C. Gillin, "The Heavy Hand of the Law: The Canadian Supreme Court and Mandatory Retirement" Canadian Journal on Aging Vol. 18 No. 2, 1999 at 259.

235 M. Minow, Not Only for Myself (New York: The New Press, 1997) at 59.

236 *Discrimination & Age*, *supra* note 231.

under section 1 of the Charter. As *McKinney* demonstrates, legislation which has been shown to discriminate on the basis of age has been upheld by the Supreme Court in the past. This result suggests that discriminatory user fee legislation could be similarly upheld in the future.<sup>237</sup>

Curtis's article is a demonstration of how the concept of age-based deterioration could be extrapolated into a policy recommendation about health care costs. Curtis speculates that because *McKinney* legitimated ageist interpretations of health data, seniors could be forced to pay the bulk of health care costs, since they are the number one consumers. Interestingly, he does not suggest that children, the number two consumers of health care services, should pay their share. Possibly this is because they, like seniors, have no means of working to pay these fees. More likely, he may hold a more positive image of children.

Curtis is not alone in his suggestions or in the age-negative logic that he is applying. This is apparent in the popular image of a looming health care calamity predicted to hit Canada as our population ages. However, according to Denton and Spencer<sup>238</sup> and Barer, Evans and Hertzman<sup>239</sup>, this predicted calamity emanating from Canada's aging

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237 B. Curtis, "User Fees for the Elderly: Medicare Solutions or Dissolution?" (1996) 2 *Appeal: Review of Current Law and Law Reform* 18 at para. 14, online: QL (JOUR). Cited in *Discrimination & Age: supra* note 231 at 19. (Insertion added)

238 F. Denton, & B. Spencer, "Demographic Change and the Cost of Publicly Funded Health Care" *Canadian Journal on Aging* Vol. 14 no. 2, 1995 at 174-192.

239 M. Barer, R. Evans & C. Hertzman "Avalanche or Glacier?: Health Care and Demographic Rhetoric" *Canadian Journal on Aging* Vol. 14 no. 2, 1995 at

population is not based in reality. The belief that increases in health care costs are due to an increasing elderly population is not substantiated in fact. Although partly associated with age, most of these increasing costs are linked to increased utilization of health care services and new high tech, high cost procedures. Denton and Spencer predict that such premature incrimination of older citizens is a harbinger of the ill-informed ageist blaming yet to come. The fact that *McKinney* has already justified a young-versus-old employment paradigm has the effect of potentially supporting a similarly misguided zero-sum paradigm in the coming health care debate. Both research groups (Denton & Barer) fear that future political interests will use ageist misinformation to drive policy development in the direction of a simplistic zero-sum young-versus-old health care debate.<sup>240</sup>

The Commission regarded *McKinney* as a part of a virtual legal wall in protection of mandatory retirement, a wall which included three other age related cases decided by the

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193-224.

240 Guillemard also noted a shift in public opinions that suggests a change in the constructs of social deservedness for limited public funds. As increasing numbers of older individuals come into the involuntary pre-retirement and/or dis-employment welfare system, their status changes from that of needy deserving elderly, into one of unworthy old age obsolescence, uselessness and disability. At a time of neo-conservative cutbacks this view has added to a zero-sum sense of displacement on an inter-neediness level as well as an inter-generational level. Such an image suggests that aging persons will be displacing more deserving and legitimately needy individuals for whom these programs were designed. Guillemard, *supra* note 226 at 441-464.

Supreme Court at the same time as *McKinney*, *Harrison*,<sup>241</sup> *Stoffman*,<sup>242</sup> and *Douglas*.<sup>243</sup> These cases were followed in 1992 by *Dickason*.<sup>244</sup> All these cases employed the same age-negative images as found in *McKinney* to the same issues in essentially the same manner, with the same conclusions. *Stoffman* addressed the loss of elderly doctors' hospital privileges on the basis of an implicit acceptance that older doctors were not technically competent in the use of new knowledge. *Harrison* upheld the age limitations of the *British Columbia Human Rights Code* just as was done in *McKinney* with respect to the *Ontario Human Rights Code*. *Douglas* applied similar concepts and images of old age in a community college setting. And finally in *Dickason*, the Charter protections were found to be circumventable under s. 1 even in the absence of a maximum age in the *Alberta Human Rights Code*. The Commission found only one further case on point at the Supreme Court level, *Large*,<sup>245</sup> which confirmed the image of old age deterioration in relation to a *bona fide* occupational requirement (BFOR).

The Commission highlighted the continuing influence of *McKinney* in confirming the validity of other age-negative legislation in the decision of *Cooper* (subsequently upheld

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241 *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451.

242 *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483.

243 *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.

244 *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103.

245 *Large v. Stratford (City)* [1995] 3 S.C.R. 733.



by the Supreme Court of Canada):

In *Cooper v. Canada (Human Rights Commission)*,<sup>246</sup> an express mandatory retirement defence contained in the *Canadian Human Rights Act* was unsuccessfully challenged. While that Act did not limit its application to a maximum age, it contained a provision (s. 15(c)) which stated that it is not discriminatory to retire a person at the normal retirement age for their occupation. Mr. Cooper, an airline pilot, was forced to retire at age 60, the normal age of retirement for airline pilots. The Federal Court Trial Division, upheld by the Federal Court of Appeal, found that because of the *McKinney* decision, the Supreme Court had effectively endorsed the legality of s. 15(c) of the *Canadian Human Rights Act*.<sup>247</sup>

Additional lower court and tribunal cases in the Commission's paper included various issues related to mandatory retirement as a BFOR, employment recruitment, age as a BFOR, workplace benefits, seniority, termination of employment and non-employment cases which covered permissible distinctions on the basis of age and international recognition of issues related to aging. After reviewing all the relevant case law, the authors came to the following conclusions:

Age cases tend to be treated differently than other discrimination cases, particularly where the case involves retirement issues. The most noticeable difference from a human rights perspective is the lack of a sense of moral opprobrium linked to age discrimination which, in comparable circumstances would generate outrage if the ground of

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246 (1992), 22 C.H.R.R. D/87, affd 22 C.H.R.R. D/90, affd [1996] 3 S.C.R. 854.

247 *Discrimination & Age*, supra note 231 at 26. (emphasis added)

discrimination were, say, race, sex or disability.

Stereotypes about older persons are used to justify age discrimination, stereotypes which the courts themselves, in some cases, appear to be supporting.<sup>248</sup> This may be contrasted with the approach taken by the Supreme Court of Canada in the recent *BC Firefighters case*<sup>249</sup>, where the court indicated that impressionistic evidence about what individuals can and cannot do, which is based on gender, will likely be struck down as discriminatory.<sup>250</sup>

Thus the Commission was suggesting that the Court fails to apply to age discrimination the usual *Charter* presumption that as humans we are all the same despite our superficial differences of sex, colour etc. Old age is treated as a unique form of difference in which the individual has become less than whole because of deterioration.

#### Law Commission of Canada - Interpersonal Relationships, Old Age and Law

Whereas the Ontario Human Rights Commission report focussed on rights issues that may affect aging Canadians, the Law Commission of Canada study focussed more narrowly on the influence of law on seniors' personal relationships in a changing society with changing values. Interestingly, the case review by Beaulieu and Spencer found

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248 "See, for example the dissents in *McKinney* and *Stoffman* for criticism of the Supreme Court's approach and the alleged reliance on stereotypes about aging": [Commission's footnote 132].

249 *British Columbia (The Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [Commission's footnote 133].

250 *Discrimination & Age*, *supra* note 231, at 39.

surprisingly few legal cases that involve concerns of older adults. They also noted that there were few advocacy groups or interveners in Charter cases, including *McKinney*. On the basis of their findings that young and old Canadians have generally embraced ageist beliefs and attitudes, Beaulieu and Spencer surmised that seniors themselves

...are far less likely to approach human rights boards or tribunals to demand or enforce their rights. Even a rudimentary review of human rights cases shows that few if any cases being brought to their attention involve older adults. Having been raised in generations where the focus has been on 'responsibility' and 'duty', the concept of demanding rights is alien to many older adults.<sup>251</sup>

Most cases in the Law Commission report dealt with personal relationships as they affect health issues, the determination of competence, estates and pensions and problems arising from seniors within a family structure. The authors found that in virtually all the cases, there was an omnipresent assumption of decline, dependence and retirement. They found the expectation of these conditions and limitations to be so prevalent that it has framed the developing specialty of "elder law" in Canada. Although this report dealt only minimally with mandatory retirement, it did consider that *McKinney* was not unusually ageist in relation to the prevailing social-legal norms.

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251 Beaulieu & Spencer, *supra* note 232 at 49.

Canadian Journal on Aging: McKinney Marks a Step Back for Seniors' Rights

"The Heavy Hand of the Law: The Canadian Supreme Court and Mandatory Retirement"<sup>252</sup> was published by Klassen and Gillin in the field of social gerontology in the *Canadian Journal on Aging*. This paper shows how the Supreme Court had, in the 1980s decision of *Etobicoke*,<sup>253</sup> been moving incrementally towards greater protection for seniors' rights and a narrowing of the grounds for exceptions to those rights. Klassen and Gillin saw *McKinney* as the point at which the Court changed direction and expanded its possible reasons to limit seniors' rights. "In *McKinney*, the Court wrote an extensive decision which included a variety of matters related to, but reaching well beyond the specifics of, compulsory retirement."<sup>254</sup> On reviewing more recent cases it was noted that this trend was continuing to limit seniors' rights in new ways beyond *McKinney*. Klassen and Gillin particularly noted the *Large* case as it demonstrated this building negative trend:

What is most striking is that the *Large* ruling is unanimous and contradictory in its result from *Etobicoke*. In 1982, the Court emphasized

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252 Klassen & Gillin, *supra* note 234.

253 "To be a *bona fide* occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code." *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202.

254 Klassen & Gillin, *supra* note 234 at 270.

that human rights legislation was fundamental law and that clear proof of danger to the public safety was required to establish the BFOQ. In 1995, the *Large* decision emphasizes that mandatory retirement is a union-driven component of the collective agreement and that the BFOQ does not require individual accommodation. *Large* confirms the general trend since *McKinney* for the Court to leave unchanged mandatory retirement regulations and legislation.<sup>255</sup>

The results of the three studies were similar in what they concluded about the treatment of old age. The Ontario Human Rights Commission found evidence of how ageism was accepted in law, economics and generally throughout society with *McKinney* highlighted as a legitimating factor. Beaulieu and Spencer portrayed how ageism infects much of the legal reasoning in the interpersonal relationships of older Canadians. And finally, Klassen and Gillin found evidence that *McKinney* actually marked an increase in the negative interpretation of older citizens' human rights. Yet all three studies made mention of a surprisingly optimistic prediction about the future treatment of old age. They all feel that despite the significant ageist influence accorded to *McKinney* on the mandatory retirement issue, the future impact of increasing numbers of seniors<sup>256</sup> will eventually force a rethinking of age-stratified roles which will lead to social, political and legal change. That view is shared by this author who feels, that in the not too distant future, the aging baby boom generation will look back at the negative images employed in *McKinney* as a clear demonstration of ageism. *McKinney* will be held as an example of how such negative images can lead to faulty legal reasoning which can lead to unjust

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255 Klassen & Gillin, *supra* note 234 at 267.

256 See Appendix V. Population Age Pyramid, Canada 1996 p. 116.

limitations of human rights. This predicted change in social attitudes won't happen because of an increase in social tolerance towards aging, but instead will grow out of self-interest and an increasing sense of awareness of the actual experience of aging. In the interim and as a kick start to this change, it is important to challenge and replace the ageist assumptions and presumptions that underpin *McKinney* that continue to inform public policy and analysis relating to aging.

**Chapter 6: Conclusions and Recommendations for Alternative Images of Old Age**

As we have seen, *McKinney* is both a reflection, and an application, of the negative images of old age in our society. Not only does the case reflect many of the negative perceptions of what is believed to be the normal course of aging and the implications of those negative beliefs, it applies and legitimates those negative images by confirming them in law. We see our highest court confirming that despite the protections of the Charter, it is legitimate to discriminate explicitly against old people. The review of the case law since *McKinney* shows how this decision has entrenched ageist images in the legal discourse. In turn, negative images in the legal discourse can help legitimate legal, social, cultural and economic limitations on the lives of older Canadians, in areas that go far beyond a case about mandatory retirement. Klare described how law extends its influence through legal discourse and hints at why this is important to this discussion:

Legal discourse shapes our beliefs about the experiences and capacities of the human species, our conceptions of justice, freedom and fulfilment, and our visions of the future. It informs our beliefs about how people learn about and treat themselves and others, how we come to hold values, and how we might construct the institutions through which we govern ourselves. In these respects legal discourse resembles all other forms of systematized symbolic interaction. The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce the belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate.<sup>257</sup>

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257 K. Klare, "The Public/Private Distinction in Labor Law" University of Pennsylvania Law Review Vol. 130, 1982 at 1358.

This ubiquitous presence of law, combined with the pervasive nature of a false social premise, makes change or even the possibility of change difficult to imagine. This is the case when trying to re-envision new images of old age in a culture dominated by positive images of youth. As Friedan has said, "Age is assessed not by what it is, but by what it is not."<sup>258</sup> The problem is how to construct a more positive image of old age in a youth-oriented world. How can we even understand the definition of old age except in terms of its difference from a younger age?

Consideration of alternatives to current images, customs and practices requires not only a review of existing constructions, it requires a review of the very way in which we categorize, label and think of ageing. Hazan pointed out the conundrum of trying to talk about solutions to problems of ageism in an ageist society without further contributing to the ageist dialogue?

Is aging a unique state, to be understood within its own terms, or is it a random multitude of commonly labelled, culturally dependent phenomena? The former assumption leaves the researcher without tools, whereas the latter robs her or him of a justification for being engaged in the study of ageing in the first place.<sup>259</sup>

The objective here is to present an alternative perspective that moves outside of the

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258 Friedan, *supra* note 228 at 104.

259 H. Hazan, From First Principles: An Experiment in Aging (Westport CT.: Bergin & Garvey, 1996) at 19.



limitations of the current study on ageing. What is needed is a view of aging that would allow for the development of an alternative paradigm upon which new images of old age could evolve. What is required is a paradigm that would go beyond the youth-focussed obsessions of modern society catalogued by Friedan<sup>260</sup> where the advantages, skills and potential of old age have been little recognized. This will be a difficult task. As shown in Chapter 3, many of our measures of what represents a good life emanate directly from the images of the youthful ideal. Healthy bodies, strength, endurance, flexibility, reaction times, are all commonly associated with youth. But these elements of youth have several things in common. They are easy to observe, measure, and they relate clearly to those things that we consider crucial to survival in a modern industrial society: doing work and everyday tasks more quickly, accurately and efficiently. On the other hand there are more difficult-to-observe-or-measure elements that also affect effectiveness, these include complex skills and attributes many of which can relate especially to maturing, experiential learning and aging. E. Dembe has suggested that some of the difficult-to-measure skills which relate to healthy aging include tenacity, sociability, productivity, unity, responsibility, creativity, flexibility and spirituality.<sup>261</sup> Could these kinds of attributes and the images they engender lead the way to a more positive valuing of old age?

As discussed earlier in this paper, language itself contributes powerfully to negative

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260 Friedan, *supra* note 228.

261 E. Dembe, Passionate Longevity (Toronto: Macmillan Canada, 1995).

images of old age. An attempt to understand and re-envision the existing images and knowledge of aging was attempted by Hazan at the Third Age experiment at Cambridge University. Their objective was to re-evaluate the paradigms and language which currently frame much of society's thinking about old age. They wanted to overcome

...[the] basic incongruity between the model of ageing as constructed by both scientific and everyday language and its actual, "real" experience. What is needed then, is no less than a new language, a new mode of articulation capable of capturing the essential of human existence.<sup>262</sup>

Yet the powerful imagery that accompanies many negative images of old age is difficult to counter. One of the most predominant of these images, which was highly significant in *McKinney*, is the presumption of intellectual decline. Diminished capacity to remember goes to the very essence of how we define our individual humanness. But what do our measures of memory capacity mean? And are the conclusions and popular images about loss of memory the only way to think about the issue? Does a loss of memory mean a loss of intellect or are there other possible conclusions? A different approach would be to look at the differences between the capacity to remember specific test items compared to the more complex concept of knowledge. Knowledge, unlike simple memory, can be understood as something gained as one ages. Even though much of it may be lost over time, the cumulative affect can offer vistas beyond the understanding of those who have yet to experience the wisdoms of time, let alone develop a measure for them.

Knowledge is like a staircase built in such a way that every landing offers

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262 Hazan, *supra* note 259 at xii.

a view of yet another one, to which one can't help wanting to ascend. No one will ever be satisfied because knowledge is also an endless spiral.<sup>263</sup>

Arguably, many of the discrete physiological declines associated with aging are fully adjusted to or compensated for as individuals gradually physically deteriorate. To the individual, the need to slow down, to use reading glasses and/or hearing aides, may facilitate an amended appreciation of the world. This change of pace may be more consistent with measured thought and wisdom. It could encourage greater awareness of both experience and mortality and a revised reliance on the image of physical strength, endurance and speed once ascribed to in youth. Moody described this possibility and hinted at a new freedom beyond what youthful inexperience can reveal:

...[M]any old people experience their lives precisely as an awakening from domination. Detached, sometimes disillusioned, they may see deeper than younger people who are utterly absorbed by conventional institutions and contemporary values. It would not be the first time that those who are marginal, those at the periphery, can tell us something important that those at the centre are unable to see.<sup>264</sup>

Carl Jung theorised far beyond the limitations of the burgeoning medical model of his

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263 A. Memmi, La Dependance Translated by P. Facey, (Beacon Press, 1984) reprinted in Minow, Making All the Difference, *supra* note 221 at 373.

264 H. Moody, "Toward a Critical Gerontology: The Contribution of the Humanities to Theories of Aging" in Emergent Theories of Aging eds., J. Birren, & V. Bengtson, (New York: Springer Publishing Co., 1988) at 35.

time.<sup>265</sup> Jung discovered that although the medical-scientific model was convincing in areas that required the study of discrete data, the model was of limited use in the understanding, measurement or replication of more complex and advanced human interactions, integrations and experience. Jung believed that the main goal of healthy psycho-social development was the eventual “integration” of the diverse and conflicting components of the individual. He theorised that the actualization of the human experience and true mental health could not be realized until integration was achieved.<sup>266</sup> This event was usually attained with the acceptance of old age. Because his theory introduced an entirely different paradigm than the emerging science model of the period, Jung needed to develop an entire new vocabulary, a vocabulary that spoke, not in scientific or biological terms, but in terms of meanings that could only be understood as archetypes. Maybe a similar language will need to be established to describe the possibilities for an image of positive aging, a concept that up until now has been the equivalent of negativity.

A positive construction of aging would need to overcome the seemingly inescapable influence of the degenerative bio-medical construct, before an alternative construct of

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265 C.G. Jung The Archetypes and the Collective Unconscious 2<sup>nd</sup>. ed., (Princeton, NJ: Princeton University Press, 1968).

266 Many eastern religions strive for similar ends in the struggle to achieve oneness. The way to ultimate peace and fulfilment (highest of spiritual and human goals) is to quiet the scenes that so dominate the youthful mind and body, and reveal the oneness within that the senses mask.

human aging could even be imagined. Interestingly, there are many positions in this world for which the ideal twenty-five year old male would seem totally inappropriate. A small sampling of these positions would include the Pope, Supreme Court Justices, Prime Minister, Dalai Lama, doctors, professors and a myriad of similar positions that require intellectual, experiential and spiritual development far beyond the limitations and distractions of youthful physiology. Defining the necessary qualities for these types of positions (including others of less exalted status) would require abandoning the parameters imposed by medical science and recognizing that a frail body can achieve far more than the sum of its parts.

Although there is little argument that advancing age slows body systems and reserves, it is the assumption about the impact this process has on a person's capacity to participate and contribute that is in question. We may well "be constrained by our physical, genetic and other natural limits, yes, but we're not altogether *defined* by them."<sup>267</sup> The image of deterioration is so powerful that it undermines the possibility that people have considerable capacity to evolve new skills and compensate or adapt old skills. Not only can older workers adapt to their changing physical condition but they can also evolve new skills that may actually stem from their advanced age. The McGill study of university professors provides an example of this type of paradigm shift. Instead of looking to rid universities of their aging professors, the study challenged the negative images of old age which were used to support Guelph University's argument in *McKinney*. The study

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267 M. Kingwell, Better Living: In Pursuit of Happiness from Plato to Prozac (Toronto: Viking, 1998) at 27.

concluded that “universities should work hard to keep older faculty members happy, and to make best use of their maturity and wisdom.”<sup>268</sup>

Whereas the McGill study challenged negative images of old age, other studies have challenged the positive assumptions and images of youth. In particular, these studies question the image and expectation that a younger worker will be more productive in situations where it is necessary to rapidly assimilate new high-tech skills and work quickly under pressure. This image was alluded to by La Forest J. when he discussed the use of expensive research facilities<sup>269</sup> and by Friedan<sup>270</sup> when she described the pervasive expectations of our youth-positive culture. But in an example that runs contrary to the youth biased predictions of their productivity research, Day’s Inns of America (a large US hotel chain), now deliberately hires older and/or retired workers. Older workers are hired specifically to run their high-tech, high-pressure centralized reservations system. They found a first-year turn-over rate for younger workers of 70% compared to 13% for older workers, and a reservations success rate of 38% for the young compared to 43% for the older workers.<sup>271</sup> The study demonstrated to Day’s Inns how their ageist

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268 P. McLeod, T. Meagher, M. Abrahamowicz, Y. Steinert, & D. Boudreau, “When Academic Physicians Age: Perceptions, Concerns, and Recommendations of Senior Faculty Members at McGill University” Annals Royal College of Physicians & Surgeons Canada Vol. 33, No. 5, August 2000 at 282.

269 La Forest J., *McKinney*, *supra* note 102 at 653.

270 Friedan, *supra* note 228.

271 V. Marshall, “Retraining Older Workers - A Good Investment” Options 45+ Oct. 1996, Vol. 1, No. 6. Canadian Network for Experienced Workers, Ottawa.

presumptions initially precluded older workers by accepting the medical prediction that younger workers have faster response times, greater endurance and can learn new skills more quickly. The expectation that young workers would have superior physical strength, endurance, speed and resistance to stress, and be able to perform faster calculations all met ageist expectations. But the younger workers were unable to demonstrate the more difficult to quantify subtle characteristics of emotional maturity necessary to face the complex human elements of this "youth oriented" job. In the case of this "youth oriented" job, the limitation of the age negative paradigm precluded the very elements that were crucial to success on the job.

More evidence that we have moved away from the industrial logic of the past surfaces when one challenges the image that implies that scarce training dollars would be wasted on older workers. For example, using an age-equals-deterioration construct, one would readily predict a greater return-on-investment of training dollars when those dollars are spent on a younger, compared to an older worker. Yet if a high-tech company is planning to train workers, does it matter if the worker is fifty-five or twenty-five years old, if the job will be technically redundant in five years? Research done at University of Toronto revealed an unexpected economic paradigm when the standard limiting presumptions about old age were discarded.

These days, with high-technology's rapid evolution, knowledge is often outdated after an estimated five years...Because technological change is so rapid, it makes as much sense to train older workers as younger workers. The old argument that the investment in training dollars will not be recouped when employees will be soon retiring loses its validity, especially given high turnover of younger employees...Older workers are less likely to transfer to another company, and so their training investment is not transferred with them and lost to the company providing the training...<sup>272</sup>

Even if the presumptions of deterioration in old age could be challenged by examples such as those above, there would still need to be a major abandoning of the limitations of age-stratification. As Guillemard has suggested, we need to look afresh at the unquestioned construct of an age-stratified three stage life course model, which we all assume we are passing through:

...the threefold model of the life course with its three successive stages, each with a distinct function: youth for education, middle-age for work, and old age for retirement.<sup>273</sup>

Guillemard's position is that retirement, as part of the age-stratified three stage life course

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272 Marshall, *ibid.*

273 Guillemard, *supra* note 226 at 443.



model, no longer fits for many individuals, presuming that it ever did.<sup>274</sup> Among other things, the rigidity of the life course model discourages and/or makes it very difficult to break out of the model in order to engage in adult re-education or mid-life leisure.

Guillemard presents the idea that if society moves away from the rigid constructs of the life course model, then alternative possibilities for all stages of life may evolve.

The foreseeable flexibility of the life course leads us to conclude that welfare should be less closely linked to the threefold model of life course. From this perspective, the very concepts of old age pensions and social transfers for definitive exit are becoming irrelevant. The decline of the model of a steady, lifetime job and the emergence of a life with multiple, successive careers imply frequent passages, in both directions, between work and non-work over the life course.<sup>275</sup>

Changing the images of old age and the negative meanings they have come to typify will take much more than a simple reversal of mandatory retirement policy. A radical solution has been presented to counter the strongly held complex of images and the perception that retirement at a fixed age is natural, unavoidable, desired and necessary. The proposed strategy to begin thinking of new concepts of justice around old age, recommends abandoning the practice of public birth dates. Young and Schuller have proposed this as a strategy to eliminate age as a means of social categorisation and

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274 A recent report from Statistics Canada indicates that retired seniors are actually returning to work. 225,000 - 6% of the senior population returned to work in 1998 either because they wanted to or had to. C. Lindsay, "A Portrait of Seniors in Canada" (Ottawa: Statistics Canada, cat. No. 89-519-XPE, 1999).

275 Guillemard, *supra* note 226 at 462-463.

control. As individuals, we currently see our personal experience of life as unique and our birth-dates as merely a modest component within a complex whole. But even as a supposed modest component of the whole person, one's birth-date effects each person uniquely and often not insignificantly. Given this, Young and Schuller ask us to consider, whether or not one's age can be considered a private, instead of a public matter. This would open the possibility of separating an individual from the age-stratified impact of their birth-date. The intent of this would be to de-emphasize the importance of age, eventually creating a culture where age is considered an irrelevant characteristic. If we believe as a society that it is not acceptable to discriminate against people based solely on their gender, race, religion and physical disability, then why hold on to birth-date? It has long been an accepted practice, supported in labour law, that a potential employer is forbidden from asking job applicants potentially discriminatory information. The suggestion here is to consider

...a radically new approach: regarding ages of adults as something very personal to them, their private property, which they are entitled to privacy about, a private matter to be taken out of the public and placed in the private domain. This will require bringing age within the scope of an extended Data Protection Act which goes well beyond what is stored in computers: their age would become information which people would not be required to give to the State or anyone else or others allowed to pass on without permission, except for census purposes where individuals would not be identified.<sup>276</sup>

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276 M. Young, & T. Schuller, Life After Work: The Arrival of the Ageless Society (Glasgow: HarperCollins, Glasgow, 1991) at 166.

In advocating the eventual dismantling of age-stratification, we are proposing the removal of a major element in the time-structure of societies and individuals as it has prevailed so far. We could not do so unless there had already emerged from the toils of the industrial revolution a new man and a new woman who acquire a range of adult capacities earlier in life and retain them latter.<sup>277</sup>

The question this proposal raises is, are we so regimented in our thinking that this possibility is rendered impossible before it is even considered? The reasons for maintaining the status quo are legion and they are also self-justifying. The reasons for many practices and policies often emanate from their own existence. The logic of pensions is justified and rationalized around retirement, which emanates from youth-structured employment bias. All these forms of logic are interdependent and self-serving. To change any one facet of an age-stratified society would threaten many interlocking aspects. La Forest J. showed this kind of concern at several points in *McKinney*. But once again we must remind ourselves about the past differential treatment of women. Although the struggle for gender equality is by no means over, society has managed to change countless small and large norms that were once imagined "natural," necessary and justifiable. Now try to imagine something that will not change as the constitution of the human species ages and evolves from one-in-ten, to one-in-four over the age of sixty-five in thirty years.<sup>278</sup> Remember that this new sixty-five plus group will be significantly healthier and better educated than any other cohort in history. What will, could or should

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277 Young & Schuller, *ibid* at 172.

278 Appendix V. Population Age Pyramid in Canada, 1996, p. 116.

remain the same? And if it does remain the same, then why? The question will soon not be why or how images, policies and laws will need to change, but what valid reasons are there to maintain an increasingly irrelevant past logic? Will we as a society be able to continue to restrain our older citizens? And what will we as individuals want as we age and begin to understand how much negative images of old age inhibit our own futures? From the Law Commission of Canada and the *Quebec Charter of Rights and Freedoms*, we can draw these final words on how the images of old age in Canadian law can impact not only those who are already old, but also on the rest of us who are on our way:

As the preamble to the Québec Charter points out, “The rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being.” In the context of older adults, this may be stated as “how we treat older adults reflects upon us all.”<sup>279</sup>

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279 Beaulieu & Spencer *supra* note 232 at 46.

**Appendices:**

**Appendix I: Definitions of Ageism**

The term “ageism” was originated by Butler in 1969, and defined as

a deep seated uneasiness on the part of the young and middle-aged - a personal revulsion to and distaste for growing old, disease and disability; and fear of powerlessness, ‘uselessness,’ and death.<sup>280</sup>

All of Butler’s identified sources of “revulsion and distaste” (disease, disability, powerlessness, uselessness and death) can be associated to a medically supported perception, that is one can expect nothing from aging, except physiological and mental decline and the social implications of that decline. In 1982, Butler and Lewis refined and expanded their definition to include a variety of negative concepts related to age.

Ageism - The prejudices and stereotypes that are applied to older people sheerly on the basis of their age. ...Ageism, like racism and sexism, is a way of pigeonholing people and not allowing them to be individuals with unique ways of living their lives. Prejudice toward older people already begins in childhood and is an attempt by younger generations to shield themselves from the fact of their own eventual aging and death and to avoid having to deal with the social and economic problems of increasing numbers of older people. It provides a rationalization for pushing older people out of the job market without spending much thought on what will

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280 R. Butler, “Ageism: Another Form of Bigotry” The Gerontologist 9. 243, 1969.

happen to them when they are no longer able to work.... Ageism is the sacrifice of older people for the sake of "productivity" and the youth image that the working world feels compelled to project. A terrible awakening comes when these younger people themselves grow old and suddenly find that they are the victims of attitudes they once held against others.<sup>281</sup>

This later description places a greater emphasis on the fears people have about the expected interpersonal, sociological and economic results of aging, yet continues to view these problems as a natural part of aging legitimately grounded in the expectation of physical decline. Both definitions describe the injustice of inappropriately judging individuals solely on the perceived negative characteristics of aging while ignoring and/or not recognizing potentially positive implications of aging. Both definitions also beg the question: It may be wrong or impolite to say bad things about old people, but what could possibly be good about getting old? Therefore, these definitions themselves could be considered ageist in that they reinforce the negative paradigm, stereotypes and associations. When ageism is defined solely in terms of how inappropriate it is to negatively label, avoid or restrict individuals because of their age, then the concept of ageism itself reinforces the ageist paradigm by maintaining a negative focus.

In this discussion, ageism is defined not only as inappropriate generalization of negative age stereotyping and the resulting reductionism, but also as the displacement, devaluation

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281 R. Butler, & M. Lewis, Aging and Mental Health: Positive Psychosocial and Biomedical Approaches 3<sup>rd</sup> ed. (St. Louis, Mo: C.V. Mosby Co., 1982) at 175-6.

and/or reevaluation of potentially positive virtues, attributes, qualities, aspects, narratives, characteristics and experiences of aging. Ageist beliefs have become so effective and pervasive that they have prevented the establishment of descriptive language and metaphors from which a positive construction and images of aging might emerge.

Appendix II: Historical Development Of Public Pensions in Canada

The historical development of the pension system that we know as one of the pillars of the modern welfare state, suggests the origins of this system are not as positive as one would imagine. Canada's rather meagre foray into state sponsored income programs was simultaneous with, yet very dissimilar from that of England. In 1908 England introduced a means-tested pension program for those over 70. Conversely, Canada was only willing to provide government guarantees for a much cheaper and arm's length annuities plan.<sup>282</sup> The annuities plan was designed with the Calvinistic idea that because neediness and poverty were the responsibility of the individual, workers should be trained or encouraged to help themselves against poverty in old age<sup>283</sup>. The plan was paid for by the individual

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282 J. Snell, "The Newfoundland Old Age Pension Program, 1911-1949" in Blake, R. & Keshen, J. Social Welfare Policy in Canada: Historical Readings (Mississauga: Copp Clark Ltd., 1995) at 83. Also see Guest, D. The Emergence of Social Security in Canada (Vancouver, University of B.C. Press, 1980), at 34-36.

283 J. Laycock, The Canadian System of Old Age Pensions (PHD Thesis, Chicago, 1952).

with the government's main contribution being in the form of guaranteeing payment until death. Bryden's research showed how government

...annuities would simultaneously allow the working class the virtue of thrift, prevent corrupt business interests from profiting at the expense of the poor, and keep the state from having to initiate large spending programs.<sup>284</sup>

The first real pension plan within Canada's current boundaries was established by Newfoundland in 1911. The plan paid \$50 annually, in quarterly increments to those 75 or more who were deemed in needy circumstances. Despite the evidence known, then and now, Snell noted that from the very beginning of pensions in Canada, the payment systems were established only to meet the needs of men, an unenlightened notion echoes of which endure into *McKinney*.

The most striking characteristic of the new scheme was that only men could qualify for such a pension. This was in spite of the government's own evidence regarding the plight of elderly women.<sup>285</sup>

Bryden described how the leadership of the Newfoundland government was not followed by the Canadian federal government until 1927 when it adopted its first old age pension plan. The plan was state funded, non-contributory, and means tested, with maximum benefits for both women and men over 70 set at \$20 per month. Recipients could not have other income over \$125 annually and all assets they did hold were assigned an

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284 K. Bryden, Old Age Pensions and Policy-Making in Canada (Montreal: McGill-Queen's University Press, 1974) at 257-258.

285 Snell, *supra* note 282 at 84.



income-producing value based on the purchase of a government annuity. This fictitious income was included in the applicant's total income as though it was in fact received. Actual payments of pensions were further delayed because of federal provincial agreements which required the federal government to pay 50 % of the benefits. Each provincial government had to establish enabling legislation for their jurisdiction, therefore full implementation of the scheme took over ten years - British Columbia in 1927, Saskatchewan and Manitoba in 1928, Alberta and Ontario in 1929, Prince Edward Island in 1933, Nova Scotia in 1934, and New Brunswick and Quebec in 1936. Another feature of the early pension system which remained in effect until the late 1940s required that a pensioner's estate would repay the total funds paid upon a person's death.<sup>286</sup>

Appendix III: Demographics of Aging Canadian Women<sup>287</sup>

1. Women's longevity exceeds men's; life expectancy for women is now 80.9 years; men's is 74.6 years.
  
2. Women work in lower paying occupations and sectors: community, business and

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286 Bryden, *supra* note 275.

287 Compiled from Stats Canada 1993-95; National Advisory Council on Aging, 1993; Studies in Aging and Independence, 1991; Women in the Labour Force 1994; National Council of Welfare, 1995; M. Townson, 1994-96 and various journal articles and newspaper reports. Compiled by L. Zimmerman, Research Associate, Gerontology Research Centre, March 1996, Simon Fraser U., Vancouver, B.C.

personal services and trade. Women earn 69% - 72% of male earnings (full-time workers).

3. 28% of women (contrasted with 10% of men) work part-time. Women bear the main responsibilities for family care; 9% - 25% of women leave work for eldercare at an average age of 52.
4. Of persons collecting CPP retirement benefits (September 95), women averaged \$274 per month while men averaged \$477 per month.
5. The risk of widowhood increases with age; 30% of Canadian women are widowed at 65 and 50% by 75. Older men are 9 times more likely to remarry than older women.
6. Older Canadian women have high poverty rates - the rate for unattached women 65+ is 47.3% (approximately 351,000 women).
7. Fewer women are covered by employers' pension plans than men, and many such plans have no survivor's benefits. 70% of the income of women aged 65+ is from government transfers (compared to 52% for men).

The cumulative effects of the above factors inhibit women from amassing adequate resources for later life. The present economic climate of downsizing, involuntary

retirement and the growth in the service sector where many women work means fewer benefits and lower or non-existent pension coverage for many, particularly women.

*Appendix IV: Suggestions To Counter Negative Images of Old Age*

The following suggestions were presented by Barbara Macdonald, "An Open Letter to the Women's Movement" in an effort raise the consciousness of organizers about the ageist attitudes they displayed in a proposed university women's centre for "old lesbians".

These suggestions speak to the power of ageism, and how it can permeate even academic and feminist dialogues<sup>288</sup> just as it does other facets of modern society.

As a beginning, I would suggest that your university women's center:

1. Organize consciousness raising groups, a process in which old lesbians should be visible. The women's movement has given lip service to opposing ageism, but no real work has ever been done to raise the consciousness of women about ageism enough for us to even recognize it.
2. Take leadership in insisting that the National Women's Studies Association devote an annual meeting to the issue and commit themselves to long-range plans for combatting ageism in every field of study.
3. Set up an ongoing group assigned to monitor feminist and lesbian publications and to address the editors, requesting retractions of published ageist material. Not only would editing staffs become more aware, but the

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288 C. Delahanty, Truncated Lives: The Marginalisation of Old Women in Selected English Canadian Feminist Texts (M.A. Thesis, Carleton U., 1992) at 14.

**publishing of such letters would increase the awareness of a much larger population - their readers.**

**The following are a few suggestions to all of us for working on our ageism:**

- 1. Don't expect that older women are there to serve you because you are younger - and *don't think the only alternative is for you to serve us.***
- 2. Don't continue to say 'the women's movement,' as I have in this letter, until all the invisible women are present-all races and cultures, and *all ages* of all races and cultures.**
- 3. Don't believe you are complimenting an old woman by letting her know that you think she is 'different from' (more fun, more gutsy, more interesting than) other older women. To accept the compliment, she has to join in your rejection of older women.**
- 4. Don't point out to an old woman how strong she is, how she is more capable in certain situations than you are. Not only is this patronizing, but the implication is that you admire the way she does not show her age, and it follows that you do not admire the ways in which she does, or soon will, show her age.**
- 5. If an old woman talks about arthritis or cataracts, don't think old women are constantly complaining. We are just trying to get a word in edgewise while you talk and write about abortions, contraception, pre-menstrual syndromes, toxic shock, or turkey basters.**
- 6. Don't feel guilty. You will then avoid us because you are afraid we might become dependent and you know you can't meet our needs. Don't burden us with your idea of dependency and *your* idea of obligation.**
- 7. By the year 2000, approximately one out of every four adults will be over 50. The marketplace is ready now to present a new public image of the aging American, just as it developed an image of American youth and the**

'youth movement' at a time when a larger section of the population was young. Don't trust the glossy images that are about to bombard you in the media. In order to sell products to a burgeoning population of older women, they will tell you that we are all white, comfortable middle class, and able to 'pass' if we just use enough creams and hair dyes. Old women are the single poorest minority group in this country. Only ageism makes us feel a need to pass.

8. Don't think that an old woman has always been old. She is in the process of discovering what 70, 80 and 90 mean. As more and more old women talk and write about the reality of this process, in a world that negates us, we will all discover how revolutionary that is.
9. Don't assume that every old woman is not ageist. Don't assume that I'm not.
10. If you have insights you can bring to bear from your radical background or ethnic culture - bring them. We need to pool all of our resources to deal with this issue. But don't talk about your grandmother as the bearer of your culture - don't objectify her. Don't make her a museum piece or a woman whose value is that she has sacrificed and continues to sacrifice on your behalf. Tell us who she is now, a woman in process. Better yet, encourage her to tell us.<sup>289</sup>

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289 B. Macdonald, & C. Rich, Look Me In The Eye (C.A.: Spinsters Book Company, 1990) at 73-75.

*Appendix V: Population Age Pyramid, Canada 1996*

**(Baby Boom Cohort)**

<u>Birth Date</u>	<u>Millions</u>	<u>Males</u>	<u>Age</u>	<u>Females</u>	<u>% Pop</u>
Pre 1906			90+	*	
1906-1911			85-89	**	
1911-1916			80-84	****	
1916-1921			75-79	*****	
1921-1926			70-74	*****	
<u>1926-1931</u>	<u>3.7m</u>		<u>65-69</u>	<u>*****</u>	<u>12%</u>
1931-1936			60-64	*****	
1936-1941			55-59	*****	
1941-1946			50-54	*****	
<u>1946-1951</u>			<u>45-49</u>	<u>*****</u>	
<u>1951-1956</u>			<u>40-44</u>	<u>*****</u>	
<u>1956-1961</u>			<u>35-39</u>	<u>*****</u>	
<u>1961-1966</u>			<u>30-34</u>	<u>*****</u>	
1966-1971			25-29	*****	
<u>1971-1976</u>	<u>18.3m</u>		<u>20-29</u>	<u>*****</u>	<u>61%</u>
1976-1981			15-19	*****	
1981-1986			10-14	*****	
1986-1991			5-9	*****	
<u>1991-1996</u>	<u>8.0m</u>		<u>0-4</u>	<u>*****</u>	<u>27%</u>

Population Age Pyramid, Canada 2031

<u>Birth Date</u>	<u>Millions</u>	<u>Males</u>	<u>Age</u>	<u>Females</u>	<u>% Pop</u>
Pre 1941			90+	***	
1941-1946			85-89	*****	
1946-1951			80-84	*****	
1951-1956			75-79	*****	
1956-1961			70-74	*****	
<u>1961-1966</u>	<u>9.2m</u>		<u>65-69</u>	<u>*****</u>	<u>24%</u>
1966-1971			60-64	*****	
1971-1976			55-59	*****	
1976-1981			50-54	*****	
1981-1986			45-49	*****	
1986-1991			40-44	*****	
1991-1996			35-39	*****	
1996-2001			30-34	*****	
2001-2006			25-29	*****	
<u>2006-2011</u>	<u>21.6m</u>		<u>20-29</u>	<u>*****</u>	<u>56%</u>
2011-2016			15-19	*****	
2016-2021			10-14	*****	
2021-2026			5-9	*****	
<u>2026-2031</u>	<u>8.0m</u>		<u>0-4</u>	<u>*****</u>	<u>20%</u>

Note: The population in the "old," "provider," and "young" age groups, as well as the total, are shown in millions, in italics, to the left of the pyramids, and the corresponding percentage distributions in italics to the right. <sup>290</sup>

290 T. Denton, & G. Byron, "Population Aging and the Maintenance of Social Support Systems" in Canadian Journal on Aging Vol. 16 no. 3, 1997 at 486.

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