# THE SUPREME COURT AND MANDATORY RETIREMENT: SANCTIONING THE STATUS QUO

Shirish P. Chotalia

The recent decision of *Dickason* v. *The Governors of the University of Alberta*[2] casts a long shadow over these words of Justice McIntyre. In *Dickason*, a majority composed of four justices of the Supreme Court upheld mandatory retirement at the age of 65 years as "reasonable and justifiable" discrimination within the meaning of s. 11.1 of Alberta's *Individual Rights' Protection Act*.[3] In taking this position, the Court retracts from the broad and liberal interpretation given to human rights legislation in a Charter conscious era.

> We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the [Human Rights] Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired without cause.[1]

Olive Dickason, the Appellant in this case, a tenured professor at the University of Alberta, was forced to retire at the age of 65 years pursuant to the terms of the collective agreement between the University and its academic staff. She filed a complaint with the Alberta Human Rights Commission alleging that the mandatory retirement policy discriminated against her on the basis of age, and thereby contravened s. 7 of the *Individual Rights' Protection Act* of Alberta. Section 11.1 of that statute provides that a contravention of the Act shall be deemed not to have occurred if the respondent shows that the alleged contravention was reasonable and justifiable in the circumstances. The initial Board of Inquiry found in Professor Dickason's favour, as did the Court of Queen's Bench. However, the Court of Appeal overturned the lower Court decision. The Supreme Court then upheld the Court of Appeal decision.

In the majority judgment, Justice Cory addressed the relationship between the *Oakes*[4] test as it applies in assessing Charter violations and "reasonable and justifiable" discrimination as referred to in the Alberta human rights statute. He affirmed that the *Oakes* test applies to private defendants provided that "it is applied without any trace of deference to a private defendant such as an employer or landlord."[5]

Since the advent of the *Charter of Rights and Freedoms*, the Supreme Court has repeatedly confirmed the "near constitutional" nature of human rights legislation, meaning that it incorporates certain basic goals of our society.[6] The majority here did not depart from voicing repeated warnings that "*no* deference should be given to the policy choice of the defendant as would be the case in the s. 1 analysis of a social policy."[7] In other words, the Court acknowledged in principle that while legislatures and Parliament are to be given due deference and latitude when legislating between competing societal groups,[8] a private actor engaged in discriminatory practices is not to be given the same latitude.

This is a rational position, given that through our democratic institutions legislators are legitimately placed to create social policy, while rights offenders have no such mandate to justify discriminatory practices. Deference to legislatures has been upheld in *Irwin Toy*[9] and *McKinney* v. *University of Guelph*,[10] given their mandate to legislate between competing interest groups within society with respect to policy issues, but this reasoning cannot be transposed to the private defendant:[11]

> With very few exceptions, employers are not representative of the general public. They are not subject to democratic checks and balances. They are not in the business of making difficult decisions of social policy and mediating between competing claims. They cannot be expected to be free from private interest in deciding whether to adopt a policy that infringes upon protected rights.

Further, as Professor Hogg points out in his constitutional law text:[12]

> The real threat to egalitarian civil liberties in Canada comes not from legislative and official action, but

> from discrimination by private persons — employers, trade unions, landlords, realtors, restaurateurs and other suppliers of goods or services. The economic liberties of freedom of property and contract, which imply a power to deal with whomever one pleases, come into direct conflict with egalitarian values...

However, after taking this laudable position, the Court went on to hold that the *Oakes* test is appropriate only to the extent that it is applied with "a large measure of flexibility" and with "due regard to the context ... the regulation of private relationships."[13] This position emasculates the *Oakes* test which requires that there be a pressing and substantial governmental objective, that the legislative means are rationally connected to those objectives, and that the means constitute a minimum impairment of the *Charter* rights abridged. In stating that "section 11.1 should not be rigidly constrained by the formal categories" of the *Oakes* test, the Court diminishes the quasi-constitutional nature of human rights legislation, demoting private discrimination to a lower standard of justification than state discrimination.

The *Oakes* test has not been applied in a vacuum, but through a careful contextual analysis of the rights and liberties at stake.[14] Further, on many occasions the Court has indicated that the *Oakes* test is not to be applied in a rigid and mechanistic fashion:[15]

> The analytical framework of *Oakes* has been continually reaffirmed by this Court, yet it is dangerously misleading to conceive of s. 1 as a rigid and technical provision, offering nothing more than a last chance for the state to justify incursions into the realm of fundamental rights. From a crudely practical standpoint, Charter litigants sometimes may perceive s. 1 in this manner, but in the body of our nation's constitutional law it plays an immeasurably richer role, one of great magnitude and sophistication.

Antithetically, the Court's application of the flexible, contextual *Oakes* test here fails to exemplify their stated position that "no deference is to be accorded to private discriminators." The majority found that the mandatory retirement policy of the University is rationally connected to the objectives of renewing faculty by introducing younger members "who may bring new perspectives to their disciplines,"[16] by preserving the tenure system, by facilitating planning and management and by protecting "retirement with dignity" for faculty members.[17] Finally, it made the cursory finding that in the "University setting, the policy of mandatory retirement withstands the minimal impairment test."[18]

In upholding the status quo, Justice Cory appeared to draw a distinction between the various grounds of discrimination: ".:. age differs from other grounds of discrimination since everyone of no matter what religion, colour, social origin, nationality or gender becomes older with the passage of time."[19] I would suggest that the analogous grounds approach as set out in *Andrews* v. *Law Society of B.C.*[20] not only confirms that discrimination based on other non-legislated grounds is prohibited by the *Charter*, but also that no one ground warrants greater or lesser constitutional protection than another.[21] Section 1 may safeguard "reasonable exercises in line-drawing"[22] but it does not diminish either the validity of the ground itself, or the careful analysis required to justify discrimination as in the case with any other violated *Charter* right.

In contrast, the reasoning in the minority judgment written by Justice L'Heureux-Dubé is fully in keeping with human rights and *Charter* interpretation precedents. First, Justice L'Heureux-Dubé confirmed the role of appellate courts in such cases: "... curial deference to the findings of the Board of Inquiry is consistent both with principle and precedent."[23] In this case the Board of Inquiry had heard *viva voce* testimony from twenty witnesses before concluding that although there was some rational connection between the policy and the University's goals, mandatory retirement was not vital to achieving the stated objectives. The effect of the policy was disproportionate to its objectives. Justice L'Heureux-Dubé then agreed with the majority in distinguishing *McKinney*[24] from the within case on the grounds that no legislative deference is to be accorded to a private offender. This position is consistent with the corollary minority position that the *Oakes* test is to be stringently applied. Given the similarity between the intent, wording and historical context of s. 1 of the *Charter* and s. 11.1 of the *IRPA*, the strict standard of proof articulated in *Oakes* is the appropriate test. "Simply put, this Court owes no deference to the policy decisions of a private employer, and the use of the flexible standard in these circumstances is completely unjustified."[25]

Justice L'Heureux-Dubé paraphrased Wilson J. in *Andrews* v. *Law Society of British Columbia*[26] in stating that as s. 7 of the *IRPA* "is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government [or in this case, the respondent University] to justify the type of discrimination against such groups is appropriately an onerous one."[27] Justice L'Heureux-Dubé thus applied the *Oakes* test to the University's mandatory retirement policy. She squarely confronted Justice Cory's conclusion that "a collective agreement cannot be readily dismissed from consideration" characterizing it as a "substantial departure from this Court's previous statements on the legality of contracting out of

human rights legislation." She is correct.[28] The majority decision views the collective agreement as a factor contributing towards the reasonableness of the discriminatory practice in issue, provided that it was freely negotiated and does not discriminate "unfairly" against minorities. With due respect, this position is absolutely contradictory to the fundamental principles of human rights laws and the *Charter*, and is a dangerous precedent to embrace.[29] Public policy requires that human rights which respect the inherent dignity of the individual cannot be the "common currency of contracts, but values which, by their very nature, cannot be bartered."[30]

As in *McKinney* the University's stated objectives are here taken to be "pressing and substantial," but according to Justice L'Heureux-Dubé they are not rationally connected to a policy of mandatory retirement. She did not accept the University's argument that the elimination of mandatory retirement will threaten the tenure system. The function of tenure is to protect professors from dismissal based upon unpopular academic views, not to shield them from individual assessment for incompetence. Indeed, alternative mechanisms for assessing competence exist and are in force, including peer evaluation. The evidence before the Board of Inquiry indicated that other universities who had abolished mandatory retirement had not abolished tenure. Accordingly there is no established link between the objectives and the means. Nor does the opening of positions to younger academics guarantee the infusion of fresh ideas. This claim is based upon stereotypical notions of older persons. Nor is the abolishment of mandatory retirement necessarily related to underfunding problems as very few persons choose to continue working after the age of 65 years: one fifth of one percent.[31] Finally, pursuant to the *Oakes* test, the means do not constitute a minimal impairment of individual rights because individual assessments of competence are appropriate and existent.

In dealing with the proportionality argument, Justice L'Heureux-Dubé rejected the majority position that mandatory retirement results in the benefits of financial compensation through secure and reasonable pension provisions, given that the University failed to adduce evidence regarding the economic consequences of the elimination of the policy. "The devastating effects that forced retirement has on a worker's finances, and self-esteem are grossly disproportionate to any advantages accrued to the University by its discriminatory practice...."[32] Further, Justice L'Heureux-Dubé made a salient point when she noted briefly that "women are penalized, in particular, because they tend to have lower paying jobs which are less likely to offer pension coverage, and they often interrupt their careers to raise families."[33]

The careful and perspicacious *Oakes* analysis of Justice L'Heureux-Dubé for the minority authenticates the expressed view of all the Justices that a private discriminator is not to be given the deference normally accorded to a legislature. Unfortunately, it is only the minority of the Court that is not afraid to challenge the status quo when the protection of civil liberties so dictates. Lord Denning once said: "You need have no fear. The Judges ... have always in the past — and always will — be vigilant in guarding our freedoms. Someone must be trusted. Let it be the judges."[34] The majority decision in *Dickason* leaves us pondering the optimism of Lord Denning's statement.[35]

---

**Shirish P. Chotalia**, B.A., LL.B., LL.M., Alberta Bar, Commissioner to Alberta Human Rights Commission.

1. *Ontario Human Rights Commission* v. *Borough of Etobicoke*, [1982]1 S.C.R. 202.

2. (24 September 1992) (S.C.C.) [unreported].

3. S.A. 1972, c. 2. The section states: "A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." This particular section came into force in 1985 after amendments to the Act removing the provision that prevented the application of the Act to those over age 65 years. I would suggest that this history reflects a legislative intent to abolish mandatory retirement at 65 years of age.

4. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

5. *Dickason, supra*, note 2.

6. *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84. See also *Ontario Human Rights Commission and O'Malley* v. *Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536.

7. *Dickason, supra*, note 2.

8. See *Irwin Toy Ltd.* v. *Quebec A.G.*, [1989] 1 S.C.R. 927 and *R.* v. *Edward Books and Art Ltd.*, [1986] 2 S.C.R. 713.

9. *Ibid.*

10. [1990] 3 S.C.R. 229.

11. *Alberta Human Rights Commission Factum* at 32.

12. P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 786.

13. *Dickason, supra*, note 2.

14. See the early case of *R* v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Subsequent decisions have confirmed this principle of Charter application.

15. *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

16. *Dickason, supra*, note 2.

17. *Ibid.*

18. *Ibid.*

19. *Ibid.* Interestingly the Canadian *Bill of Rights* did not contain protection for discrimination on the grounds of age; only in subsequent anti-discrimination legislation leading up to the *Charter* was "age" included as a protected ground.

20. [1989] 1 S.C.R. 143.

21. See *Re Shewchuk and Ricard* (1986), 28 D.L.R. (4th) 429 (B.C.C.A.) as a further example.

22. See *R.* v. *Brooks* (1989), 93 A.R. 1 (Alta. C.A.).

23. *Dickason, supra*, note 2.

24. *Supra*, note 10. In *McKinney* the Court decided that mandatory retirement at a specified age was not constitutionally impermissible if legislated by Parliament or a legislature. This is in contrast to the within case where the Alberta legislature has not simply legislated to prohibit mandatory retirement. In *McKinney*, Justices L'Heureux Dubé and Wilson dissented from the majority decision stating that, on the assumption that University policies are law, they are discriminatory within the meaning of s. 15(1) of the *Charter*, but constitute reasonable limits under s. 1.

25. *Dickason, supra*, note 2.

26. *Supra*, note 20.

27. *Dickason, supra*, note 2.

28. See *supra*, note 1 at 213-14: "It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy... The Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract."

29. *Ibid.* Unfortunately an erosion of this principle has been occurring. See *McKinney, supra*, note 10 wherein the majority held that the acceptance of a contractual obligation might well, in some circumstances, constitute a waiver of a Charter right, especially in a case like mandatory retirement.

30. *Dickason, supra*, note 2. Justice L'Heureux-Dubé then accepted that it may be a factor in the exceptional case although it is not a factor in the within case.

31. Canada Labour Board, as quoted in *supra*, note 2. Indeed Justice Murray of the Court of Queen's Bench noted that the "real villain" in this situation is the demographic bulge of academics currently in their forties, rather than those who are over the age of sixty-five.

32. *Dickason, supra*, note 2.

33. *Dickason, supra*, note 2.

34. "Misuse of Power" (1981) 55 Australian L.J. 720 at 726.

35. In this case Olive Dickason had begun her academic career at the age of 55, had earned the title of "Professor Emeritus," and had just recently written a nationally acclaimed book. Her qualifications were never in issue.

**POINTS OF VIEW / POINTS DE VUE**

Points of View/Points de vue is an occasional paper series published by the Centre for Constitutional Studies at the University of Alberta. The series is designed to publish in a timely manner discussion papers of current constitutional interest both to Canadian and international audiences.

Submissions for publication in the Points of View/Points de vue series are invited in either official language. Submissions will be reviewed critically before acceptance. Please direct submissions to the Editor, Kate Sutherland, Centre for Constitutional Studies, Room 459, Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5.

Points of View/Points de vue est une série d'articles publiés occasionnellement par le Centre d'études constitutionnelles de l'Université de l'Alberta. Au fait de l'actualité, elle sert à diffuser promptement les documents de travail parmi les lecteurs canadiens et étrangers.

Les auteurs qui souhaitent collaborer à Points of View/Points de vue sont invités à soumettre leurs articles dans l'une ou l'autre des langues officielles pour fins d'évaluation. Prière d'adresser toute correspondance à la rédactrice en chef, Kate Sutherland, Centre d'études constitutionnelles, Bureau 459, Law Centre, University of Alberta, Edmonton (Alberta) T6G 2H5.