



**SIMON FRASER UNIVERSITY AT HARBOUR CENTRE
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Challenging the Economic Assumptions of Mandatory Retirement

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Final Revised Draft August 25, 2004

Prepared for the volume *Ageism, Mandatory Retirement and Human Rights in Canada*, eds. C.T. (Terry) Gillin, David MacGregor, and Thomas Klassen.

*Parts of this chapter draw on the author's "Mandatory Retirement and Older Workers: Encouraging Longer Working Lives," *Commentary 200*, Toronto: C.D. Howe Institute, June 2004; the author thanks the C.D. Howe Institute for permission to use this material.

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Introduction

Nobel-prize winning economist Wassily Leontief gave his 1970 presidential address to the American Economic Association the title “Theoretical Assumptions and Nonobserved Facts.” In his talk he expressed concerns about how complex mathematical economic models are often used in addressing issues of economic policy:¹

By the time it comes to interpretation of the substantive *conclusions*, the assumptions on which the model has been based are easily forgotten. But it is precisely the empirical validity of these *assumptions* on which the usefulness of the entire exercise depends.

Leontief’s comments are devastatingly germane to how economic theory has been applied to the policy of contractual mandatory retirement over the past 25 years. Because it results from collective agreements and associated pension plans, mandatory retirement is “contractual” and thus supposedly voluntary, even though it forces some older workers to leave their jobs earlier than they desire. Economically based arguments remain at the core of support for mandatory retirement policies, which continue to be permitted for most of the Canadian labour force outside of Quebec and Manitoba.² Yet the key assumptions upon which the economic model of mandatory retirement hinges—some explicit and some implicit—have received little critical scrutiny in the public policy debate.

My analysis finds that the model traditionally used to support mandatory retirement has scant basis in terms of the realism or relevance of its key assumptions; the model is based on postulated but “nonobserved facts.” I find that current policies permitting forced retirement, instead of promoting efficient labour markets, are economically costly to workers, employers, and public finances. Provinces other than Manitoba and Quebec permit mandatory retirement either by limiting coverage of their human rights codes to workers under age 65 or by explicitly exempting the practice in their codes.³ Additional legislative or judicial bans on mandatory retirement would serve economic ends and also eliminate a fundamental violation of older

¹ Leontief (1971, p. 2).

² Manitoba and Quebec banned mandatory retirement in 1982 and 1983, respectively. At the time of writing, British Columbia, Newfoundland, Ontario, and Saskatchewan did not protect against age discrimination in employment for persons aged 65-plus, thus allowing employers to set retirement ages. The other provinces protect older workers against age discrimination with the exception of mandatory retirement. See Fourzly and Gervais (2002, pp. 156), Gunderson (2003), and Gillin and Klassen (Chapter 5).

³ Some analysts have argued that contractual mandatory retirement should continue to be permitted but that there should be no age limit on the prohibition of *other* forms of employment discrimination. See Gunderson and Hyatt in Chapter 6 and Gunderson (2003, 2004).

workers' human rights: judging individuals on the basis of their age rather than on their actual work performance. These findings are relevant to many Canadian provinces.

I begin by restating the claims made by proponents of the economic theory of mandatory retirement in scholarly research, judicial decisions, and employer usage. Then I investigate the behavioural assumptions that underlie the theory, focusing on the asserted voluntary nature of mandatory retirement and the perfect foresight of individual workers. Next I critically assess the putative beneficial effects of compulsory retirement, including the employment effects, worker productivity and training, and deferred compensation and incentives. Key implicit assumptions of the theory in these areas are that workers will continue working indefinitely if given deferred compensation and that there is no productivity-related self-selection by workers about when to retire. I consider the divergence between private and public perspectives on behaviour, calling into question the net fiscal and economic benefits of permitting contractual mandatory retirement. The preceding issues are instructively applied to an area often viewed as posing special problems for a ban on mandatory retirement—university professors and the tenure system. I conclude by examining some common characterizations of mandatory retirement and offering a summary of my findings.

The Claims of Economic Theory

Economic theory has been developed to explain mandatory retirement and to show the benefits that might arise for employers and workers from such agreements. American economist Edward Lazear produced the first formal model in 1979, the same year that University of Toronto economist James Pesando offered parallel intuitive insights.⁴ In essence, the theory states that an employer offers a pattern of wages and pension benefits that underpays its workers during early years, relative to their productivity, and overpays them during later years. This system of “deferred compensation” gives employees incentives to stay with the firm for a long time, accept training, and apply themselves diligently. It also allows the employer to invest in job-specific skills with some assurance that workers will stay long enough for the firm to reap the returns, and it reduces the employer's costs of worker turnover, hiring, and monitoring.⁵ By capping the period of “overpayments,” it is argued, mandatory retirement allows for more

⁴ See Lazear (1979) and Pesando (1979).

⁵ Note that wage rates below productivity levels will also be accepted by workers in their earlier years if they are gaining general human capital skills on the job that are readily transferable to employment elsewhere.

efficient agreements to be reached. It is further asserted that mandatory retirement gives employers a non-disputatious means to terminate workers with declining productivity at age 65. In Pesando's words, "banning [mandatory] retirement would lead to both the creation of costly new productivity measurements and a new arrangement of work rules, as well as the elimination of an effective dismissal procedure."⁶

Pesando along with another University of Toronto economist, Morley Gunderson, were early Canadian proponents of contractual mandatory retirement on economic grounds. In 1988 they summarized the supporting arguments as follows:⁷

Mandatory retirement is often justified on the grounds of opening up job and promotion opportunities for younger workers. ... Mandatory retirement may facilitate planning on the part of both employers and employees. For employers, having a known termination date to a particular contractual arrangement facilitates planning for replacements, pension payouts, training and upgrading ... For employees, a fixed retirement date pressures them to plan for their retirement and this, in turn, is likely to leave them better prepared for the eventuality of retirement. ... A fixed retirement date minimizes the need to monitor and evaluate the performance of older workers. ... [I]f mandatory retirement is banned, employers will have to monitor and evaluate the performance of their older workers more carefully. ... [E]mployers will be faced with the inevitability of having to dismiss some older workers. ... [S]ome older workers may be dismissed prior to what would have been their mandatory retirement age, and others will be subject to more scrutiny and evaluation. This in turn may jeopardize their human rights and affect the notion of their retiring with dignity. ... Mandatory retirement facilitates a deferred compensation system by providing a finite termination date to the contractual arrangement. ... [S]uch a deferred compensation system ensures honesty and work effort on the part of employees because they want to be retained in order to receive the deferred compensation.

In 1990 the Supreme Court of Canada rendered judgment in a group of cases challenging the mandatory retirement practices of several universities. In the leading case of *McKinney v. University of Guelph*, the majority judgment echoed the economic argumentation of Gunderson and Pesando, as follows:⁸

[Mandatory retirement] 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 and retire with dignity. Another important objective [is] 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. To put it in its simplest terms, mandatory retirement has become part of the

⁶ Pesando (1979, p. 4).

⁷ Gunderson and Pesando (1988, pp. 35-37).

⁸ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at 294-295, 236; henceforth cited as *McKinney*.

very fabric of the organization of the labour market in this country. ... The repercussions of abolishing mandatory retirement would be felt in all dimensions of the personnel function with which it is closely entwined: hiring, training, dismissals, monitoring and evaluation, and compensation.

This economic perspective on mandatory retirement continues to be cited by employers, as in a 2003 draft policy on post-retirement contracts by the University of British Columbia:⁹

There are sound reasons for [UBC's] mandatory retirement policy. These include:

- ensuring systemic opportunities for faculty renewal through the hiring and promotion of newly qualified faculty members. ...
- creating an environment in which it is acceptable to have a deferred compensation system that involves lower pay in earlier years and higher pay in later years.
- given the need for the University's tenure system, enabling individuals to retire from the University with dignity. Without mandatory retirement individuals who do not retire voluntarily must ultimately be dismissed for cause. This is undesirable and would necessitate detailed performance appraisals to justify each dismissal decision.
- encouraging and enabling faculty to plan in advance for retirement. ...
- enabling the University to plan for change and renewal.

Because of the influence and durability of the economic arguments used to support mandatory retirement, they warrant careful critical scrutiny. Without the defence of sound economic reasons, the clear violation of older workers' human rights by mandatory retirement would quickly lead to a ban on the practice.

Behavioural Assumptions of Mandatory Retirement

A key assumption of the economic analysis is that all agreements for mandatory retirement at age 65 are fully consensual among the parties concerned.¹⁰ As stated by Gunderson, mandatory retirement is "part of a private contracting arrangement between consenting parties ... mutually agreed to by employers and employees who generally have considerable individual or collective bargaining power."¹¹ That "consensual" characterization might be accurate if all agreements were between an individual employee and the employer, such

⁹ "Draft Policy #52: Retirement and Post-Retirement," advanced by the UBC administration for discussion, *Faculty Focus: Newsletter of the Faculty Association of the University of British Columbia*, Vol. 36, No. 7 (October 2003), pp. 10-12, at 10. Note that UBC was a party to one of the cases considered alongside *McKinney*.

¹⁰ In this section I question the assumption implicit in the mandatory retirement theory that all workers have the same preferences about when to retire, so that a collective decision will satisfy all of their needs. In a later section I introduce heterogeneity in the productivity levels of older workers as well as heterogeneity in their desired retirement age. Early Canadian advocates of mandatory retirement cited possible differences of preferred retirement ages between younger and older members of a union but asserted that the union would properly mediate (Gunderson and Pesando, 1988).

¹¹ Gunderson (2004, pp. 2-3).

as the employment contract of an executive that specifies a termination date or age. However, almost all workers subject to mandatory retirement are covered by collective agreements rather than individual contracts. The linkage between mandatory retirement and pension plans, most often found in unionized firms, is also very strong. In a sample of older workers from the US, 62 percent of workers with a pension plan had contractual mandatory retirement, and 86 percent of those with mandatory retirement had a pension plan.¹² In Canada mandatory retirement is highly concentrated in work covered by collective agreements or formal personnel policies, not individual contracts.¹³

Once an organization like a trade union intermediates between the wishes of employees and the employer, the consensual nature of the relationship for the individual worker is broken.¹⁴ The union officials may have a preference for mandatory retirement, perhaps as a way of opening positions for younger workers or as a way of cultivating support from members with many years ahead of them. Even if the union's leadership is fully responsive to its members, it will follow the preferences of its "median" voters. With respect to any issue, including the imposition of mandatory retirement, the union cannot satisfy the tastes of all its members. Those who would prefer to work beyond age 65, typically a minority, are compelled to accept the terms negotiated for all members of the union at that establishment.

One might argue that workers who anticipate that they will want to continue working beyond age 65 should simply find jobs in non-union firms or firms that do not practice mandatory retirement. Yet, they may work in an industry or occupation that is universally unionized, or they may work in a locale where there is one dominant unionized employer. Should such workers be expected to change their industry, occupation, or residence in order to find employment that does not bind them to retire at age 65? That kind of mobility may impose large costs on individuals in terms of retraining or relocation or loss of work by a spouse. And taking work with a non-union employer imposes a loss of wages and fringe benefits in most occupations.

¹² Lazear (1979, p. 1281). Note that these figures relate to a period prior to the abolition of mandatory retirement in the US.

¹³ Gunderson and Pesando (1988, p. 33).

¹⁴ This point was acknowledged in the Supreme Court's majority judgment by reference to situations "... where a collective agreement may not really find favour with individual employees subject to discrimination." *McKinney*, at 233.

Moreover, some groups may have a stronger preference for working beyond 65 than the average worker. Among American workers covered by mandatory retirement agreements, it was found that the specified retirement age was higher in agreements involving women than men and those involving blacks than whites.¹⁵ Women who entered the labour force relatively late, after raising children or marriage breakdown, and recent immigrants may wish to work until later ages than “typical” non-immigrant male workers. These groups often need to work until a later age to accrue adequate pension benefits or savings for their retirement. These concerns are of particular salience to women with their longer life expectancies. To the extent that these workers are employed alongside “typical” male workers who favour compulsory retirement, their ability to choose is constrained. It is telling that the two women justices took the minority side in the Supreme Court’s 1990 decisions on mandatory retirement. They alone supported the elimination of mandatory retirement, and Madam Justice Wilson observed that:¹⁶

women workers generally are unable to amass adequate pension earnings during their working years because of the high incidence of interrupted work histories due to child-bearing and child-rearing. Thus, the imposition of mandatory retirement raises not only issues of age discrimination but also may implicate other s. 15 rights as well [i.e. sex discrimination].

Even if all mandatory retirement were clearly based on consensual agreements between individuals and their employers, one might question the ability of most people to predict their situation and needs many years into the future. The assumptions of perfect foresight and rational choice by younger workers—both essential for the optimality of contractual mandatory retirement—have previously been challenged.¹⁷ Moreover, economic analysis now recognizes the possibility of myopic behaviour by younger workers in their lifetime savings and retirement planning decisions.¹⁸ Most younger workers find it difficult to forecast their financial or health status or even marital and dependency status at age 65. Many who might, when young, like to retire at 65 will find that when they reach that age their circumstances are quite different than anticipated. For example, some workers will find that they are far short of their lifetime savings

¹⁵ Lazear (1979, p. 1282).

¹⁶ *McKinney*, at 415-416. A classic example of the female worker entering a job late in life was that of Olive Dickason, who completed her doctorate in 1977 at age 57, worked as a professor at the University of Alberta to age 65 in 1985, and continued working while her legal challenge of mandatory retirement wended its way through the courts, ending in 1992 with an adverse ruling by the Supreme Court of Canada in the case *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103. Dickason, who was part-Métis, pioneered the field of Canadian Aboriginal history.

¹⁷ See Krashinsky (1988).

¹⁸ See Diamond (1977) and Diamond and Köszegi (2003).

goals on account of marital dissolution, child support payments, the costs of second families, unexpectedly low earnings, or simply poor investment returns. Others will find that they are continuing to like work and its social connections more than they had anticipated.

Those individuals who are subject to mandatory retirement yet would like to continue working beyond age 65 will be “involuntarily retired” from their current job. Typically, even in those provinces that outlaw age discrimination beyond 65, seniors face significant difficulties in finding work that fully utilizes their skills and experience. The time needed to find work after being laid off is usually much longer for workers aged 55 to 64 than for workers aged 25 to 54, and this disadvantage extends to workers terminated by mandatory retirement at age 65. Older workers are twice as likely as younger workers not to have a new job one year after layoff—63 percent versus 30 percent.¹⁹ Older job seekers are also shut out of most positions that require much job-specific training by employers, who cannot count on a long enough period to recoup their investment in older workers. Most of these workers suffer a significant earnings decline in their new jobs reflecting the loss of job-specific skills and experience that were useful only to their previous employer.

In short, the behavioural assumptions needed to justify mandatory retirement are at best relevant to one-to-one bargaining between individual workers and their employers. The intermediary role of unions in this process disrupts the consensual nature of the agreements for many workers. Even if they can find other work that does not carry mandatory retirement, these individuals are likely to bear heavy costs from doing so. And even where younger workers make consensual agreements to bind themselves to a fixed retirement age, they will often find their circumstances in later life have changed in ways that they could not have predicted. Most workers who are forced to retire by mandatory retirement but wish to continue working will suffer large earnings losses in their alternative employment.

Asserted Beneficial Effects of Mandatory Retirement

The proponents of contractual mandatory retirement claim that allowing the practice yields significant positive benefits to workers, their employers, and the economy more broadly. A statement of these putative benefits in the contemporary Canadian context asserts that

¹⁹ Statistics Canada (1998, p. 22).

mandatory retirement serves to:²⁰

open job and promotion opportunities for younger workers ... [and] facilitate retiring with dignity and reduce the need for more constant monitoring and evaluation and possibly ultimate dismissal of older employees ... [and] enable deferred compensation [which in turn serves] ... purposes, such as reducing unwanted turnover and shirking, enabling retrospective and periodic monitoring, and encouraging worker commitment, loyalty and bonding to the company.

Almost all these benefits were also promulgated in the original analysis supporting mandatory retirement, with the exception of the first item. Lazear intended his theory to explain the practice of mandatory retirement as self-interested mutually beneficial behaviour by employers and their *current* employees; he rejected the “young worker” view as an explanation of mandatory retirement.²¹

It is useful to assess all of these claimed benefits for allowing mandatory retirement, including the often-cited “young worker” view. If the benefits are found to be limited, absent, or even negative, then banning mandatory retirement could prove to be innocuous and perhaps even beneficial. I assess the claims under three headings: employment effects; worker productivity and monitoring; and deferred compensation and incentives. My analysis finds the claims to be mostly postulated rather than proven, and the little evidence that exists is sketchy, often inconclusive, and more suggestive of social costs than benefits associated with allowing mandatory retirement.

Employment effects

One of the most commonly cited arguments for mandatory retirement is that it is needed to open employment and promotion opportunities for younger workers. This point has been asserted by leaders in business, unions, and public sector institutions such as universities. For example, the president of the Ontario Federation of Labour was quoted as stating that mandatory retirement “provides job opportunities for young people coming into the workplace.”²² Indeed, this “young worker” argument was a part of the evidence accepted by the Supreme Court of Canada in its decisions upholding mandatory retirement. The majority judgment stated, “The problem of unemployment would be aggravated if employees were unable to retire their long-

²⁰ Gunderson (2004, p. 3).

²¹ Lazear (1979, p. 1263); Gunderson and Hyatt in Chapter 6 similarly reject this common argument for mandatory retirement.

²² Cited in Krashinsky (1988, p. 50). Also see the earlier quotation from the University of British Columbia about “faculty renewal” and Chapter 8 by Klassen and Forgione.

term workers. ... [T]here is a significant correlation between those who retire and those who may be hired.”²³ Nevertheless, the Court’s decision did not give much weight to this point, even though it was ruling in the context of universities where limited public funding would mean that deferred retirements could slow the hiring of young academics.

The argument that mandatory retirement is needed to open jobs for younger workers runs counter to elementary economic principles. It assumes that the economy offers only a given total amount of work—what economists call the “lump-of-labour” fallacy. While job displacement may arise in the very short run, in narrowly defined occupations, or in recessionary periods, over the long run the economy can create as many jobs as there are workers able and willing to fill them. Indeed, an economy’s long-run growth is constrained by the availability of workers with the requisite skills, motivation, and experience. Moreover, young workers are hardly a substitute for the skilled and experienced workers who are forced to leave on account of mandatory retirement provisions. An early study of the effects of banning mandatory retirement in Ontario reached a similar conclusion: “The argument that ending compulsory retirement would reduce the job opportunities available in the labour force is not substantiated by economic analysis ...”²⁴

The “young worker” argument is particularly archaic under contemporary labour market conditions and those forecast for future years. The Canadian economy is entering an era of skill shortages and even shortages of workers with more limited skills. Training young workers and upgrading the skills of those already at work must be complemented by policies to encourage older workers to continue contributing their skills as long as possible. Mandatory retirement policies not only cut short the working lives of some older workers, but they also cause some of the most productive middle-aged workers to depart to other jurisdictions that do not allow the practice. The Ontario Human Rights Commission cited this phenomenon arising at Ontario universities.²⁵

Those who fear a flood of elderly workers if mandatory retirement were abolished should consider the current situation. Two-thirds of workers choose to retire before age 65, 43 percent retire before age 60, and the average age of retirement for all workers was 61 years in 1999,

²³ *McKinney*, at 295, 287.

²⁴ Pesando (1979, p. 23).

²⁵ Ontario Human Rights Commission (2001, p. 37); also see the examples cited by MacGregor in Chapter 10.

down more than two years since 1989. Still, 11.8 percent of the population aged 65 to 69 were active in the labour force in 2001, and more than one-fifth of all workers aged 45 years and older planned to retire after 65 or never to retire.²⁶ About half of Canadian workers are in jobs with mandatory retirement, and an estimated 6 to 20 percent of them would like to work beyond that age. Hence, an additional 3 to 10 percent of workers would choose to continue in their jobs if mandatory retirement were banned.²⁷ However, the total employment effect of a ban on mandatory retirement is likely to be smaller, as some workers now forced to retire find other jobs or continue working on special terms with their original employer.

The policy-relevant questions about the employment effects of mandatory retirement are how many would continue to work and how long they would work if not constrained by the practice. The only recent empirical study using Canadian data found these effects difficult to estimate reliably but suggested that the total employment impact of abolishing mandatory retirement would be quite small. An earlier empirical study, undertaken just several years after Manitoba and Quebec banned mandatory retirement, found the effects on labour force participation rates of people aged 65 and over to be statistically insignificant.²⁸ An American study that focused on university professors found much larger impacts of abolishing mandatory retirement, which is not surprising in view of that occupation's high pay and job satisfaction and limited physical demands.²⁹ In comparative terms, the proportion of persons aged 65 to 69 who work is twice as high in the US (which bans contractual mandatory retirement) as in Canada, though factors other than mandatory retirement may explain much of the difference.

Overall, the available evidence suggests that the abolition of mandatory retirement is unlikely to have a major impact on average retirement ages or years of work in Canada. Hence, any potential adverse effects on younger workers are minimal, or non-existent, but the gains in terms of an enlarged skilled workforce and reduced public finance strains are similarly limited.

²⁶ These statistics are taken from Human Resources Development Canada (2002).

²⁷ These figures were provided in Gunderson (2004, p. 2). The half coverage by mandatory retirement was confirmed in a recent survey by Hewitt Associates (2003, p. 5), which found that 52 percent of Canadian companies had an organization-wide mandatory retirement policy (and a few more percent with such policies on an incomplete basis), though the survey's exclusion of firms with fewer than 100 employees likely overstates the figure for the overall labour force.

²⁸ Shannon and Grierson (2004); Reid (1988). Additionally, Chapter 9 by Reid, Cheng, and Shea finds no significant impact on youth unemployment from bans on mandatory retirement by Australian state and federal governments in the 1990s.

²⁹ Ashenfelter and Card (2002).

To achieve the full benefits of an expanded workforce of older workers, the abolition of mandatory retirement would need to be complemented by adaptations of other public policies and workplace practices.³⁰

The related claims that mandatory retirement opens promotion opportunities for younger workers—and that banning the practice would significantly impede promotions—are equally flawed. Even if this did not run afoul of the “lump of labour” fallacy, the size of the effect would be small. Evidence presented later suggests that a ban on mandatory retirement would raise the average retirement age for the overall labour force by just a fraction of one year, most likely under four months. Hence, such a ban would at most simply defer the average age for promotions of younger workers by several months. That hardly constitutes a significant blockage for the promotion of younger workers, although the delays could be longer in some occupations. The delays could also be lengthened in the transition period from a situation with mandatory retirement to a new “steady state” without it.

Worker productivity and monitoring

A central argument for allowing mandatory retirement is that the productivity of workers declines as they approach age 65 and in the years beyond.³¹ Advocates argue that contractual mandatory retirement allows for the graceful discharge of workers without the need for harsh and costly monitoring of their performance to determine when they are no longer productive.³² Indeed, in the *McKinney* case, the Supreme Court justices accepted evidence that “on average there is a decline in intellectual ability from the age of 60 onwards,”³³ which they used to justify accepting age 65 as a basis for allowing mandatory retirement. It is ironic that the mean age of the justices deciding the case was 65, three were over 65, and Supreme Court justices can continue holding office to age 75. This irony is heightened by the fact that the case concerned the forced retirement of professors, whose work entails physical and intellectual demands not unlike those of Supreme Court justices.

³⁰ For discussion of these issues, see Gunderson (1998) and Kesselman (2004).

³¹ However, in the formal economic theory of contractual mandatory retirement, it is not necessary that the productivity of older workers decline, but simply that their compensation exceeds their productivity.

³² For various statements of this view, see Lazear (1979), Gunderson and Pesando (1988), and Gunderson (2003, 2004). Here I consider the productivity of older workers as an exogenous matter of health status, while in the next section I consider the worker incentive aspects of productivity; both are subsumed in the economic model.

³³ *McKinney*, at 289.

In empirical studies of the determinants of individual worker performance, there is little evidence that ability or productivity declines with age except for occupations that rely heavily on physical strength or sensory acuity.³⁴ The typical pattern is for a worker's productivity to rise over most of the lifetime and then to level off for the last 10 or 15 years. Even if an individual's work skills do eventually decline with advanced age, there is no evidence that this occurs abruptly at 65 or as early as 65 in most occupations. In white-collar work, one study reported that "reliability and especially experience seemed to compensate for the effects of somewhat reduced physical abilities."³⁵ Moreover, those workers who do experience declining physical, sensory, or mental faculties are more likely to retire voluntarily prior to age 65. Current high rates of early retirement reflect this self-selection behaviour as well as responses to the financial incentives in private and public pensions and taxes.

Ordinary economic behaviour ensures that those workers with declining abilities at work will be the ones most likely to choose early retirement. Individuals' labour force participation and retirement decisions can be modeled as a utility-maximizing choice.³⁶ Utility is derived from income from all sources (including earnings, savings, and pensions), from leisure time, and from job satisfaction. It is natural that the utility of working will decline for individuals as their health status declines, as work becomes more demanding, and as their productivity and job satisfaction declines. Some workers with falling productivity will face declining earnings, but even with unchanged pay levels they will be more inclined to choose early retirement. As noted in a Labour Canada report, "poor performers are usually unhappy in their jobs and are anxious to leave as soon as feasible."³⁷ Hence, most workers who find their productivity declining tend to self-select into early retirement.

Advocates of mandatory retirement argue further that banning the practice would necessitate costly systems to monitor the performance of older workers to catch those who wish to stay on too long. The noted self-selection process will limit the numbers of older workers who fall into this category. Moreover, given their age, the work period ahead of them is limited in

³⁴ For a review of studies, see Sterns et al. (1996). Hellerstein et al. (1999) finds that the productivity of workers continues to rise with age, even for the age group 55 and over, though not with statistical significance.

³⁵ Richter (1992, p. 181).

³⁶ For a textbook presentation of the formal economic model, see Benjamin et al. (2002, pp. 47-49).

³⁷ Labour Canada (1985, Annex, p. 5).

any event. Employers need to be more concerned about any younger workers whose productivity is poor or declining. Those workers have far more years ahead of them that they can constitute a burden to their firms, and they do not have the financial options of public and private pensions to leave the workforce early. In short, employers need effective processes to monitor the productivity of workers at all ages, and little if anything additional would be needed for older workers in the absence of forced retirement. Despite the claims, there is no evidence of costly new monitoring processes in the Canadian jurisdictions that have banned the practice.

Deferred compensation and incentives

Another key aspect of the theory and claims relating to mandatory retirement is that there must be a terminal point for the worker's employment in order for deferred compensation to provide effective incentives. Deferred compensation is the practice of paying workers less than their productivity in earlier years and more than their productivity in later years with the firm. This deferral can be achieved by a steeply inclined age-earnings profile and by deferred benefits such as pensions and post-retirement benefits that grow with the worker's tenure. The professed purpose of deferred compensation is to augment workers' incentives to work hard, so as not to lose the deferred compensation if they are "shirking" and get fired, and incentives to remain with the firm a long time, so that the employer can reap the returns from its investments in training.

Empirical research offers mixed findings on the existence of deferred compensation, though it does appear to be present in skilled occupations. While some studies are supportive of deferred compensation, others find that both productivity and compensation rise in lockstep with the worker's age, contrary to deferred compensation.³⁸ Yet, an age limit on employment, as imposed by mandatory retirement, is not crucial to this process. Proponents of mandatory retirement have asserted, "Without such a termination date, compensation could exceed productivity *indefinitely* and hence the contractual arrangement *could not exist*."³⁹ That claim is puzzling, in that workers continuing beyond age 65 would not work "indefinitely"; for most it would be no more than a few additional years. And the previously cited fact that the majority of

³⁸ For supportive findings, see Kotlikoff and Gokhale (1992) and Prendergast (1999, pp. 47-49); for opposing findings, see Hellerstein et al. (1999).

³⁹ Gunderson and Pesando (1988, p. 36; emphasis added). This assertion continues to be made, as in a recent labour economics textbook: "such a contractual arrangement requires a termination date for it to exist. Otherwise, employers run the risk of paying wages in excess of productivity for an indefinite period ... In such circumstances a contractual arrangement involving deferred wages could not persist." Benjamin et al. (2002, p. 407).

workers choose early retirement casts further doubts about the salience of a cutoff age.

For example, if all workers now constrained by mandatory retirement who wish to continue beyond age 65 (about 3 to 10 percent of the labour force) were to work an additional three years, that would add only about one to four months to average working lives.⁴⁰ That figure seems hardly large enough to upset deferred compensation arrangements and the putative associated efficiency gains. If deferred compensation were one-third of the worker's productivity (or one-fourth of total compensation) in later years, adding one to four months to the average working life would constitute just 2 to 8 percent of one year's earnings. Averaged over the last 20 years of work in which there is positive deferred compensation, the impact is a trifling 0.1 to 0.4 of 1 percent of total compensation for that period. And based on our earlier analysis, those choosing to work longer would typically be workers with above-average productivity, so the extent of any deferred compensation would be minimized.

Deferred compensation could adjust to the abolition of mandatory retirement in many ways, if in fact there were any adverse effects. The age-earnings profile could be flattened or even decline beyond a specified period for workers with below-average productivity, based on performance reviews. Various adjustments to public and private pension schemes could be implemented, and early retirement incentive schemes could be modified. Although mandatory retirement has been abolished in the US since 1986, there has been no ensuing evidence of reduced incentives to work hard or to stay with the employer. If deferred compensation schemes did play a role in these incentives, suitable adjustments to those schemes must have occurred. Indeed, empirical analysis suggests that age discrimination laws, akin to but broader than a mandatory retirement ban, have actually strengthened long-term incentive contracts by steepening age-earnings profiles in the US.⁴¹

One might also question whether deferred compensation is as useful an incentive device for the purposes of firms' training their workers as in earlier years. Given the more rapid obsolescence of worker skills, training has become a more recurring process than a one-time event at the start of a worker's tenure with the firm. Hence, the returns to the firm's investments

⁴⁰ A survey by the Conference Board of Canada found that "those few employees presently aged 65 who elect to continue working will, in general, leave their employment prior to age 70 and will, on average, probably work for a period of three years beyond age 65." (Dunlop, 1980, p. 40).

⁴¹ Neumark and Stock (1999).

in training must be reaped more quickly, and the role of deferred compensation to purchase lifetime loyalty will have diminished. This point also means a firm can invest in training its older workers with some expectation that it will obtain an adequate return before they retire. Additionally, the declining lifetime security of jobs in many occupations weakens the role of deferred compensation in labour market incentives. The economic theory of contractual mandatory retirement assumes that workers spend all or almost all of their working lives with a single employer; in fact, very few workers retire from the same employer that hired them when they first began full-time work.

Public versus Private Perspective

Even if the mandatory retirement process were not deficient on the grounds already cited, it has further problems from a public policy perspective. The practice of mandatory retirement could be socially optimal if the parties directly involved—employers and their employees—captured all the benefits and carried all the costs of their agreements. However, mandatory retirement also imposes costs on the rest of society, so that these private, voluntary agreements may not be in the public interest. External costs take the form of fiscal impacts (on tax revenues and public expenditures) and economic impacts arising through the tax burden and the labour market. Because of these external costs not recognized by the parties to mandatory retirement agreements, society may have an interest in banning or at least restricting the practice.

Fiscal impacts

With mandatory retirement some workers who would like to continue working beyond age 65 are involuntarily terminated from their jobs. While some workers may find alternative work after being forced to retire, that work often pays significantly less, and others will not succeed in finding work. Hence, many persons terminated on account of mandatory retirement will pay less in income, sales, and payroll taxes, and some will begin drawing public pension benefits earlier than if they had been allowed to continue working. The adverse impact on tax revenues would be offset if the forced retirements opened up equivalent, equal-paying jobs for unemployed workers; our earlier analysis suggests that that is not the case. Taken together, the decreased tax revenues and increased public pension costs from mandatory retirement will aggravate the fiscal strains that will arise in future years from the bulge of retiring baby boomers.

On the tax side, part of the reduced earnings from those involuntarily terminated by mandatory retirement provisions will be offset by earlier withdrawals of taxable funds from tax-

deferred savings plans such as company pensions and RRSPs. Yet those additions to the tax base represent simply an acceleration of funds that would have been withdrawn and taxed in later years, if those workers had been allowed to continue. Taxable withdrawals will also be less than the lost earnings, so that mandatory retirement exerts a negative net impact on the taxable base. If mandatory retirement were banned, it would be desirable to raise the age for mandatory distributions from tax-deferred savings plans above the current 69; alternatively, individuals' mandatory distributions could be reduced by the amount of their labour earnings.

Contractual mandatory retirement can also increase fiscal strains on the expenditure side of federal budgets.⁴² For applicants aged 65 and over, the Canada Pension Plan (CPP) does not impose any work or earnings test in order to receive benefits. For delayed start of benefits beyond the standard age of 65, the benefit payment is increased by 0.5 percent per month up to the age of 70, but this provision under-compensates deferred beneficiaries relative to the actuarial cost. Hence, workers who begin their CPP benefits earlier than they would have preferred on account of mandatory retirement cost the program money. The Old Age Security (OAS) pension is paid at age 65 irrespective of work, but the reduced earnings for some workers caused by mandatory retirement means that there is less tax clawback of OAS payments from higher earners. The largest impact of mandatory retirement on budgetary costs arises through the income-tested Guaranteed Income Supplement (and the companion Allowance) program. Some who would have continued working beyond 65 will be forced to retire and find their incomes decline to a point that they draw GIS benefits.

Additional costs are imposed on provincial budgets from the higher health care costs of workers compelled to retire earlier than they wanted.⁴³ A variety of medical and dental services and prescription drugs are provided on an income-tested basis by provincial programs (often on more generous terms for seniors than others). Workers forced to retire are more likely to have incomes fall to the levels at which such benefits are covered. Moreover, those forced to retire by mandatory retirement provisions who do succeed in finding other work are less likely to obtain

⁴² The number of OAS beneficiaries is projected to rise from 3.8 million in 2001 to 8.4 million in 2030 and the number of GIS beneficiaries from 1.4 million to 2.2 million. Annual OAS expenditures are projected to rise from \$19.5 billion in 2001 to \$89.5 billion in 2030 and annual GIS expenditures from \$5.3 billion to \$18.0 billion. Office of the Chief Actuary (2002, pp. 25, 29).

⁴³ Several provinces pay supplementary cash benefits to lower-income GIS recipients, and their budgets are also impacted by workers who are forced to retire.

jobs with extended health and dental insurance coverage. There is also growing evidence that physical and mental inactivity can spur the degenerative diseases that afflict many older people, so that forced retirement may further increase public health care costs. One study that overcame the problem of isolating causation found that increased labour force activity by seniors reduced their mortality rates. Another study found that persons who were forced to retire earlier than they wished experienced a lower quality of life than those who had a choice in their retirement.⁴⁴

One might question whether the fiscal impacts of people's work and retirement decisions are relevant to public policy. Shouldn't policy respect people's preferences and eschew attempts to prolong working lives? From the public policy perspective, the appropriate reference point is the work and retirement choices that individuals would make in the absence of the distortions imposed by taxes, public pensions, and regulation of private pensions. However, given that most such public policies are tilted toward incentives for shorter work lives and early retirement and against longer work lives and phased retirement, the fiscal impacts are relevant to sound public policy. The fiscal impacts of biases from mandatory retirement practices that also shorten working lives relative to individual preferences are similarly germane for policy formulation.

Economic impacts

To the extent that mandatory retirement causes tax revenues to be lower and public expenditures to be higher, this practice puts upward pressure on tax rates. Higher tax rates increase the distortions of the economy and can reduce its efficiency and growth, though the extent of this damage depends on the exact form of the taxes that are increased. The upward pressure on tax rates from mandatory retirement will only compound other powerful stresses on public finances and tax rates over the next generation. The demographics of the baby boom and bust will radically alter the economic landscape. For the first time in Canadian history, retirees from the labour force will outnumber new entrants. From the current four workers per senior, the balance will shift to just two workers per senior by mid-century.⁴⁵ Allowing a practice such as mandatory retirement that exacerbates these problems runs counter to desirable public policy.

Contractual mandatory retirement can also have a more directly adverse impact on economic performance by withdrawing some of the most skilled and experienced workers before

⁴⁴ Snyder and Evans (2002); Blane et al. (2002).

⁴⁵ These figures are based on projections that assume the continuation of existing trends in immigration, birth, death, and participation rates. See Baxter and Ramlo (2003, p. 21).

they want to depart. Even when those individuals can find alternative work with another firm, that work typically does not exploit the full firm-specific skills and knowledge that they had acquired over years in their previous job. Older workers bring to the workplace a wealth of institutional knowledge and networking connections that cannot be replaced by younger workers. While their current employer could rehire these workers under a special contract immediately after retiring them, often tradition or institutional rigidities (including collective agreements) stand in the way. As the Canadian economy enters an era of growing skills shortages, any policy that allows many of the most seasoned workers to be forced out of their jobs seems counterproductive.

Just like women were the major driver in the Canadian labour force over the past two generations, older workers have the potential to play a similar role in the future. It is forecast that by 2010 fully 70 percent of the net increase in the working age population from 2000 will arise in ages 55 to 64, and by 2020 all of the net increase will be in that age group.⁴⁶ Moreover, growth in the population aged 65 and above is perched to accelerate rapidly. It makes little sense that average retirement ages have been declining at the same time that life spans have been rising, health status of older persons improving, and the physical demands of most jobs falling. Increased time spent in formal education before starting work has further truncated the period of productive work. A person entering the workforce at age 22 and retiring at 61 is spending just 39 years at work, barely half the lifetime. As argued by the OECD, a prime challenge for policy will be to raise the average age of retirement in order to obtain a better balance between people's economically active lives and their period of retirement.⁴⁷

Demographic trends in addition to improving health and life expectancies are rapidly becoming more favourable for the extended employment of older workers. Canadians have been increasing their average educational levels, most notably for younger cohorts but progressing over time to older cohorts. In 1990 almost two-thirds of the population aged 55 to 64 had less than high school completion, but by 2010 this figure will fall to just one-quarter. In 1990 only one-fifth of those aged 55 to 64 had a college, university, or technical degree, a figure that will

⁴⁶ Robson (2001, p. 7); also see the discussion of population aging by Kerr and Beaujot in Chapter 3.

⁴⁷ For evidence on and analysis of this issue in a cross-country context, see the work of the OECD (2001, chapter 5).

jump to nearly one-half in 2010.⁴⁸ Similar advances in educational attainment will apply to the group aged 65 to 74 ten years later, in 2020. Hence, failure to undertake policies that reverse early retirements and that allow individuals to continue working beyond age 65 will have much more adverse economic impacts than in the past.

Mandatory Retirement and Post-Secondary Faculty

Post-secondary faculty members offer a demanding test of my critique of the economic reasoning used to support mandatory retirement policies.⁴⁹ Professors are the ultimate “knowledge workers” and personify a sector of the labour force that is growing in relative size and economic importance. Their work entails long training and experience, high self-direction, little direct supervision, long-run assessment, and high pay and job satisfaction. When mandatory retirement was banned in the US, professors extended their average working lives more than other occupations.⁵⁰ Yet professors also enjoy another condition of employment that makes it harder for their employers to terminate them if their performance is found to be flagging—the tenure system. This point was cited by the Supreme Court’s majority decision in the *McKinney* case:⁵¹

Mandatory retirement is ... intimately tied to the tenure system which undergirds the specific and necessary ambience of university life and ensures continuing faculty renewal, a necessary process in enabling universities to be centres of excellence on the cutting edge of new discoveries and ideas.

Legislative actions banning mandatory retirement have reflected concern for the situation of universities and their faculties. The United States passed the Age Discrimination in Employment Act in 1967 banning mandatory retirement in general but, in response to pressures from college and university administrators, allowed the continued mandatory retirement of

⁴⁸ These figures were compiled from the Labour Force Survey by the Régie des rentes du Québec (2003, p. 23). To the extent that longevity is correlated with educational level, the figures for persons aged 65-74 in 2020 are likely to be even more favourable than for those aged 55-64 in 2010. For Census figures on educational attainment by seniors in 2001, see Duchesne (2004, pp. 6-8).

⁴⁹ Also see the deeper examination of issues of mandatory retirement and universities in three chapters of this volume. Note that the focus of judicial rulings on mandatory retirement, particularly by the Supreme Court of Canada, on universities and other public-sector employers is explained by the fact that the Charter guarantees of equality apply only to the actions of governments; regulation of private-sector practices falls under the jurisdiction of provincial human rights legislation. The majority judgment in *McKinney* was that the actions of a university do not constitute governmental actions and hence do not warrant Charter protection.

⁵⁰ See the evidence in Ashenfelter and Card (2002). MacGregor in Chapter 10 reports that University of Calgary faculty (who do not face mandatory retirement) have an average retirement age two years higher than that of University of Alberta faculty (who do have mandatory retirement).

⁵¹ *McKinney*, at 234.

faculty members at age 70.⁵² Congress terminated this exemption in 1994, thus prohibiting mandatory retirement for faculty at US post-secondary institutions. When Manitoba passed legislation to ban mandatory retirement in 1982, university faculty members were included in this ban. However, 1996 amendments to the University of Manitoba Act exempted universities from the ban on the basis that age is a “*bona fide* occupational requirement” (BFOR) for academics.⁵³ Subsequently, the three Manitoba universities instituted mandatory retirement under collective agreements.

Typically an exemption from mandatory retirement for reasons of age being a BFOR is restricted to occupations where individual abilities cannot be reliably assessed and where errors of judgment or action can carry catastrophic or irreversible consequences. Examples include airline pilots, firefighters, police, and judges; exemptions for occupations of these kinds are found in federal and provincial legislation even where mandatory retirement is otherwise prohibited. It is dubious whether the errors of omission or commission of an occasional bumbling professor who clings to office too long carry any such dire consequences. Ten years after abolishing mandatory retirement for faculty, Harvard University students expressed their support for older professors as follows:⁵⁴

Simply put, older professors are some of the most valuable teachers at Harvard. The faculty who choose to keep working late into their lives do so out of passion. Often they love to teach and excel at it; others stay on because their eclectic research interests still awaken curiosity even after decades of study; and for many more it is a combination of the two. For undergraduates, the chance to interact with these dynamic professors and hear first-hand about their storied careers is one of the most exciting and unique aspects of being a Harvard student. We are grateful to these professors for dedicating their lives to academia.

My earlier challenges to the economic assumptions of mandatory retirement can be tested in the context of retirement for professors. First, the issue of making way for younger faculty members will have diminishing significance as growing shortages of candidates with the requisite training and abilities become universities’ main problem. Indeed, the application of mandatory retirement in most Canadian universities has become a competitive disadvantage, as

⁵² The legally permissible mandatory retirement age for faculty members in the US was raised to 70 in 1982. For a brief chronology of these developments, see Ashenfelter and Card (2002, pp. 957-959).

⁵³ In Chapter 10, McGregor attributes the Manitoba amendments to retribution by a provincial government for the bitter but successful faculty strike of the mid-1990s.

⁵⁴ The Crimson Staff, “The Process of Aging,” *The Harvard Crimson*, February 23, 2004. Also see Rebecca D. O’Brien, “Older Faculty Stay on at Harvard,” *The Harvard Crimson*, February 12, 2004, for a detailed account of the rewards and challenges of older professors; seven percent of Harvard’s tenured professors are over 70.

high-performing younger and middle-aged professors seek out jurisdictions where they will be allowed to continue working beyond age 65. Second, those professors who would choose to work longer tend to be the most energetic and productive individuals, following my economic analysis of self-selection and as confirmed by Harvard University students' observations. This point receives further confirmation from a study finding that professors whose work is weak or unsatisfactory are more likely than others to retire early even with mandatory retirement.⁵⁵

Third, a growing contingent of the professoriate is coming from women and recent immigrants, both tending to begin their academic work lives in Canada later in life. For women this delayed start often results from the combination of years taken for child rearing plus the time for completion of graduate studies.⁵⁶ For both women and immigrants, the ability to work beyond 65 is often needed to accrue adequate pensions.

Deferred compensation, a key element in the economic theory of mandatory retirement, also plays a problematic role in the academic setting. The market for academics (like other professionals, business executives, and workers with advanced technical and creative skills) is national and international. If universities in provinces that allow mandatory retirement attempt to depress salaries for younger faculty and boost salaries for senior faculty, they will find it difficult to attract promising junior candidates. They are pressed to imitate the flatter lifetime salary profiles that the economic theory predicts will prevail at institutions not practicing contractual mandatory retirement.⁵⁷ Hence, there is little scope for some universities to pursue greater deferred compensation than the general pattern, which for top academics is set by American institutions without mandatory retirement. This point also challenges the implicit assumption in the theory that workers will spend all, or almost all, of their lives with a single employer. In the highly mobile market for academics, particularly the top talent, the more typical pattern is multiple employers over a lifetime.

In its majority judgment in *McKinney*, the Supreme Court suggested that a ban on

⁵⁵ Necheles-Jansyn (1983).

⁵⁶ See the compelling personal account by McKenzie Leiper in Chapter 12.

⁵⁷ The age-wage profile for academics has flattened sharply over the past generation. Krashinsky (1988, p. 47) cites a ratio of beginning to terminal salaries of 2.5 for professors at the University of Toronto in 1984; currently that ratio is less than 2.0 (and close to 1.5 for economists). This likely mirrors growing salary compression at US universities, explained in part by the hike in mandatory retirement age to 70 in 1982 and the abolition of mandatory retirement in 1994.

mandatory retirement at universities would be incompatible with the tenure system. This view was based on the assumption that many older professors would need to be dismissed but that tenure would prevent such dismissals. However, in a dissenting opinion Madam Justice L'Heureux-Dubé asserted:⁵⁸

There is no convincing evidence that mandatory retirement is the quid pro quo of the tenure system. The value of tenure is threatened by incompetence, not by the aging process. The presumption of academic incapacity at age 65 is not well founded. The discrepancies between physical and intellectual abilities amongst different age groups may be more than compensated for by increased experience, wisdom and skills acquired over time. There is therefore no pressing and substantial objective addressed by the mandatory retirement policy.

In fact, despite the abolition of mandatory retirement more than two decades ago in Quebec and one decade ago in the US, tenure systems have remained in place at almost all such institutions and continue to function well. This situation suggests no inherent conflict between the tenure system and a prospective ban on mandatory retirement for faculty members.

University administrations have at their disposal diverse tools for identifying and releasing faculty members, both over and under age 65, who are performing poorly. Based on inferior evaluations, individual salaries can be frozen and thus reduced over time in real terms. Many institutions already use selective incentives for early retirement to weed out low performers, and these can be applied to older faculty members as well as those under 65. For faculty whose research has flagged but who continue to teach effectively, work can be shifted toward greater teaching, thus releasing younger faculty to undertake more research. Similarly, many older faculty members are highly effective as administrators and can assume more of that task from younger colleagues. Universities without mandatory retirement can also assist older professors in assessing their role and in making retirement plans; for example, Harvard University uses “discreet one-on-one advising” to counsel older professors and work out interim plans, often with phased retirement and continued access to office and library facilities.⁵⁹

Thus, even in the restrictive setting of university professors and the tenure system, the economic arguments for retaining mandatory retirement do not hold up. There already exist adequate provisions for assessing performance, for shifting workloads where appropriate, and for inducing workers to retire where needed. Contrary to the fears about disputatious firings cited by supporters of mandatory retirement, there are methods for instituting phased retirements,

⁵⁸ *McKinney*, at 244-245.

⁵⁹ The Crimson Staff, “The Process of Aging,” *The Harvard Crimson*, February 23, 2004.

continuing university connections, and departures with dignity. In the relatively rare cases of malfeasance or incompetence, and where an individual resists moves to terminate, older faculty members do not raise any issues not already faced by university administrations for younger faculty. The evidence from Quebec and the US is that professors over 65 do not present any more problems than do younger professors. Also, older professors depart more willingly in view of their larger accrued pension entitlements.

Characterizations of Mandatory Retirement

Those who support permitting contractual mandatory retirement have advanced various characterizations to defend the practice. These ways of viewing mandatory retirement are outside the formal economic model but are not entirely unrelated. One common critique is that a ban on mandatory retirement is just the thin edge for further policy changes to weaken both private and public pensions. If workers can hold their jobs indefinitely, it is argued, that would give employers and governments an excuse to reduce or delay pension benefits. This point is expressed most often by trade unions, which have fought hard for existing pension provisions.⁶⁰ Yet, the issue of delaying the age for benefit entitlement, most often proposed for public pensions, is fully separable from the issue of banning compulsory retirement. Nevertheless, if extending productive working lives is seen as a desirable goal in the context of an aging population, healthier older workers, and less physically demanding jobs, one could argue that mandatory retirement bans and pension reforms can play useful complementary roles.⁶¹ For employer pensions, a ban on mandatory retirement could even lead to enriched benefits or early retirement incentives as a way to induce the departure of less productive older workers.

Supporters of contractual mandatory retirement have offered some colourful analogies in seeking to rebut the arguments for a ban on the practice.⁶² They have contrasted mandatory retirement with legally prohibited labour activities such as prostitution and indentured service, depicting mandatory retirement as relatively innocuous and analogous to marriage and mortgage contracts. More apt analogies would be the extensive regulations of labour markets in Canada and most modern economies. Individuals are banned from contracting with employers to work

⁶⁰ See the more detailed analysis of this issue by Klassen and Forgione in Chapter 8.

⁶¹ This complementary role was suggested in Kesselman (2004), but one could clearly support a ban on mandatory retirement with no changes in public pension policies; see the comments in Munro's Chapter 11.

⁶² The characterizations cited in this and the following two paragraphs are drawn from Chapter 6 by Gunderson and Hyatt.

for less than a specified wage, for unduly long hours, under harassing conditions, and in hazardous workplaces—even if the worker and employer could reach mutually agreeable terms. A ban on mandatory retirement is no different in kind from these commonplace labour restrictions that are well established for clear social or economic purposes.

Questions have also been raised about the singling out of mandatory retirement among all the areas that can enter collective agreements based on a simple majority vote of the union's members. Unionized workers and their employers typically agree to terms of employment that do not have the support of every last member. Yet, with mandatory retirement a collective agreement or pension plan is violating one of the Charter's enumerated protected characteristics—age. If an agreement specified that no women or visible or religious minorities were to be hired or promoted, this would equally violate the Charter protections.⁶³ These types of terms constitute vitally different matters than the wage scales, job classifications, work hours, and benefit provisions that are the heart of collective agreements. A ban on mandatory retirement would not imply any reduction in the scope of collective bargaining in the core areas or a need for unanimity in these decisions.

Supporters of mandatory retirement have also argued that age differs fundamentally from the other enumerated characteristics; after all, with good fortune we all attain age 65, but few of us change our sex or race. Even the Supreme Court expressed tacit acceptance of this point in its landmark ruling on forced retirement.⁶⁴ But this view ignores the fact that people age at different rates both physically and mentally; some workers are more vital and productive into their 70's and beyond than others are even in their 50's. The protection against age discrimination in employment is based on the premise that individuals should be judged on their own performance, not on an extrinsic attribute such as age (or sex or race) and not based on stereotypes concerning older workers. Hence age should not be treated any differently than the other enumerated

⁶³ Mandatory retirement supporters might further argue that the practice involves *quid pro quo* benefits for workers who agree to the practice, unlike discriminatory practices based on race or sex. However, if mandatory retirement is newly instituted in a workplace, the workers who are approaching age 65 face only the cost of forced retirement with little compensating benefit.

⁶⁴ The Supreme Court quoted approvingly the passage: “the facts that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws ... that comparatively advantage [non-aged adults over those aged 65 and up].” *McKinney*, at 297. It expressed this view more directly in a majority decision on another case upholding CMR: “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.” *Dickason v. University of Alberta* [1992] 2 S.C.R. 1103, at 1132-1133.

characteristics in the Charter. The Supreme Court ultimately agreed that mandatory retirement violates the Charter's Section 15 prohibition against discrimination on the basis of age.⁶⁵

Summary of Findings

My analysis finds many of the key assumptions underpinning the economic model of contractual mandatory retirement to be unfounded—or in the words of Leontief, based on “nonobserved facts.” Accordingly, the economic case for mandatory retirement fails on several grounds:

- The model of mandatory retirement characterizes the practice as voluntary, utility-enhancing agreements that must bring benefits to both employers and workers. Yet, mandatory retirement provisions usually are not agreements between individual workers and their employers but rather the result of collective agreements. Hence, some individuals (especially women and recent immigrants) may wish to work longer than the median union voter, but they will be constrained by compulsory retirement. And in some provinces the employer can unilaterally impose the age of retirement, which is totally at odds with the model's assumptions.
- The model further assumes that individual workers have perfect foresight about their tastes and situation throughout their lives, so that they can commit to a fixed retirement age early in working life. In fact, many individuals will find later in their working life that they had not accurately predicted their family, health, income, or wealth situation, so that they would wish to alter their planned retirement date, often extending work beyond their original plans.
- The economic theory asserts that mandatory retirement facilitates deferred compensation schemes that bring significant economic benefits in worker loyalty and diligence. It further implies that a ban on mandatory retirement would be costly to employers in terms of increased monitoring, turnover, and training of workers. Yet, jurisdictions that banned mandatory retirement many years ago—Manitoba, Quebec, and the United States—have observed little if any of these predicted adverse consequences.⁶⁶

⁶⁵ In contrast, Gunderson and Hyatt in Chapter 6 argue “Since the individual ultimately is applying the rule [of mandatory retirement] to themselves and not to others, this should not be regarded as age discrimination.” Yet, in collective bargaining the majority of voting union members are applying the rule to others without their consent.

⁶⁶ Indeed, the leading Canadian labour economics textbook states “there is virtually a complete absence of research on the impact that banning [mandatory] retirement will have on other aspects of the employment relationship [besides the length of employment].” Benjamin et al. (2002, p. 411).

- The economic theory of mandatory retirement also asserts that with deferred compensation, individuals would choose to work “indefinitely” to capture more wages exceeding their productivity. In fact, even in employment offering mandatory retirement and deferred compensation, a substantial majority of workers choose to retire well before age 65. The theory additionally ignores the self-selection process in which less productive workers tend to retire earlier and more productive workers tend to retire later.
- A recurrent economic argument for mandatory retirement is that the practice opens up work and promotion opportunities for younger workers. But this argument runs counter to what economists call the “lump-of-labour” fallacy; a healthy economy is actually limited in its growth by the availability of workers of all ages. Moreover, the looming shortage of skilled workers means that the economy would benefit from allowing workers to stay on the job longer.
- The standard economic case for mandatory retirement ignores the social costs that parties to these agreements do not consider, but that are essential to a public policy perspective. These costs include the impacts of workers retiring earlier than they desire on tax revenues, public pension and health costs, and the economy. With the impending fiscal stresses from an aging population and shrinking workforce, these impacts argue further for abolishing mandatory retirement.
- As a relatively stringent test of the mandatory retirement model’s assumptions, the case of universities and the tenure system was examined. Even in that context the model’s assumptions are found to be deficient, and academic employers are seen to have sufficient human resource tools to deal with a ban on forced retirement. Both the tenure system and employer pension plans have survived at Quebec and US universities, and there is no indication of declining overall academic quality.
- A ban on mandatory retirement would simply extend an existing long list of prohibited types of labour agreements; it would not undermine unions’ ability to bargain over diverse terms of employment nor would it constrain collective agreements to unanimity of union members; and forced retirement is similar to other forms of employment discrimination (such as that based on sex or race) in judging workers on their extrinsic characteristics rather than their individual abilities and work performance.

The case for allowing mandatory retirement to continue is based on economic analysis

that presumes markets always produce desirable results. One proponent has argued, “Since the current package of rules [including contractual mandatory retirement] has evolved from market forces and without legislated restraints, economic theory prescribes that ... [a ban on mandatory retirement] must entail a net loss in efficiency.”⁶⁷ The Supreme Court accepted this presumption in its landmark rulings to permit age discrimination on the basis of the asserted economic benefits. Yet while racial and sexual discrimination were once the norm in Canada, economic analysis has shown how discrimination can persist in competitive markets but still fail tests of efficiency.⁶⁸ Legislative bans have reduced these unwarranted forms of discrimination and also stimulated incentives for advanced education and labour force activity by groups that have made increasing contributions to the economy. The same point could be made about older workers, age discrimination, and a prospective ban on forced retirement.

Mandatory retirement, even if in a contractual agreement between workers and their employer, cannot be justified on economic grounds. The economic theory underpinning mandatory retirement hinges on a series of unrealistic assumptions, thus undermining its policy prescriptions. As witnessed in the jurisdictions where mandatory retirement has been banned for many years, this is not a radical change nor have the alleged adverse effects emerged. Hence, such agreements should not be exempted from the prohibition of age discrimination on the basis that they constitute “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁶⁹ Given emerging labour shortages, looming public finance stresses, and newer economic evidence, the Supreme Court decisions on mandatory retirement will inevitably be contested. Indeed, one lower court decision has already urged such a legal challenge.⁷⁰ But there is no reason for the provinces to await judicial action before proceeding. The remaining provinces should follow the lead taken more than 20 years ago by Manitoba and

⁶⁷ Pesando (1979, p. 3), but quotations similar in spirit could be drawn from Lazear (1979), Gunderson and Pesando (1988), Benjamin et al. (2002), or Gunderson (2003, 2004).

⁶⁸ For early economic models of discrimination, see Becker (1971) and Arrow (1972).

⁶⁹ This passage from Section 1 of the Charter of Rights and Freedoms provides grounds for exceptions to the prohibitions against discrimination on the enumerated grounds, including age, in Section 15.

⁷⁰ In *GVRD Employees' Union v. GVRD* [2001] BCCA 435, a justice of the BC Court of Appeal writing for the majority stated: “I would urge the Supreme Court of Canada to reconsider this issue. Eleven years have now passed since *McKinney* was decided. The demographics of the workplace have changed considerably, not only with respect to the university community, but also in the workplace at large. ... The extent to which mandatory retirement policies impact on other equality rights, and on the mobility of the workforce, have become prominent social issues. The social and legislative facts now available may well cast doubt on the extent to which the courts should defer to legislative decisions made over a decade ago. The issue is certainly one of national importance.” At par. 127.

Quebec in banning mandatory retirement in both the public and private sectors.

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