

Paper presented at the John Deutsch Institute Conference, “Retirement Policy Issues in Canada”, October 26-27, 2007 at Queen’s University. The final version is published in a book entitled *Retirement Policy Issues in Canada*, edited by Michael G. Abbott, Charles M. Beach, Robin W. Boadway and James G. MacKinnon, 2009 (Kingston: John Deutsch Institute, Queen’s University). Published in cooperation with McGill-Queen’s University Press and available at: <http://mqup.mcgill.ca> .

## **MANDATORY RETIREMENT: MYTHS, MYTHS AND MORE DAMN MYTHS**

by

**Rafael Gomez  
and  
Morley Gunderson\***

**September, 2007**

Rafael Gomez is a Lecturer in the Department of Management at the London School of Economics (LSE), and an Associate Professor in the Department of Economics, Glendon College, York University. He is also a Research Associate of the Centre for Industrial Relations and Human Resource Management and the Centre for International Studies at the University of Toronto. Morley Gunderson holds the CIBC Chair in Youth Employment at the University of Toronto and is a Professor at the Centre for Industrial Relations and the Department of Economics and the School of Public Policy and Governance. He is also a Research Associate of the Institute for Policy Analysis, the Centre for International Studies, and the Institute for Human Development, Life Course and Aging. Financial Support of the Canadian Labour Market and Skills Research Network is gratefully acknowledged, as are discussions with Lorne Carmichael and James Pesando.

[MandatoryRetireQueens709]

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# MANDATORY RETIREMENT: MYTHS, MYTHS AND MORE DAMN MYTHS

## INTRODUCTION

Mandatory retirement is an important workplace practice in that about one-half of the Canadian workforce are in jobs that have a mandatory retirement policy<sup>1</sup>. Its importance will grow in the future given a number of inter-related demographic factors: the proportion of older workers in the workforce is increasing, given the aging baby-boom population and declining fertility rates<sup>2</sup> as well as the fact that youths are spending longer acquiring education<sup>3</sup>; older workers are working longer as the trend towards early retirement is being reversed<sup>4</sup>; and their health and longevity is improving so that they have a longer potential remaining lifespan for continuing to work<sup>5</sup>.

Until recently, mandatory retirement was allowed in all Canadian jurisdictions except Manitoba and Quebec (both banned in the early 1980s) and even in those jurisdictions the extent of the ban was not complete. For example, a court decision in Quebec allowed people to be terminated at the age of 65 on the grounds that only those up until the age of 65 had their employment protected.<sup>6</sup> In Manitoba, University Professors were exempt from the ban and were still subject to mandatory retirement. There is also a perception – one of the many myths – that the federal government also banned mandatory retirement. The reality is that the federal government voluntarily moved away from mandatory retirement for its civil servants, but this is an option that can be followed by any employer.

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<sup>1</sup> Evidence on the existence of mandatory retirement is mainly indirect and should not be regarded as precise; nevertheless, it is also consistent with figures from the United States before they banned mandatory retirement. See, Gunderson and Pesando (1988, p.33) and Gomez, Gunderson, and Luchak (2002) and other references cited in these studies. A recent survey of larger organizations of 100 or more employees indicates that 52% of Canadian organizations had a company-wide mandatory retirement policy and some others had such a policy for part of their workforce (Hewitt Associates, 2003). The restriction to larger firms may slightly overstate the extent of mandatory retirement for the workforce as a whole (Kesselman, 2004, p.9). The fact that half of the workforce works in jobs with a mandatory retirement policy does not mean that half will involuntarily retire because of the policy. Many may die prior to the policy and others may prefer to retire at that time. Others may work with their organization after they “officially” retire, and others may work with other organizations.

<sup>2</sup> By 2021, for example, workers age 55 and over are expected to constitute 20% of the workforce compared to 14% in 2005 (Martel et. al. 2007). By 2020, workers age 50-64 are expected to constitute 25% of the workforce compared to 15% in 1980 (United Nations 2002). Demographic issues around mandatory retirement are also outlined in Ibbott, Kerr and Beaujot (2006).

<sup>3</sup> The longer education period of youths is documented and discussed in Beaujot (2004).

<sup>4</sup> The reversal of the trend towards early retirement in Canada is documented and discussed in Gomez, Gunderson and Luchak 2002, Lowe 2005, Marshall and Ferrao 2007, Milligan 2005 and Schirle 2007.

<sup>5</sup> Improvements in health and longevity in Canada are outlined and discussed in Chen and Wayne (2000), Crompton (2000), and Hogan and Lise (2003).

<sup>6</sup> *Parent v. The Gazette*, 81 D.L.R. (4<sup>th</sup>) 689 (A.Q.) (1991).

In a series of mandatory retirement decisions in 1990, the Supreme Court of Canada refused to override the right of provinces to allow mandatory retirement. The court argued that mandatory retirement was “demonstrably justified in a free and democratic society” because its social benefits (for reasons outlined subsequently) exceed its social costs, including its possible infringement on the rights of some particular individuals. This placed the decision back in the hands of individual provincial governments. In 2005, Ontario followed Quebec and Manitoba and banned mandatory retirement (effective 2006) and others are following suite. In essence, the trend is in the direction of legislatively banning mandatory retirement.

Whether that decision is right or wrong, it is an issue that is not well understood. As we have indicated elsewhere in a typically Canadian “kinder and gentler” manner, the issue is “not as simple as it seems.” (Gunderson and Hyatt 2005). Or in a more aggressive tone: “The debate over whether to ban mandatory retirement is one of the most misunderstood discussions in the area of labour and social policy.” (Gunderson 2004, p. 1). And now in an even more aggressive manner: “myths, myths and more damn myths.” One can only imagine our next subtitle.

The purpose of this chapter is to set out those myths in the debate over mandatory retirement, and to provide what we perceive to be the realities. Prior to that discussion, some basic background facts will be provided to help frame the discussion.

## **SOME BACKGROUND FACTS**

The background facts are based mainly on the 2002 Workplace and Employee Survey (GSS Cycle 16) the most recent cycle to have included questions on retirement.<sup>7</sup> They include information on: reasons for retiring and the factors associated with those reasons; factors that would have facilitated the continued employment of those who retired; and reasons for returning to work after retirement. Many of these facts will be drawn on in our subsequent discussion of the realities surrounding mandatory retirement.

### Reasons for Retiring

In descending order of their relative importance, the reasons that retirees gave for retirement were (percents summing to more than 100% since multiple responses were possible):

- Financially possible 59.7%
- Wanted to stop working 55.5%
- Wanted to do other things 39%
- Qualified for a pension 38.6%
- Health 28.4%
- Early retirement incentive 13.3%
- No longer enjoyed work 12.8%
- Job downsized 11.3%
- Mandatory retirement 11.1%
- Care for a family member 11%
- Unemployed 4.8%.

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<sup>7</sup> Shellenberg and Silver (2004) use this GSS to analyse the congruence of retirement preferences and experiences.

This highlights that individuals retired for reasons that could generally be considered as voluntary such as wanted to stop working, wanted to do other things, financially possible, qualified for a pension, early retirement incentives and no longer enjoyed working. Health reasons and care for a family member can also be generally regarded as voluntary, in response to those personalized constraints. Involuntary reasons are less prominent and include the job being downsized (11.3% of respondents) and being unemployed (4.8%), although even here retirement may be a viable alternative for older persons. Even the number who responded that they retired due to mandatory retirement (11.1%) appears low given that about half of the workforce appears to be in jobs with a mandatory retirement policy. Furthermore, the 11.1% figure is likely an *extreme* upper limit of the proportion of the workforce who retired *involuntarily* because of mandatory retirement, since the mandatory retirement date could correspond with their preferred age of retirement. Retiring because of a mandatory retirement policy does not mean that the decision was involuntary. This is supported by the empirical evidence<sup>8</sup> that banning mandatory retirement has not had a substantial effect on older workers continuing in employment.

As indicated in the more detailed discussion in Gomez and Gunderson (2005) retiring due to mandatory retirement was more prominent for males and persons with higher education, better health, full-time work, urban locations and higher income households. These are characteristics generally associated with more advantaged as opposed to vulnerable workers.

#### Factors that Would Have Facilitated Continued Employment

In descending order of their relative importance, the factors that would have facilitated the continued employment of persons who retired were (percents summing to more than 100% since multiple responses were possible):

- Better health 27.3%
- Part-time work 23.1%
- Work fewer days 22.9%
- Work shorter days 21.0%
- Better pay 16.4%
- Vacation leaves 13.0%
- No mandatory retirement 10.5%
- Suitable care giving 5.8%

Better health tops the list, but this is followed closely by reduced *work-time* arrangements that are under the control of employers. Many retirees would have continued if they could have reduced work-time in such forms as part-time work, fewer days per week, fewer hours per day and longer vacations or leaves. This highlights that if employers want older workers to continue working to offset the labour and skill shortages associated with the impending retirements of the large baby-boom cohort, flexible work-time arrangements are a viable mechanism. Of course, this entails a Catch-22: in order to get older workers to continue working, employers should enable them to work less. But this is part of a phasing into retirement that is likely in the interests of all parties, in part to avoid the all-or-nothing pattern that is otherwise common.

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<sup>8</sup> Reid (1998) and Shannon and Grierson (2004) for Canadian evidence, with references also to U.S. evidence.

The fact that only 10.5% suggested they would continue working if there were no mandatory retirement suggests again that this is not a substantial constraint for most. Again, this does not imply that they would prefer not to have the policy of mandatory retirement. They may well prefer the policy for reasons outlined subsequently, but say that they would have continued working if the policy did not exist.

### Returning to Work after Retirement

Almost one-quarter (22.6%) of persons who ever retired had returned to work after retiring. For those who returned, the most prominent reason for returning was financial (43.9%) followed by did not like retirement (22.4%), with returning because of improvements in health being uncommon (5.2%), as was the case for care-giving no longer being required (2.9%). Females were more likely to return because it was no longer necessary to provide care-giving. Divorced persons were more likely to return for financial reasons while widows were more likely to return because care-giving is no longer needed, possibly reflecting the fact that they were providing care until their spouse deceased. Immigrants who arrived before 1970 and in the 1970s were less likely to have to return to the labour market for financial reasons while those who arrived in the 1980s and 1990s were more likely to have to return for financial reasons, likely reflecting the greater difficulty that more recent cohorts of immigrants have had assimilating into the labour market. Retirees in Quebec and Manitoba were much less likely to return because they did not like retirement. Since these were the two jurisdictions that banned mandatory retirement this likely reflects that fact that persons in those provinces would be less likely to retire if they felt they would not like retirement.

## **MYTHS AND REALITIES ABOUT MANDATORY RETIREMENT**

These background facts provide evidence to guide some of our discussion of the myths and realities about mandatory retirement. We fully recognize the dictum scrawled in a washroom stall: “reality is for those who can’t face drugs”. Nevertheless, we continue undaunted under the rationale that: “reality is for those who have fallen victim to the myths”. What are the myths and the realities?

### Mandatory Retirement Means Having to Retire from the Labour Force

Mandatory retirement is often erroneously regarded as government or other policy that requires individuals to retire from the labour force at some pre-determined age such as 65 when public pensions such as the Canada/Quebec Pension Plan are normally received. The Ontario government’s Speech from the Throne on April 30, 2003, announcing the government’s intention to ban mandatory retirement, for example stated: “[The government] will also introduce legislation to allow more seniors to remain active in the workforce—retiring at a time of their own choosing, not an arbitrarily *government appointed time*.” [emphasis added].<sup>9</sup> The *Globe and Mail* stated: “CPP [Canada Pension Plan] should be more flexible so that it *allows* people to stay in the work force past 65 if they want to and are able.” [emphasis added, highlighting that the implication is that the CPP does not allow people to work past 65].<sup>10</sup>

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<sup>9</sup> Hon James K. Bartleman. “Speech from the Throne,” April 30, 2003, <<http://hansardindex.ontla.on.ca/hansardeissue/37-4/1001.htm>> (October 15, 2004).

<sup>10</sup> Heather Scoffield, “Rethink CPP’s Age-65 Rule,” *Globe and Mail*, 21 April 2004, A1.

The reality is that mandatory retirement policies are private contractual arrangements between employers and employees that terminate a particular contractual arrangement invariably at the age when the employer-sponsored occupational pension plan normally becomes available. In some cases, termed *compulsory* retirement, re-contracting can occur and a new contractual arrangement can be worked out that allows the person to continue working for that employer. In other cases, termed *automatic* retirement, the parties pre-commit to not allowing re-contracting. Mandatory retirement is part of a collective agreement or formal personnel policy and not part of any government policy or public pension policy that prohibits individuals from working past age 65 or any age. As discussed subsequently, government laws and policies only allow or disallow private parties from entering into arrangements that involve mandatory retirement.

### Mandatory Retirement is an Employer Policy Forced on Employees

There is often the perception that mandatory retirement is a policy that benefits only employers, enabling them to shed their expensive and unproductive older workers. This image is highlighted by phrases like “forced” retirement or “involuntary” retirement.

The reality is that mandatory retirement can serve a number of positive functions for *both* employers and employees. Otherwise it would not be part of collective agreements negotiated by powerful unions and generally defended by unions as in the interest of their members. Nor would it be part of formal personnel practices where individual employees often have considerable individual bargaining power.

Possible rationales for mandatory retirement have been enumerated in detail elsewhere<sup>11</sup>. As such, they will only be summarized here, emphasising how they can be in the interests of *both* employers and employees.

Mandatory retirement can facilitate deferred or back-loaded compensation in longer-term contractual arrangements whereby workers are underpaid relative to their productivity when they are younger and overpaid relative to their productivity when they are older and more senior with the organization. Importantly, such a deferred compensation package implies nothing about the relationship between productivity and age; whatever that relationship it simply implies that people are paid less than their productivity when younger and more when they are more senior with the organization. Mandatory retirement provides a termination date to such a contractual arrangement (Lazear 1979) with the equilibrium condition being that the expected present value of the overpayment period just compensates for the underpayment period. Without a termination date, the equilibrium could not be sustained because the overpayment period could continue for an undefined period.

Deferred compensation can be an optimal compensation scheme for employers for a number of reasons. It can deter shirking and induce work effort from employees, and foster loyalty and commitment, since the deferred compensation is like the employer holding a “performance bond” to be returned to the employee conditional upon good performance (Lazear 1979). For the same reasons deferred compensation fosters employees having an interest in the

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<sup>11</sup> Rationales for mandatory retirement are outlined, for example, in Gunderson and Pesando (1980, 1988), Gomez, Gunderson and Luchak (2003) and Gunderson and Hyatt (2005).

financial solvency of the firm and this in turn can encourage behaviours such as concession bargaining to sustain that solvency. It can reduce quits and unwanted turnover since employees have an incentive to remain with their firm to receive their deferred compensation (Ippolito 1987, 1991). This reduced turnover in turn provides an incentive for the firm to provide training to their employees since they can recoup their training investments (Carmichael 1983). Deferred compensation can save on current wage costs and provide a source of internal funds for investment. It can enable employers to periodically monitor and evaluate the performance of their employees and to do so on a retrospective basis, based on past performance which is easy to observe (Prendergast 1999, p. 47). In a world of asymmetric information, deferred compensation can discourage workers who privately know that they will be poor performers or “lemons” from applying since their poor performers will be revealed over time (Salop and Salop 1976). Since their deferred compensation will be paid in the future, it may also attract employees who are savers and more future oriented, and these may be associated with desirable work characteristics (Ippolito 1994, 2002).

Survey evidence indicates that employees also prefer such deferred compensation (Frank and Hutchens 1993, Loewenstein and Sicherman 1991) for a variety of reasons. It often comes in the form of pension benefit accruals and this provides security in retirement. As well, deferred compensation (especially in the form of pensions) implies deferred taxes, perhaps coming at a time in the lifecycle when marginal tax rates are lower. Employees may prefer the periodic and retrospective monitoring and evaluation that is facilitated by deferred compensation. They may value the longer-term employment relationship that tends to be associated with deferred compensation. Employees may also receive higher lifetime compensation to the extent that deferred compensation has positive incentive effects and hence better performance outlined previously.

Employees are also protected from opportunistic behaviour on the part of employers who otherwise may have an incentive to dismiss employees when their wages begin to exceed their productivity. Firms that did this would be disciplined by a loss of reputation that would inhibit hiring new employees into such a deferred compensation system (unless they voluntarily induced older employees to leave through generous early retirement buyouts). They could also be subject to wrongful dismissal claims where the magnitude of any award would be based on any wage loss associated with their being displaced to their next-best alternative employment. When they are covered by a collective agreement, employees are protected by seniority rules as well as unjust dismissal protection through the grievance procedure.

Mandatory retirement can also serve other positive functions for both employers and employees. For employers, it can facilitate succession planning and the costing of age-related fringe benefits such as pensions and disability benefits since the retirement date is known in advance. For the same reason it can facilitate planning for retirement on the part of employees in advance of their known retirement date.

Mandatory retirement can facilitate employee renewal and open job and promotion opportunities for younger persons. It can reduce the need for the monitoring and evaluation of older workers who are approaching the mandatory retirement age and who otherwise may be dismissed for poor performance. Employers and work-teams are more likely to “wait it out” knowing that it is for a finite period. This in turn facilitates “retiring with dignity” on the part of older employees.

Clearly, there a variety of reasons for both employers and employees as to why mandatory retirement may be part of an optimal compensation policy. It is not simply a policy that mean-spirited employers force on employees. Even if employers do benefit disproportionately more by the policy and it imposes costs on employees, this simply means that employers have to compensate employees for such a disamenity at the workplace. This could occur in the form of compensating wage premiums<sup>12</sup> or perhaps pensions to provide income security in the post-retirement period.

### Mandatory Retirement is Forced on Vulnerable and Uninformed Employees

The impression often exists that mandatory retirement is not only forced on employees, but that the employees are vulnerable and uninformed. It is the case that mandatory retirement may be a job attribute that some employees may reluctantly accept even if it is accompanied by higher wages and more generous pensions. But all jobs involve a bundle of attributes that have to be trade-off in any decision to accept or leave a job.

Furthermore, as outlined previously in the background material and in the general literature<sup>13</sup>, the reality is that mandatory retirement is generally associated with “good jobs” with higher wages, generous pensions and due process provided at work. Mandatory retirement is generally part of a collective agreement or formal personnel policy involving an implicit contract of long-term employment relationships. Vulnerable workers, in contrast, are more often part of the “spot market” with no mandatory retirement – but also no pension, collective agreement, personnel policy or job security. They are generally hired and terminated at the will of the employer.

Since mandatory retirement is part of an inter-temporal contractual arrangement where the constraint comes later in the person’s career, it is possible that individuals underestimate the constraining effect<sup>14</sup>. It is also possible that they may not be fully informed about the constraint. But these are always issues associated with any inter-temporal contracts such as student loans or mortgages or even marriage contracts. Banning such inter-temporal contracts to “protect people from themselves” (or at least to protect their future self from their current self) seems an over-reaction. The appropriate response would be to insure that employees are informed of the constraint and possibly that the constraint is accompanied by other benefits at the time it becomes binding. Since mandatory retirement is often part of a collective agreement and invariably twinned with a pension, it is very likely that employees are informed of the policy and they receive the benefit of the pension at the time the constraint binds. As well, court decisions have disallowed mandatory retirement when individual employees were not informed of the policy<sup>15</sup>.

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<sup>12</sup> Canadian evidence on the wage-pension tradeoff is provided in Pesando, Gunderson and Hyatt and (1992) which also contains a discussion of the U.S. literature in this area.

<sup>13</sup> The association between mandatory retirement and “good jobs” is documented and discussed in Gomez, Gunderson and Luchak (2002), Gunderson and Pesando (1988, p. 33) and Pesando and Gunderson (1988 and references cited therein).

<sup>14</sup> This argument is articulated in Kesselman (2004, 2005) and Krashinsky (1988).

It is the case that employees may prefer that the policy not be in place when the constraint becomes binding, but they have benefited from it earlier and they will benefit by it being banned since they will receive a windfall from any continuation of deferred compensation whereby their wages exceed their productivity. In that vein, the growing voting bloc of “grey panthers” suggests that they may well pressure for banning mandatory retirement.

#### Mandatory Retirement Has a Disproportionate Adverse Effect on Women and Immigrants

Mandatory retirement is often perceived as having a disproportionate adverse effect on women and immigrants – groups that may not have worked sufficiently long in the labour market to accumulate labour market earnings to provide savings for their retirement, or who may not have accumulated the service credits upon which pension benefits are based. For women, this may occur because of career interruptions associated with childbirth and child-raising. For immigrants it may occur because they may be late entrants into the labour market, and more recent cohorts may have had difficulty assimilating into the labour market.

It is the case that women tended not to accumulate the service credits upon which pension benefits are often based and this also reduces their eligibility for subsidized early retirement benefits (Pesando, Gunderson and McLaren 1991). However, that effect is dissipating over time as women’s participation rate is approaching that of men, and subsidized early and special retirement benefits are becoming less prominent than they were in the 1970s and 1980s when they were used as a form of downsizing – the current issue being one of labour shortages (Conference Board 2005). As well both women and immigrants may have benefited by the job and promotion opportunities that were fostered by retirements induced by mandatory retirement.

#### Mandatory Retirement Will Foster Poverty Amongst the Aged

A further myth is that mandatory retirement will foster poverty amongst the aged since it may inhibit some from continuing working to accumulate savings for retirement (Croll 1979 p. 26; McDonald 1995, p. 447).

The reality is that it would be extremely rare to find anyone in poverty who retired because of a formal mandatory retirement policy. As indicated previously, mandatory retirement is associated with good jobs and pensions. Persons who retired from such jobs would not be in poverty except for extremely unusual circumstances.

In fact a legitimate concern is that banning mandatory retirement could exacerbate poverty if it led to a dissipation of the pensions that are invariably twinned with mandatory retirement. Pensions may dissipate because people could be perceived as capable of working indefinitely; there would no longer be a need to provide pensions as a quid pro quo for mandatory retirement. Since private pension income<sup>16</sup> is the largest component of income for the elderly, then any dissipation of pensions could reduce their financial security in retirement.

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<sup>15</sup> The British Columbia Supreme Court in *McLaren v. Pacific Coast Savings Credit Union*, British Columbia Court of Appeals, 186 (2000), disallowed a mandatory retirement provision on the grounds that it had not been effectively communicated to the employee and the employee had not explicitly accepted it as a condition of employment

<sup>16</sup> In 2003, retirement income from private pensions averaged \$14,100 for the 60% of persons over 65 who had such income. This was over half (56%) of the average income of about \$25,100 across all persons age 65 and over (Statistics Canada, 2005).

### Mandatory Retirement Constitutes Age Discrimination

The most notable attack on mandatory retirement is that it constitutes age discrimination and this is the argument upon which court cases against mandatory retirement have been based<sup>17</sup>. The argument seems appealing since mandatory retirement is an age related rule that indicates that the person has to retire from a particular job at a pre-specified age, regardless of their performance. The appearance of age discrimination is enhanced by the fact that in jurisdictions where mandatory retirement is allowed, it is done so largely through an age cap or limit in the human rights code at age 65 (Gunderson 2003). That is, the human rights code which normally protects against discrimination does not apply for employment issues for persons over 65. This appears to say: “discrimination on the basis of age is prohibited – except against persons age 65 and older.”! The reality is that this age cap exists to allow mandatory retirement as not being contestable in the courts. But the reality is also that this creates a loophole in that persons 65 and older do not receive normal protection against age discrimination.

Age discrimination is a serious concern and it likely has not received the attention given to other forms of discrimination. As indicated in Ontario Human Rights Commission (2000a, p. 39): “Age cases tend to be treated differently than other discrimination cases, particularly when the case involves retirement issues. The most noticeable difference from a human rights perspective is the lack of moral opprobrium linked to age discrimination which, in comparable circumstances would generate outrage if the ground of discrimination were, say, race, sex or disability.” Furthermore, age discrimination is difficult to document empirically (unlike say gender discrimination through pay equity procedures) in part because age is related to so many other factors that can influence wage and employment outcomes (Gunderson 2003).

The age discrimination argument, however, ignores the fact that mandatory retirement is a mutually agreed upon private contractual arrangement between informed parties where the employees have considerable individual or collective bargaining power. It is part of an inter-temporal contractual arrangement generally made at the time in an individual’s life when the discriminatory attribute (age) is not a factor when the contractual arrangement is made. Importantly, the age of mandatory retirement is a characteristic that applies to all who are in that contractual arrangement if they have the good fortune to reach the age in question. If it is discrimination, it is discrimination that our *current* selves are imposing on our *future* selves. This is different from discrimination against *other* groups such as women, visible minorities, Aboriginal persons or disabled persons when discrimination is imposed by majority groups.

### Mandatory Retirement Fosters Labour and Skill Shortages

A further argument against mandatory retirement is that it can foster labour and skill shortage at a time when the retirements of the baby-boom population are fostering such shortages. Requiring large numbers of baby-boomers to retire at a specific age fosters contributes to such shortages.

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<sup>17</sup> Legal issues surrounding mandatory retirement in Canada are discussed in Gillin and Klassen (2005), Gunderson (2003) and Ontario Human Rights Commission (2000, 2001).

The reality is that employers can move away from mandatory retirement if they find that it inhibits them from filling labour shortages. In fact, this does appear to be occurring in the current climate of impending shortages: survey evidence from the Conference Board (2005, p. 11) indicates that 55 percent of Canadian companies that have a mandatory retirement policy intend to eliminate that policy in the near future. Firms that follow automatic retirement where they have pre-committed not to continue to employ their retirees can also shift to compulsory retirement (which simply terminates the existing contractual arrangement) and employ them on a new contractual basis. They could also raise the mandatory retirement age. In situations where mandatory retirement is part of the collective agreement, they would obviously have to negotiate these changes with the union, but this is part of the normal give-and-take of the collective bargaining process. If the gains to employers from altering mandatory retirement to facilitate filling labour shortages outweigh the costs, then this would provide the means to compensate the unionized employees. Furthermore, workers who retire from a particular employer because of mandatory retirement could still remain in the labour force and fill shortages of other employers. In essence, banning employers from having mandatory retirement to help them fill their labour shortages, again appears to be an over-reaction to help employers help themselves. Surely they can do it on their own if it is sensible.

#### Mandatory Retirement is Against the Interest of Some Union Members

When mandatory retirement is part of a collective agreement there is often the concern that the union may not represent the interests of all of its members and some individual workers may not want the policy. This is always a concern with respect to collectively provided goods. Workers without children may not want unions to negotiate childcare arrangements. Workers in good health may not want to give up cash wages for health and disability benefits. Young workers may not want to give up cash wages for future pension benefits. Workers who played hockey as youths and lost their teeth as a right of passage in Canada may not want their union to negotiate dental plans. These are part of the normal union trade-offs that are always present.

Again, the reality is that it is an over-reaction for governments to prohibit unions from negotiating provisions like mandatory retirement in return for pension benefits because they want to protect union members from the union. Some protections already exist in that members can bring a “duty of fair representation” complaint against the union if they feel that their interests are not properly being represented. Furthermore, union actions are largely determined by the preference of the median union voter. Since the median union voter is likely to be an older worker, the trade-offs involved in mandatory retirement are likely to be well represented by the union.

#### Mandatory Retirement Should Be Banned

The arguments and myths outlined above foster the “mother of all myths” – that mandatory retirement should be banned. Individuals should be able to choose their own time of retirement rather than have that decision made by a company personnel practice or collective agreement. Mandatory retirement appears to be against individual choice.

But the reality is that the “pro choice” argument would allow private parties the choice to enter into contractual arrangements like mandatory retirement because of the previously discussed benefits even though it constrained choices in the future. Banning mandatory retirement is banning the private parties from the option of entering into such contractual arrangements in spite of the mutual benefits.

This highlights that the relevant question to ask with respect to mandatory retirement is *not*: are you for or against mandatory retirement? Rather, it is: are you for or against allowing private parties to enter into contractual arrangements that provide mutual benefits but that can impose constraints like terminating an existing contractual arrangement? It is quite possible to be individually against mandatory retirement at your workplace but to be in favour of allowing it to exist, just as it is possible to be individually against abortion, but “pro-choice” in allowing the parties the right to choose. Governments often ban mutually agreed upon contractual arrangements like prostitution or assisted-suicide. But they sanction others like marriage contracts and loan contracts that provide mutual benefits and impose constraints. As such, legitimate trade-offs and difficult decisions are involved. Is mandatory retirement more like prostitution and assisted-suicide or like marriage or loan contracts?

Our perspective is that it is more like the latter and hence should be sanctioned and not banned. It confers mutually beneficial arrangements which is why it is negotiated in situations where the parties have reasonable individual and/or collective bargaining parties. The parties do not need to be protected from themselves by prohibiting them from entering into such arrangements. If these mutual gains from trade are no longer prominent, then the parties will voluntarily negotiate new arrangements that suit their changing needs, as appears to be occurring already.

The current practice of accommodating mandatory retirement by having an age cap in the human rights code of jurisdictions that allow mandatory retirement, however, creates a loophole in that it does not provide the normal protection against age discrimination to persons over age 65. The solution, however, is simple. Remove the age cap so that such persons have the normal protection against age discrimination, but exempt bona fide pension plans or collective agreements that have mandatory retirement (Gunderson 1998, 2004). This will effectively allow mandatory retirement since it invariably is part of a pension plan or collective agreement. But it insures that the contractual arrangement is allowed only if there is the quid pro quo of income security of a bona fide pension plan and/or collective agreement. One could also add the requirement that employees be fully informed of the existence of the mandatory retirement requirement, perhaps by signing a formal statement to that effect. If there is concern that collective agreements do not provide adequate protection – and this is not a concern of these authors – then the exemption could exist only if there is a bona fide pension plan.

Such an arrangement would allow private contracting in this area, but only if it were accompanied by specific safeguards. In our view, this would provide the appropriate balance in this complex – and often misunderstood -- area.

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