Flexible Retirement: An Alternative to Mandatory Retirement

The National Advisory Council on Aging urged the Committee to recommend government initiatives to encourage the development of flexible retirement as the norm for Canadians. The goal would be to maximize the range of choice for older people so that they could retire with an adequate level of financial security at any time during a period beginning several years before 65 and continuing beyond that age.

The Special Senate Committee on Retirement Age Policies espoused a similar objective in its 1979 report, *Retirement Without Tears*. A step towards that objective was proposed by the Parliamentary Task Force on Pension Reform in 1983. The Task Force recommended that Canadians be given the choice of commencing receipt of Canada Pension Plan benefits, subject to appropriate actuarial adjustments, at any time between the ages of 60 and 70. We are persuaded that it would be desirable for Parliament and the government of Canada to take steps to facilitate flexible retirement.

The opportunity for early retirement is not, in our view, mandated by section 15 of the *Charter*. However, if mandatory retirement were abolished, the availability of early retirement options would help to head off some of the concerns that might arise as a result of that action. In particular, any aging trend in the workforce that might increase employee benefit costs and indirectly reduce job opportunities for younger workers would be attenuated. We have therefore considered the benefits of flexible retirement in the course of our review of mandatory retirement.

Mandatory Retirement and Section 15

Section 15 of the *Charter* provides an assurance of equality without discrimination based on a number of factors, including age. In the view of the Committee, mandatory retirement is a classic example of the denial of equality on improper grounds. It involves the arbitrary treatment of individuals simply because they are members of an identifiable group. Mandatory retirement does not allow for consideration of individual characteristics, even though those caught by the rule are likely to display a wide variety of the capabilities relevant to employment. It is an easy way of being selective that is based, in whole or in part, on stereotypical assumptions about the performance of older workers. In the result, it denies individuals equal opportunity to realize the economic benefits, dignity and self-satisfaction that come from being part of the workforce.

The Canadian courts have consistently interpreted prohibitions on age discrimination in human rights legislation as precluding mandatory retirement. They have, however, recognized and given effect to the specific limitations and exceptions of such legislation, which generally allows for the imposition of *bona fide* occupational requirements and usually for mandatory retirement at or after age 65. We anticipate that the courts will also find that mandatory retirement offends the prohibition on age discrimination in section 15 of the *Charter*. Unlike many human rights codes, the *Charter* contains no upper age limit on that prohibition. The only permitted limitations on section 15 rights are those that are reasonable, prescribed by law and capable of being demonstrably justified in a free and democratic society, as provided in section 1 of the *Charter*. We believe that the *bona fide* occupational requirement exception set out in the *Canadian Human Rights Act* is such a limitation. It is a qualification that has been construed narrowly by the courts (in the *Etobicoke Firefighters* case) and is in common use in human rights statutes in both Canada and the United States.