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POLICY-MAKING BY EXEGESIS: THE ABOLITION OF 'MANDATORY RETIREMENT' IN MANITOBA*

L'interprétation judiciaire de la loi des droits fondamentaux du Manitoba a imposé l'abolition de la 'retraite obligatoire' dans cette province, et cela à l'encontre de l'intention avérée du gouvernement et de la législature responsables de la loi en question. Un tel résultat illustre bien ce qui peut arriver quand on confie aux tribunaux des tâches équivalentes à la détermination de politiques, alors que ceux-ci fonctionnent selon des règles avant tout destinées à favoriser la résolution de litiges particuliers. De telles situations ne pourront d'ailleurs manquer de se reproduire lors des contestations portant sur le principe des 'droits à l'égalité' prévu par l'article 15 de la Charte canadienne des droits et libertés. Or, il est indéniable que le phénomène contredit les principes de la démocratie représentative.

Judicial interpretation of the *Manitoba Human Rights Act* has led to abolition of 'mandatory retirement' in that province, contrary to the demonstrable intention of the government and legislature responsible for the statute. This result illustrates what can happen when Canadian courts, equipped with procedures which focus on the resolution of particular disputes, are thrust into a policy-making role. Similar situations will tend to recur in the litigation over the 'equality rights' of section 15 of the *Canadian Charter of Rights and Freedoms*. Such developments are at variance with the principles of representative democracy.

On April 17, 1985, section 15 of the *Canadian Charter of Rights and Freedoms* will take effect:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Peter Russell predicted even before its adoption that the Charter would 'expand the policy making role of the Canadian courts' (Russell, 1982: 2). Or, to be more precise, 'a constitutional charter of rights guarantees not rights but a particular way of making decisions about rights in which the judicial branch of government has a much more systematic and authoritative role' (*ibid.*, 32). This prediction has already been confirmed by a recent quantitative study of the

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first year of the Charter's life (Morton, 1984a). The main effect up to now has been in the field of criminal law with many Charter-based challenges in matters such as search and seizure. When s.15 takes effect, the courts will be thrust more deeply into social and economic questions than they have ever before been in Canada, and dozens of federal and provincial statutes will be challenged because of alleged discriminatory effect.

This development will be new in certain respects, but it is not unprecedented. Since Ontario created Canada's first human rights code in 1961, a substantial body of legislation, caselaw, and jurisprudence of human rights has grown up. Two decades of anti-discrimination law provide abundant evidence for assessing the impact of equality rights upon the policy process. Section 15 of the Charter will give new scope to anti-discrimination efforts by constitutionally entrenching a set of prohibited grounds of discrimination applicable to the public sector in all jurisdictions; to that extent the situation after April 17, 1985, will be novel (Tarnopolsky, 1983). But the matters to be litigated under the Charter have all been, and will continue to be, litigated as well under federal and provincial human rights legislation. Concepts, arguments, and strategies already in existence will inevitably carry over into Charter cases. Thus the future is at least partially foreseeable in the light of the past.

This paper provides some observations about the policy process based on a single case study: the step-by-step abolition of fixed-age retirement in Manitoba. The Manitoba case was chosen because it is a particularly striking example of how the process of judicial interpretation can produce a policy which is demonstrably different from the historical intent of the legislature. The observations derived from the Manitoba experience are, I believe, broadly applicable to the policy-making process whenever it is affected by human rights or anti-discrimination guarantees.

It has become common to speak of retirement at a predetermined age as 'compulsory' or 'mandatory' retirement. However, Thomas Sowell has pointed out that these terms are rather misleading (Sowell, 1980:194). In very few cases is retirement at a certain age mandated or compelled by law. It normally rests upon freely bargained collective agreements or upon employer policy connected with a pension plan. A fixed retirement age is usually part of a package of terms and benefits which employers and employees have found acceptable in a particular industry. The acceptance is explicit in the case of collective bargaining. In the case of employer policy, it is implicit; the employee, who has other alternatives in the labour market, is at least not driven to resign by the policy. Moreover, employment beyond the normal retirement age is usually possible if both parties desire it and can agree upon contractual terms. Retirement at a specified age means only that the employer's obligation to employ a worker ends at that age. Properly speaking, compulsion enters the picture only when government legislates an age of retirement or forbids employers and employees to voluntarily establish one. Since the terms 'mandatory' and 'compulsory retirement' conceal the true location of coercion, I shall speak in this paper of 'fixed retirement'.

The Rise of Age Discrimination

The concept of 'age discrimination' is a child of the American civil rights movement. The success of Blacks in attaining political objectives by presenting themselves as victims of discrimination led other groups to begin conceptualizing themselves in the same way (Dworkin and Dworkin, 1976). The analogy between race and age is tenuous at best. Age, like race, is not within the individual's control, but there the resemblance ends. Race is an invariant characteristic, whereas age varies throughout the life cycle. Racial groups perpetuate themselves through heredity, whereas age groups are not segmented within society. The family ties together individuals of different age in a way that has no counterpart for race. Additionally, there are ideologies of racial dominance and superiority which have supported movements of racial oppression; there are no counterparts to these phenomena with respect to age. But these profound differences have not prevented political acceptance of the concept of 'age discrimination'.

Although numerous states had previously legislated on the subject, 'age discrimination' became a national issue in 1964, when attempts were made to introduce age, along with race and sex, as a prohibited ground of discrimination in the *Civil Rights Act*. Congress, while not accepting the amendment, directed the Secretary of Labor to study 'older people'. The Labor Department study led to the *Age Discrimination in Employment Act* (ADEA) of 1967, which applied to private sector employers with more than 25 employees. It exempted certain categories of workers, such as university professors. Most importantly, it applied only to workers between the ages of 40 and 65. Within these limitations, the Act forbade employers to engage in age discrimination among their workers with respect to hiring, promotion, benefits, etc. (Morrison, 1982:223–240.) Even among the included categories, certain exceptions were allowed:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization——
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or
> (3) to discharge or otherwise discipline an individual for good cause (29 U.S.C. 623).

ADEA was plainly designed to deal with the limited problem of 'the employment plight of the older worker,' on which the Department of Labor's study had focussed. The Congressional statement of purpose said nothing about retirement, stating rather that 'in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs' (29 U.S.C. 621(a)(1)). The age ceiling, reinforced by the exemption for 'bona fide' retirement plans, meant there would be no impact on retirement practices, certainly not after 65, and perhaps even prior to 65. 'Not a single legislator claimed that forced retirement before 65 was being prohibited, although there was no serious denial' (Morrison, 1982:227). One leading advocate of ADEA stated that the principle of retirement was 'universally accepted' (*ibid.*, 228).

The movement against 'age discrimination' quickly spilled over into Canada. Even before the passage of ADEA, British Columbia (1964) and Ontario (1966) had passed age legislation in the employment field.[1] After ADEA, Canadian provinces began to put age provisions into their human rights acts. The pioneers were British Columbia (1969), Newfoundland (1970), Ontario (1972) and Alberta (1972).[2] In all cases, ADEA's emphasis on the older worker was the model for Canadian legislation, with corresponding avoidance of the retirement issue. All four provinces imitated ADEA's age cap of 65 as well as the exemption for bona fide occupational qualifications (bfoq), i.e., job qualifications deemed reasonable by human rights authorities. All except Ontario also incorporated clauses, modelled on the language of ADEA, exempting retirement and pension plans. In 1973 New Brunswick broke with the ADEA model in a different direction by defining age as 'nineteen years of age and over' without a ceiling – but the likely impact on retirement practices was blunted by a bfoq exemption and a clear, ADEA-type statement that the prohibition of age discrimination did not apply to 'the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan'.[3]

While these carefully worded provisions on age discrimination were being inserted into provincial human rights codes, attempts were being made to attack fixed retirement practices in labour arbitration cases. After some years of confusion, the Supreme Court of Canada held

in 1973 that 'retirement' and 'discharge' were separate concepts, and that an employer did not have to justify a retirement policy in any special way, unless a collective agreement supervened.[4] Subsequent labour relations cases have followed this doctrine, albeit with occasional aberrations (Tarnopolsky, 1982:233 ff.). Thus it is a fair statement that as of 1973, fixed retirement was legal in Canada and had not been disturbed by provincial anti-discrimination legislation.

Manitoba dealt with age discrimination in a package of amendments to its *Human Rights Act* in 1974.[5] By comparison with Canadian precedents, there were some important changes. Like New Brunswick, Manitoba put no ceiling on age, but went farther by omitting an age floor in the definition. The concept of bfoq was redefined as 'a reasonable occupational qualification and requirement for the position or employment' (*ibid.*, s.6(6)). The substitution of 'reasonable' for *'bona fide'* emphasized that the age qualification must be persuasive to external observers, no matter how sincere the employer's belief in it might be. Finally, the clause relating to retirement plans was somewhat weakened.

> 7. (2) No provision of section 6 or of this section relating to age prohibits the operation of any term of a bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan or of any bona fide scheme based upon seniority (*ibid.*, s.7(2)).

The language of this section was similar to that of the Alberta Act in referring to the 'operation' of retirement or pension plans.[6] It was weaker than that of similar clauses in the British Columbia, Newfoundland, and New Brunswick legislation which allowed 'termination of employment' in connection with a retirement plan.[7]

Events would soon show that the cumulative effect of the innovations in the *Manitoba Human Rights Act* was to enable a plausible legal challenge to fixed retirement to be made. I could not establish whether this was apparent at the time to the anonymous draftsmen of the amendments, but it certainly does not seem to have been the intention of the politicians who took responsiblity for the legislation. The then Attorney-General, Howard Pawley, referred only to the employment problems of older workers when he introduced the amendments into the Legislative Assembly on June 1, 1974; he did not mention retirement at all.[8] The same was true of the government's press release describing the bill.[9] Two members of the cabinet later made public statements that they had not intended the law to have an impact on retirement practices. Sydney Green said: 'I know of no legislator at the time who felt that that was the result of the legislation' (Rothstein, 1982: 78). Ben Hanuschak said: 'I was party to the initial draftsmanship of it ... we were not so much concerned, in fact I don't think that we gave any attention to or any thought to the issue of retirement' (*ibid.*, 79). If actions speak louder than words, it is also relevant that the same government continued to operate its civil service with a normal retirement age of 65 and subsequently passed a bill allowing school boards to establish a fixed retirement age for teachers.[10] I have found no informed person in Manitoba who believes the legislature intended to abolish fixed retirement in 1974.

Once proclaimed, however, legislation escapes the control of its creators and its 'intent' becomes a legal artifact of statutory construction, perhaps having little to do with the historical intent of the legislators. This happened very quickly in the case of *Derksen v. Flyer Industries* (unreported).

Peter Derksen was a lathe operator who had worked for Flyer Industries thirteen years when he turned 65 in January, 1975. After another month on the job, he was asked to retire. Retirement was not mentioned in the collective agreement, although the union had been trying to negotiate a retirement age of 60. The company had a policy of retirement at 65 which, although documented and made known to the union, was not rigorously implemented in every case. Many employees seem to have been unclear about the policy. There was a voluntary pension plan in which Derksen did not participate; only six employees did.

Derksen first grieved through his union. A labour arbitration board was convened which

ruled that the new amendments to the *Human Rights Act* had not made fixed retirement discriminatory. With the support of his union, Derksen then complained to the Human Rights Commission. After investigation, Jack London, Professor and later Dean of Law at the University of Manitoba, was appointed to a board of inquiry, which rendered its decision in June 1977.

London had no special familiarity with age issues, but he had spent a sabbatical in the United States where he had heard much about racial and sexual discrimination. When he began to think about the *Derksen* case, it struck him that 'ageism' was just like racism or sexism. In his own words, the *Derksen* Case 'radicalized' his position on age discrimination.[11] He has subsequently become something of a spokesman for the abolition of 'mandatory retirement' (London, 1983).

The issue in *Derksen* was how Flyer, in the absence of an age cap in the *Human Rights Act*, could defend its policy of retirement at 65. Claiming that age was a 'reasonable occupational qualification and requirement' was a hypothetical possibility, but not a very serious one, for Derksen was plainly able to continue the physical work of operating a lathe. Flyer therefore chose to rest its case on s.7(2), that the Act did not prohibit 'the operation of any term of a bona fide retirement, superannuation, or pension plan...'.

Counsel for Derksen and the Commission was Roland Penner, later New Democratic M.L.A. and Attorney-General. He offered to London several ways of reinstating Derksen without giving a sweeping decision against fixed retirement in general. His strategy was to argue that the Flyer retirement plan was not bona fide because it had been unilaterally proclaimed, ineffectively communicated to the workforce, inconsistently enforced, and did not necessarily involve a pension. Surprisingly, London did not accept any of these proffered grounds for a narrow decision. Instead, he rendered a sweeping decision that s.7(2) referred only to contributions paid into and benefits paid out by a retirement plan, not to the actual practice of retirement. I.e., pension contribution and annuity payments, as well as other fringe benefits, could be proportioned to age; but age could not be a factor in requiring an employee to retire.

This decision was questionable first of all because it was more far-reaching than required under the circumstance. Furthermore, the language of s.7(2) was plainly traceable to s.4(f)(2) of ADEA, and that section was interpreted by the Supreme Court of the United States in 1977 in a sense opposite to London's view, i.e., that it applied not just to retirement benefits but to the retirement decision.[12] An American precedent is not binding in Canada, but it is persuasive, particularly where the Canadian statute is modelled on an American one. However, London's decision did not mention the American cases, perhaps because they were not brought to his attention by counsel for either side.[13]

Curiously, the radical decision in *Derksen* did not have the impact one might have forecast. To judge from its annual reports, the Human Rights Commission, even before *Derksen*, had developed the cautious policy of using its powers to conciliate retirement cases only where the complainant did not have a pension and so retirement might mean financial hardship (MHRC, 1975:36; 1976:53–54). This was only nibbling at the fringes of fixed retirement, for the large employers with formal retirement policies always have pension plans. Small employers may have a retirement policy but are usually much less insistent about adhering to it. After *Derksen*, the Commission simply ignored the implications of the decision and continued its previous policy. There may have been an element of bureaucratic inertia in this, but there was also important political pressure. The Cabinet was not pleased with *Derksen*, and the Minister of Labour privately threatened the Commission that he would 'cap' the definition of age in the Act if the Commission started accepting complaints about retirement in general.[14] The underlying motives of each side in this *de facto* co-operation are clear: the Commission did not want the Act weakened, and the government did not want the status quo in the labour market upset. The government also would not have wanted the embarrassment of having to admit it had not foreseen the consequences of its own legislation; and the

Commission, composed largely of NDP supporters, would not have wanted to embarrass the government gratuitously.

This *ad hoc* compromise between the government and the Commission ran counter not only to *Derksen* but also to one possible reading of a recent amendment to the *Human Rights Act*. In 1976 s.7(2), which London had explained away, had been amended to remove the explicit mention of retirement, superannuation, and pension plans.[15] The new wording referred only to employee benefit plans. Although London had had to interpret the *old* s.7(2) because Derksen's complaint had arisen under it, he had effectively imported into it one interpretation of the *new* s.7(2). Thus, after the decision in *Derksen* was rendered in June, 1977, both precedent and statute seemed to agree in depriving fixed retirement of any claim to legitimacy. Ironically, it seems that neither the Commission nor the government had foreseen this consequence of the amendment to s.7(2), which had been conceived as a purely technical measure without independent effect.[16] Thus the Commission, with the government's tacit approval, continued its policy of rejecting most retirement complaints.

On July 18, 1978, John Finlayson, a Winnipeg police officer recently retired at age 60 pursuant to a collective agreement, lodged a complaint with the MHRC.[17] His situation raised not only the general problem of fixed retirement but the special problem of whether age could be a bfoq for occupations like police work where public safety was involved.

Before much could be done in his case, the entire MHRC was replaced on August 15. Premier Sterling Lyon, who had led the provincial Tories to victory in the election of 1977, replaced a Commission widely (and accurately) considered to be sympathetic to the NDP with an entirely new Commission just as obviously Conservative in complexion. The new Chairman was Sig Enns, a former Conservative MP. From the course of events, it can be deduced that the new MHRC and the government decided to continue their policy of deflecting retirement cases. Finlayson's complaint, which was already on record, was put on a bureaucratic merry-go-round, so that it took almost three years to come to a board of adjudication.

On October 31, 1978, Aubry Newport, a Manitoba civil servant, was retired at 65 pursuant to the *Civil Service Act.*[18] He tried to complain to the MHRC, which at first refused even to receive his complaint.[19] This was probably illegal, as the *Human Rights Act* stated, 'The Commission *shall*, as soon as is reasonably possible, investigate and endeavour to effect a settlement of any complaint of an alleged contravention of the Act.'[20] The Commission was finally forced to accept the complaint when Newport's counsel, one of whom was Jack London, now Dean of the Manitoba Law Faculty, threatened to obtain a writ of mandamus.[21] Once it accepted the complaint, the Commission conducted a perfunctory investigation and then called upon the Attorney General to appoint a board of adjudication. Whereas the Commission legally has 'carriage of the complaint' and normally appears with the complainant and pays legal expenses, in this instance it removed itself from the proceedings, leaving Newport's counsel to act *pro bono publico*.

These delays led to an end run around the Commission by Imogene McIntire, a Professor of Education at the University of Manitoba. She was due for retirement June 30, 1980, at age 65, according to the University's collective agreement with academic staff. She obtained the services of Mel Myers, who had been Chairman of the MHRC under the NDP and who was now acting for the Winnipeg Senior Officers Association against Finlayson.[22] Knowing that McIntire would find only delay if she complained to the Commission, Myers took her complaint directly to the Court of Queen's Bench, as was allowed by s.34 of the *Manitoba Human Rights Act*. He asked for a declaratory judgment that the collective agreement was void with respect to setting an age for retirement because it conflicted with the *Human Rights Act*. The Court agreed, ruling that, since the Act contained no upper limit on age, 'no employer may refuse to continue to employ a person solely on the basis of his age.'[23] The collective agreement made no difference because 'parties may not contract out of the provisions of the human rights legislation.'[24]

This decision was quickly followed by a board of adjudication in the grievance of Stewart

Thexton, a non-academic employee of the University of Manitoba.[25] The legal issue was identical, namely the validity of retirement at 65 under a collective agreement. More importantly, the McIntire decision was upheld in an appeal to the Manitoba Court of Appeal in early 1981. By a vote of 3–2, the Court held that 'in passing legislation without any limitations by way of definition of the word 'age,' the Manitoba legislature intended to prohibit discrimination in employment against its adult citizens of whatever age.[26] In dissent, Justice Monnin observed that this issue 'should be resolved by the elected representatives of the people and not left to the courts to struggle with, unaware of all social, actuarial, and other implications involved.[27] Retirement at 65 was widespread in both public and private sectors, and the government had continued to follow that practice even after introducing age into the *Human Rights Act* in 1974. Monnin reasoned that the legislature would not have brought about such a drastic change in existing practice without some explicit statement. He was undoubtedly correct about the historical intent of the legislation, but on weaker ground as far as pure statutory construction was concerned.

Meanwhile the complaints of Finlayson and Newport were grinding ponderously ahead. In the fall of 1980, the Attorney General appointed Winnipeg lawyer Marshall Rothstein to adjudicate both cases. Rothstein was connected to the Conservative Party, highly respected in legal circles, sympathetic to individual rights, but not a human rights crusader.

Newport differed importantly from *McIntire*. In the latter case, retirement rested upon a collective agreement; in the former, the age of 65 was explicitly established by two provincial statutes, the *Civil Service Act* and the *Civil Service Superannuation Act.*[28] The legal question was whether the *Human Rights Act*, passed after these two, had impliedly repealed provisions which were inconsistent with itself. Rothstein ruled that implied repeal had not taken place, chiefly because the *Civil Service* Act stated that it applied 'unless explicitly provided to the contrary in another Act'.[29] Rothstein reasoned, therefore, that the *Human Rights Act* did not repeal the retirement provision of the *Civil Service Act* because it did not explicitly say so.[30]

This victory against the abolition of fixed retirement proved to be short-lived. In two levels of appeal, both the Court of Queen's Bench and the Court of Appeal disagreed with Rothstein.[31] The *ratio decidendi* was that the *Human Rights Act* was later in time than the early statutes and that it contained a statement explicitly binding the Crown. In the words of Justice Monnin:

> ... the old law and the new law cannot stand together, and one must give way. *The Human Rights Act* was passed later in time, and in view of the fact that it contains a specific provision declaring the Crown to be bound, —thereby necessarily making it applicable to members of the Civil Service,—this is a case where the later enactment prevails over the earlier one.[32]

While the *McIntire* and *Newport* appeals were decisive in giving an authoritative interpretation of the law, other cases extended the law to various situations. *Bedrich* (unreported) covered the by-laws of the City of Winnipeg, *Parkinson* the by-laws of the government-funded Health Science Centre.[33] *Paterson v. Price* applied to employer policy in the private sector where 'retirement age was not specified in a collective agreement'.[34]

The abolition of fixed retirement has thus been effectuated except for three minor limitations. First, Adjudicator Rothstein ruled, and was upheld in two appeals, that Finlayson could be required to retire at 60.[35] Age could be a bona fide occupational qualification for a police officer, particularly because public safety was involved and no satisfactory tests existed, capable of measuring each officer's physical and mental abilities in individual terms. Second, in *Galbraith and Lylyk*, the Manitoba courts refused to make the impact of *Newport* retroactive, thus staving off a reinstatement of civil servants retired before *Newport.*[36] Third, after adding age to the *Human Rights Act*, the Manitoba legislature in 1980 revised and repassed the *Public Schools Act.*[37] Section 50 of the new statute allowed public school divisions to

establish a retirement age for teachers, leading to the involuntary retirement of Doreen Craton at 65. The Court of Queen's Bench and the Court of Appeal have both held that the *Human Rights Act* takes precedence over the *Public Schools Act*. A statute such as the *Public Schools Act* would have to contain an explicit statement exempting it from the *Human Rights Act* before it could legitimate fixed retirement.[38] However, one judge in dissent has argued that, according to the logic of *Newport*, the later statute should take precedence. The Winnipeg School Division No. 1 has received leave to appeal from the Supreme Court of Canada. Craton's counsel, Mel Myers, believes that this will be a chance to establish the quasi-constitutional status of human rights acts.[39]

Even if *Craton* is reversed by the Supreme Court, it will constitute only a very limited exception to the abolition of fixed retirement, as does *Finlayson*. The reality is that fixed retirement in Manitoba has been effectively abolished by judicial interpretation of the *Human Rights Act*, even though that interpretation was almost certainly contrary to the historical intention of the legislature which had passed the Act in 1974 and amended it in 1976. Of course, as the judges often remarked in these cases,[40] if the legislature did not like the judiciary's view of the law, it was at all times free to 'cap' the Act or in some other way to provide for the continuation of fixed retirement.

That the Lyon government considered this possibility is shown by its appointment, on March 11, 1981, of a Commission on Compulsory Retirement. The Commissioner was Marshall Rothstein, who at that point had already rendered his decision in *Newport* and was still seized of the protracted *Finlayson* case. Given his ruling in *Newport* that the *Human Rights Act* had not repealed the retirement provisions of the *Civil Service Act*, his appointment by the government may have looked like a prelude to the reestablishment of fixed retirement. But again there was a surprise. Rothstein's long report, presented after a year of studying legal and economic evidence, recommended continuation of the *status quo*, which by that time had become 'abolitionist' (Rothstein, 1982). While Rothstein worked, his ruling in *Newport* had been reversed by the courts and further decisions had overturned fixed retirement in other sectors of the Manitoba economy. Rothstein's report ratified these developments, albeit with a strong statement in favour of retaining the bfoq exemption for certain exceptional situations. This result would have made it difficult for any government to restore fixed retirement by amending the *Human Rights Act*, but in any case the Lyon cabinet was replaced by a new NDP government even before the report was delivered.

Analysis

This slice of Manitoba history illustrates how a policy-making process can emerge from the adjudication of private rights. By 1982, the result was effectively the same as if the legislature had decided to abolish fixed age retirement; yet the legislature never made such a decision, and it is questionable whether such a proposition could have been passed at any time between 1974 and 1982. Rather than making a clear decision of its own, the legislature, by including age in the *Human Rights Act* in 1974, set in motion a policy process involving a complex interaction of legislative, administrative, and judicial institutions.

The most striking feature of the process was the attainment within a very few years of a result clearly divergent from the intent of the legislature. The historical evidence makes clear that the cabinet and legislature were primarily concerned about the employment opportunities of older workers, men and women in the 40–65 range who were required by circumstances to change jobs. Ironically, it is unknown whether this group was helped at all by the legislation. Human Rights Commission conciliation files are confidential, but no complaint in this category has gone as far as a board of adjudication. Whatever the impact on the original target group, the legislation's most visible consequences were clearly unintended ones. No one seems to have realized that drafting the age provision in sweeping language without the customary upper limit or 'cap' would lead to the abolition of fixed retirement. Later statements by government officials as well as a consistent pattern of

government actions show that this outcome was neither intended nor desired.

The outcome was a victory for the literal word. The Manitoba courts followed the British model of precluding themselves from examining historical evidence of legislative intent (Gall, 1983:257). Statutory construction depended upon the reading of the legal text, aided by certain canons of construction. This style of interpretation may be appropriate for the adjudication of private rights, but it leads to a peculiar form of policy process which I shall call 'policy-making by exegesis'. The exegetical approach to policy proceeds by deductive logic to unpack the possible meanings of legislative words. No notice is taken of 'social facts', i.e., of recurrent patterns of behaviour or of historically established practices. Public policy is thus produced syllogistically rather than empirically. This approach, long typical of Canadian courts, is beginning to change in favour of certain American practices. The Supreme Court of Canada, at least, will now look at historical evidence of legislative intent in interpreting a constitutional text and will examine social facts, as shown in the *Anti-Inflation Reference* case. But the older positivistic traditions of statutory construction are still overwhelmingly dominant in the lower courts (Morton, 1984b:171–175; Hogg, 1976).

To say this is not to criticize the Manitoba courts for 'judicial activism'. The courts did not at all seek out the policy-making role that was thrust upon them by the expansive wording of the 1974 amendments to the *Human Rights Act*. 'In the beginning was the word....' The courts were bound by the legislative word and had to deliver an exegesis on demand. Responsibility for the situation rests with the government of the day for introducing into the legislature a statute so broadly worded that it amounted to a delegation to the courts of legislative authority over a broad area of public policy.

Policy-making by exegesis leads to the domination of the policy process by exegetical specialists, usually lawyers (Sowell, 1980:331–368). In the events described here, a small number of Winnipeg lawyers interested in 'human rights' questions repeatedly played key roles. Mel Myers, Chairman of the MHRC at the time of *Derksen*, was later counsel for the complainant in *McIntire* and *Craton*, and counsel for the defendant in *Finlayson*. Jack London, the adjudicator in *Derksen*, represented the complainant in *Newport*. Marshall Rothstein, the adjudicator in *Bedrich, Newport* and *Finlayson*, was also appointed commissioner to study the whole question. The judges of the Manitoba courts made the ultimate decisions on appeal, of course, but the activities of counsel and adjudicators were vital in formulating the issues. Rothstein's report was also crucial in legitimating what the judiciary had wrought. Thus it is not an overstatement to say that provincial public policy on this issue was made by a small number of unelected lawyers and judges in Winnipeg. The government and legislature, which could legally have reversed the outcome, were politically paralyzed by the mystique of human rights.

Another noteworthy fact is that the abolition of fixed retirement was achieved against remarkable opposition. Neither the NDP nor the Conservatives, who controlled the government and legislature at different times, favoured it. Pliant human rights commissions, heeding the voice of the cabinet, did their best to hold up abolition.[41] City governments, school districts, and police commissions fought the trend as did the University of Manitoba, which made vigorous public statements (Rothstein, 1982:145–146). Large private sector employers were almost universally opposed to abolition; the insurance industry, which is particularly important in Winnipeg, made a submission to Rothstein (*ibid.*, 145, 164). Small employers were more or less unconcerned about the issue since they do not normally rely on a fixed age of retirement. The labour movement was badly split on the issue. McIntire, Newport, Finlayson, and Craton all had to act without or even against their unions. The Manitoba Government Employee Association and the Manitoba Federation of Labour publicly advocated leaving such matters to collective bargaining (*ibid.*, 153). The University of Manitoba Faculty Association, after sitting on the sidelines in *McIntire*, did recommend abolition to the Rothstein Commission, but only for a five-year trial period (*ibid.*, 154).

Throughout this period, no large or powerful

organization in Manitoba was pushing for an end to fixed retirement; complaints were all brought by isolated individuals without institutional support. Their objectives were opposed by public sector employers, big business, and at least a large part of organized labour. Almost incredibly, this imposing array of political power could find no way to influence or reverse the outcome of the judicial policy-making process. Again, the mystique of human rights was triumphant.

One reason for the power of the word is that there was little institutional control over complaints. The MHRC by statute had to receive and invesitgate complaints. It did not have to request the Attorney-General to appoint a board of adjudication; but if it did so, the Attorney-General had to comply.[42] Additionally, complainants could go directly to the Court of Queen's Bench for an injunction, as McIntire did. Once the legislation had been passed, neither the government nor the MHRC could control the resultant process of adjudication.

Such circumstances make it likely that sooner or later all logical possibilities of a statutory text will be exhausted. As complainants come forward with their grievances, counsel will develop arguments as necessary. There is a high probability that a wide variety of complaints will actually be made, for the costs of complaining have been deliberately made low. The Commissions's 'carriage of the complaint' means it pays expenses when it supports the complainant before the board of adjudication and in court appeals. Litigation without the Commission's support, as in *McIntire* and *Newport*, imposes a cost on the complainant for legal fees, which may however be reduced or erased if counsel acts *pro bono publico*, as London did in *Newport.* Even if the complainant loses his case and has to pay legal fees, he is very unlikely to be assessed costs and/or damages for the defendant; at least, this has not yet happened in Canada in human rights proceedings. All of this means that it is only a matter of time before all logically possible interpretations of broadly worded human rights codes are tested. Policy-making by exegesis will not fail to thrive for lack of disputes.

The incremental nature of the process is not by itself open to objection. The common law is a valuable incremental process of law-making, in which the law emerges as an unintended consequence of adjudicating particular disputes. The virtues of the common law, as of all incremental decision-making processes, are many: gradualism, incorporation of practical experience, avoidance of catastrophic error, possibility of correction, responsiveness to changing conditions. However, there is an essential difference between the common law and human rights law. The common law method of reasoning by analogy is a method of formulating rules of law to settle particular cases. Undergirding the process is the people's real but largely inarticulate sense of justice. Common law adjudication 'discovers' the law by articulating these principles of justice as they apply to particular cases. Once articulated, a principle stands until it is modified or specified by another principle brought to light in a different case. Thus the common law is a gradual process of discovery and articulation of principles which are already implicit in the morality of the people (Hayek, 1973:1:83–87). Because discovery and articulation are based on existing patterns of behaviour, the tendency is to confirm rather than upset expectations.

In contrast, human rights law begins with a legislated statement of an abstract principle: that there shall be no 'age discrimination'. This is not an articulation of existing practice but a radical innovation. Prior to 1974, 'age discrimination' was part of life in Manitoba as everywhere else in the Western world. Age was routinely considered as a relevant factor in decisions about school entry, apprenticeship, hiring, retirement, and innumerable other aspects of daily life. To suddenly declare such reliance on age to be a form of discrimination is not an expression of popular *mores* but an attempt to change them. It is an effort to reform reality according to intellectually conceived norms (Talmon, 1968: 1–2). 'In the beginning was the word....' The human rights complaint machinery now sets up a discovery process which, unlike the common law, is unguided by actual behaviour. The major constraint on adjudication is the wording of the statute. The formulation of legal principles becomes a kind of textual exegesis rather than an articulation of tacitly observed patterns of

behaviour.

Although the incremental process of common law adjudication is oriented toward the resolution of particular conflicts, as general principles emerge they will have an impact on public policy. For example, the rise in the nineteenth century of the doctrine of negligence in torts had the effect of removing from employers most liability for industrial accidents suffered by their employees. Ultimately legislatures intervened to reintroduce, in various forms, the notion of strict liability (Gillespie and Klipper, 1972:26–30). But the policy impact of common law is qualitatively different from that of human rights adjudication because of the greater dependence on existing behaviour as opposed to intellectually conceived standards of reform. An abstract idea such as the prohibition of age discrimination is bound to have policy consequences in many unexpected directions.

At this point should be mentioned the well-known weaknesses of adjudication as a method of making policy. These apply almost equally to courts and to quasi-judicial tribunals such as the boards of adjudication established under the Manitoba *Human Rights Act*. Courts and tribunals do not control their own agendas, they must react to cases brought before them. Their methods of inquiry focus on the history of particular cases, not on recurrent patterns of behaviour. The necessity to declare individual rights precludes compromise and turns bargaining situations into contests of principle. Courts must declare individual rights under the law regardless of social consequences; they would be rightly reproached if they denied justice to a complainant because of a view of the policy consequences. And in any event, they have no machinery to allow them to study the policy consequences of their decisions and to change direction if the consequences are undesirable. The precedential method encourages a straight-ahead movement towards the logical limits that a doctrine will bear (Horowitz, 1977).

All these characteristics of judicial policy-making were evident in the abolition of fixed retirement in Manitoba. Individual complaints forced the issue to the fore, even though it was not on the agenda of government or of any well-organized interest in the province. The tribunals and courts had to deal with individual cases in the absence of general information. Ironically, an excellent study was done, but only after the legal decisions had been made. Research served the function of retrospective legitimation, not prospective definition of policy choices. The rights format required a decision of principle – fixed retirement, yes or no – whereas the matter might also have been handled by legislative compromise, as it was in the United States. A legislative increase of the retirement age to 70 would have dealt with practically all realistic complaints without introducing the sweeping principle that *no* fixed age for retirement may be established by collective bargaining or employer policy. Similarly, the legislature could have made special provision for certain categories of employment, as was done in ADEA.

This does not mean that courts are inferior institutions. The peculiar characteristics of their decision-making processes are all beneficial features for the resolution of particular disputes, and courts which were not of this type would soon lose their legitimacy in adjudication. But what is a strength for adjudication of disputes can be a weakness for general policy-making. The appropriate conclusion is that the legislature should not force the courts to play a role for which they are poorly equipped.

Alternatively, if the Canadian courts are to be thrust by legislatures into a policy-making role, they will have to adopt new procedures to cope as best they can with their new responsibilities. Two innovations with which the Supreme Court of Canada has already experimented are suggested by this case study. First, it would have been useful if the courts could have examined historical evidence about legislative intent instead of deducing intent through exegesis. Second, the courts would have been assisted by taking judicial notice of the 'social facts' concerning retirement practices. This might have been accomplished by submission of 'Brandeis briefs' by the litigants or by intervention of informed parties. Such changes in judicial procedure create new difficulties of their own to the extent that they transfer the court's focus from a particular conflict to a general question of policy, but the costs may have to be accepted if courts are compelled to be policy-makers.

Abolition of fixed retirement is a *fait accompli* in Manitoba. It has been legislated in Quebec,[43] and may ensue in New Brunswick from human rights cases now being heard.[44] The unqualified use of the term 'age' in s.15 of the *Canadian Charter of Rights and Freedoms* may produce the same result in all of Canada, at least in the public sector. I am not necessarily opposed to the substance of these developments. I believe that expansion of individual choice is normally desirable. However, there are also many situations where fixed retirement seems to be a useful part of a package of employment arrangements: in the judiciary, so that the government will not get into the dangerous habit of forcing the resignation of aging judges whose competence is declining; in military and quasi-military hierarchies, where 'up or out' promotion prevails; in the university, where tenure becomes a guarantee of lifetime employment in the absence of a retirement age; for high corporate executives, who otherwise might be retired only at the cost of a disastrous fight within the board of directors; for pilots, bus drivers, and other occupations where public safety is involved. Only a few of these situations are adequately covered by the concept of bfoq.

Apart from the substance of the outcome, the way in which it was reached has alarming implications. Since employment conditions in a market economy are so diverse, retirement provisions should be left to the flexibility of individual or collective bargaining (Macdonald, 1978; Gunderson and Pesando, 1980). If government regulation is necessary, it should be done through specific legislation passed after debate by elected legislators, so that compromises can be struck and exceptions provided for. The path taken in Manitoba seems the least desirable policy process for a liberal democracy: the legislature passes a statute of unknown meaning, the exegesis of which leads unelected lawyers and judges to impose a sweeping policy change on all employers and unions. Transforming such important policy matters into 'rights' questions takes them out of the conventional political process where they belong, short-circuits debate on the broad issues, and makes it extraordinarily difficult for the legislature to regain control of events. This is hardly the substance of representative government.

The considerations developed in this section apply with equal or even greater force to the coming era of Charter jurisprudence. Consider again the wording of s.15(1) of the Charter:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Even more than human rights legislation, this language is a triumph of abstract principle. Words like 'sex' or 'age' are wholly undefined. Will 'sex' apply to such difficult practical issues as maternity leave or fringe benefits to homosexual partners? What impact will 'age' have on school entry, on retirement practices, on government-regulated automobile insurance rates? Existing human rights legislation is filled with provisions to cover such practical problems: bfoq clauses, age floors and ceilings, specific exemptions, etc. The Charter leaves all such questions to the courts to determine as best they can.

One important difference between human rights and Charter litigation is worth noting. Human rights legislation facilitates access to adjudication by allowing a Minister to appoint boards of inquiry and by giving the Commission 'carriage of the complaint' before such boards and before the courts on appeal. This access is so generous that it allows individuals to affect the policy process without being part of a larger organized group, as happened in this case study. Access under the Charter, although generous by any usual standard, is not so wide. There are no quasi-judicial tribunals to hear Charter cases, so litigants will have to go directly to court under s.24(1): 'Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances'. This section makes it easy to get into court, but litigants will have to find their own lawyers and pay expenses, obligations which Commissions undertake in human rights

cases. This difference means that the Charter will be less useful to random individuals than to organized groups providing money and legal advice in support of a strategy of litigation. Canadian feminists are already on this path, preparing lawsuits to be filed April 17, 1985.[45] Other interest groups will doubtless imitate the feminists if the latter are successful.

Section 15 of the Charter thus promises to make the courts an arena for the combat of organized groups pursuing deliberate strategies. In such an environment, policy-making by exegesis will be satisfactory to no one's interest, least of all the public interest. Legislatures will have to take steps to regain control over some of the power which they have devolved upon the courts, while the courts will have to adjust their procedures to deal with their more prominent role in the policy process. The inevitable politicization of courts will be an epochal development in Canadian government. With such a broad policy-making role, the political neutrality of the judiciary will be increasingly transformed from a half-truth to a fiction, with incalculable long-range consequences for the legitimacy of the courts.

Notes

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1 S.B.C., 1964, C.19; S.O., 1966, C.3.
2 S.B.C., 1969, C.10, s.5(b), 6(b), 7(1)(b), 11(1); S.N., 1970, c.262, s.9(1)(b), 9(3)(b), 9(4)(b), 5; S.O., 1972, C.119, s.15; S.A., 1972, C.2, s.2(1), 7, 8, 10, 38(a).
3 S.N.B., 1973, C.45, s.2,3.
4 *Bell Canada v. Office and Professional Employees' International Union Local 131*, (1974) S.C.R. 335.
5 S.M., 1974, C.65, s.3, 4, 5, 6, 7(2).
6 S.A., 1972, c.2, s.7(2).
7 S.B.C., 1969, C-10, s.11(1)(a); S.N., 1970, C.267, s.5(a); S.N.B., 1973, C.45, s.3.
8 Legislative Assembly of Manitoba, *Debates and Proceedings*, June 1, 1974, pp.4212–4213.
9 Manitoba Government News Service, press release, June 7, 1974, in the Library of the Manitoba Human Rights Commission.
10 *Public School Act*, S.M., 1980, C.33, s.50.
11 Interview with the author, December 14, 1983.
12 *McMann v. United Air Lines*, 98 S.Ct. 444 (1977).
13 Interview, December 14, 1983. Professor London kindly checked his records of the hearing to see whether counsel had introduced American decisions.
14 Non-attributable interview.
15 S.M., 1976, C.48, s.11, amending s.7(2) of *Human Rights Act*.
16 Interview with Mel Myers, December 15, 1983.
17 *John W. Finlayson v. City of Winnipeg et al.*, 2 C.H.R.R. (1981), D/429.
18 *Aubrey Herbert Mead Newport v. The Government of Manitoba*, 2 C.H.R.R. (1981), D/323, at D/324.
19 Interview with Jack London, December 14, 1983.
20 S.M., 1974, C.65, s.20.
21 Interview with Jack London, December 14, 1983.
22 Interview with Mel Myers, December 15, 1983; Winnipeg *Tribune*, May 30, 1980.
23 *Imogene McIntire v. The University of Manitoba et al.*, 2 C.H.R.R. (1981), D/305, at D/309.
24 *Ibid.*
25 *Grievance of Stewart Thexton*, 2 C.H.R.R. (1981), D/318.
26 *Imogene McIntire and the University of Manitoba*, 2 C.H.R.R. (1981) D/310, at D/314.
27 *Ibid.*
28 *Civil Service Act*, C.C.S.M., c.C110, s.20(2); *Civil Service Superannuation Act*, C.C.S.M., c.C120, s.54.
29 C.C.S.M., c.C110, s.3.
30 *Aubrey Herbert Mead Newport v. The Government of Manitoba*, 2 C.H.R.R. (1981), D/323.
31 2 C.H.R.R. (1981), D/528; 3 C.H.R.R. (1982), D/721.
32 3 C.H.R.R. (1982), D/721, at D/722.
33 *Parkinson v. Health Sciences Centre*, 3 C.H.R.R. (1982), D/724.
34 *Paterson v. Price Ltd.*, 3 C.H.R.R. (1982), D/904.
35 *John N. Finlayson v. The City of Winnipeg Police Department*, 2 C.H.R.R. (1981), D/429; 3 C.H.R.R. (1982), D/775; 3 C.H.R.R. (1982), D/902.
36 *Manitoba v. Manitoba Human Rights Commission and Galbraith and Lylyk*, 4 C.H.R.R. (1983), D/1607; 5 C.H.R.R. (1984), D/1885.
37 S.M., 1980. C.33.
38 *Craton v. Winnipeg School Division No. 1 et al.*, 21 Man. R. (2d), 315.
39 Interview with Mel Myers, December 15, 1983.
40 E.g., *McIntire*, 2 C.H.R.R. (1981), D/310, at D/314.
41 The Manitoba Human Rights Commission finally came out for abolition of 'mandatory retirement' in its brief to the Rothstein Commission, July 20, 1981. MHRC Library.
42 S.M., 1974, C.65, s.21(2).
43 *Loi sur l'abolition de la retraite obligatoire*, L.Q., 1982, C.12.
44 *Geza Charles Kuun v. University of New Brunswick*, 5 C.H.R.R. (1984), D/1901. On appeal.
45 Mary Eberts, statement at conference on women's rights, October 1983, Banff, Alberta.

References

Dworkin, A.G. and R.J. Dworkin (1976) *The Minority Report* (New York: Praeger).
Gall, Gerald (1983) *The Canadian Legal System*,

2nd ed. (Toronto: Carswell).

Gillespie, Paul and Miriam Klipper (1972) *No-Fault* (New York: Praeger).

Gunderson, Morley and James E. Pesando (1980) 'Eliminating Mandatory Retirement: Economics and Human Rights,' *Canadian Public Policy –Analyse de Politiques*, VI:2:351–360.

Hayek, F.A. (1973) *Law, Legislation and Liberty*, 3 vols. (Chicago: University of Chicago Press).

Hogg, P.W. (1976) 'Proof of Facts in Constitutional Law Cases,' *University of Toronto Law Journal*, 26:386–408.

Horowitz, Donald (1977) *The Courts and Social Policy* (Washington, D.C.: Brookings Institute).

London, Jack R. (1983) 'Universities Should Prepare for Abolition of Mandatory Retirement,' *University of Toronto Bulletin*, June 6, 1983.

Macdonald, Robert M. (1978) *Mandatory Retirement and the Law* (Washington, D.C.: American Enterprise Institute).

Manitoba Human Rights Commission (1975, 1976) *Annual Report* (Winnipeg).

Morrison, Malcolm H. (1982) *Economics of Aging: The Future of Retirement* (New York: Van Nostrand Reinhold).

Morton, F.L. (1984a) 'Charting the Charter—Year One: A Statistical Analysis,' Canadian Political Science Association Annual Meeting.

——— (1984b) *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press).

Rothstein, Marshall C. (1982) *Report of the Commission on Compulsory Retirement* (Winnipeg).

Russell, Peter H. (1982) 'The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts,' *Canadian Public Administration*, 25:2–33.

Sowell, Thomas (1980) *Knowledge and Decisions* (New York: Basic Books).

Talmon, J.L. (1968) *The Origins of Totalitarian Democracy* (New York: Praeger).

Tarnopolsky, W.S. (1982) *Discrimination and the Law in Canada* (Toronto: Richard De Boo).

——— (1983) 'The Equality Rights in the Canadian Charter of Rights and Freedoms,' *Canadian Bar Review*, 61:242–264.