

## **MANDATORY RETIREMENT**

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### **I. Introduction**

This paper will first summarize the decision of the B.C. Court of Appeal concerning mandatory retirement in *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District* (2001), 206 D.L.R. (4<sup>th</sup>) 220 (“*GVRDEU*”).

The paper will then discuss the following four issues arising from the *GVRDEU* decision:

- (a) The relationship between the *Charter* and human rights legislation.
- (b) The impact of the incorporation of mandatory retirement in a collective agreement.
- (c) The definition of “law” for the purposes of section 1 of the *Charter*.
- (d) The possible impact of the *GVRDEU* decision in the private sector.

### **II. The *GVRDEU* decision**

#### **A. The facts**

In October 1998 Mr. Ray Coutts commenced employment with the Greater Vancouver Regional District (the “Employer”) as an operator in the Employer’s wastewater treatment plant. This position was in the bargaining unit represented by the Greater Vancouver Regional District Employees’ Union (the “Union”).

Mr. Coutts was already 65 years old when he was hired, but the Employer was unaware of this fact. Shortly after Mr. Coutts was hired the Employer discovered his age and terminated his employment.

The Employer had consistently applied an unwritten policy of mandatory retirement at age 65. In August 1998 the Employer had adopted a written policy confirming its policy of mandatory retirement at 65 but allowing for the employment of individuals after age 65 in certain circumstances, as auxiliary employees without seniority or benefits.

The collective agreement between the Employer and the Union did not contain any provisions concerning mandatory retirement.

The Union grieved the termination of Mr. Coutts’ employment.

## B. The arbitration proceedings

The Union's grievance proceeded to arbitration before a panel chaired by Rod Germaine. The Union nominee was Ray Haynes and the Employer nominee was Mike Hunter.

There was no dispute that the Employer was a government body to whose actions the *Charter* applied. There was also no dispute that the Employer's mandatory retirement policy violated section 15(1) of the *Charter*. The issue was whether the policy was saved under section 1 of the *Charter*.

The Employer's position was that it did not have to call evidence to justify its policy because it was settled law that all mandatory retirement policies are saved under section 1 under the *Charter*. The Employer took the position that an arbitrator does not have to examine the specific factual circumstances of a case since the factual circumstances are not important. The Employer's position was supported by two Ontario lower court decisions concerning the retirement of a provincial court judge (*Charles v. Canada (Attorney General)* (1995), 129 D.L.R. (4<sup>th</sup>) 114 and *Charles v. Canada (Attorney General)*, [1995] O.J. No. 2223 (QL)), as well as one British Columbia arbitration award (*Kamloops (City) v. Canadian Union of Public Employees, Local 900*, [1995] B.C.C.A.A.A. No. 334 (QL)). Consequently the Employer did not adduce evidence to meet the section 1 test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103.

On June 22, 2000 the majority of the arbitration panel, consisting of Mr. Germaine and Mr. Haynes, issued its award in *Re Greater Vancouver Regional District and Greater Vancouver Regional District Employees' Union*, 90 L.A.C. (4<sup>th</sup>) 93. The majority award upheld the grievance, rejecting the Employer's argument that the case law established that government mandatory retirement policies were constitutionally permissible in all circumstances. Instead, the majority held that a case-by-case determination is necessary -- although in some instances the burden on an employer to justify the policy would be negligible. The majority found that the Employer in this instance did not discharge its burden. The majority concluded:

[101] In our view the S.C.C. cases contemplate a case-by-case determination of such challenges. On our reading of the majority judgments of La Forest, Sopinka and Cory JJ., it is apparent that such challenges will have little or no prospect of success if the mandatory retirement measure in question has been incorporated into a collective agreement or is otherwise consensual. But if it is not, and if the *Charter* applies, then the employer bears the burden of establishing the basis on which its mandatory retirement policy is justified under s. 1 of the *Charter*. As a consequence of *McKinney*, *Harrison* and *Stoffman*, the justification of mandatory retirement under s. 1 of the *Charter* will be so evident in some cases that the burden will be negligible, rendering it unnecessary for the party defending the measure to call evidence. In the "educational field" it would appear that, absent "special circumstances", the burden would not necessitate any particular evidence (*Lewis, supra*). But, on the evidence received in this case, the facts involve few if any of the factors which were treated as significant in all of the judicial

determinations binding on this board. In our view, in these circumstances, the burden under s. 1 of the *Charter* cannot be simply ignored.<sup>1</sup>

Mr. Hunter in dissent would have dismissed the grievance. He was of the view that the law had been settled since *McKinney* as argued by the Employer.

## **C. The Court of Appeal decision**

### **1. Introduction**

The Employer appealed the arbitration award to the Court of Appeal pursuant to section 100 of the *Labour Relations Code* which gives the Court of Appeal limited appellate jurisdiction over arbitration awards. There was no dispute that the Court of Appeal had jurisdiction and that the standard of review was one of correctness.

There were three separate reasons for judgments delivered by the court. The majority judgment was delivered by Madame Justice Prowse, with Madame Justice Newbury concurring. In addition, Madame Justice Newbury delivered her own reasons for judgment on the issue of whether the mandatory retirement policy was prescribed by law within the meaning of section 1 of the *Charter*. Mr. Justice Mackenzie delivered a dissenting judgment.

### **2. The majority judgment**

The GVRDEU majority judgment began by noting that there was no dispute that the Employer's mandatory retirement policy breached section 15(1) of the *Charter* by discriminating against employees on the basis of age, as was found to be the case with mandatory retirement policies in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 ("*McKinney*"):

[51] In finding that mandatory retirement policies breach s. 15(1) of the *Charter*, therefore, the Supreme Court of Canada in *McKinney* has found that these policies undermine human dignity, that they result in unfair treatment to individuals over age 65, and that they discriminate against individuals solely on the basis of their age, without regard to their individual circumstances, their needs, their capacities or their merits. Thus, these individuals are marginalized and devalued both as individuals, and as members of a group sharing a common characteristic - the characteristic of being "too old".<sup>2</sup>

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<sup>1</sup> *Re Greater Vancouver Regional District and Greater Vancouver Regional District Employees' Union*, *supra*, p. 125

<sup>2</sup> *GVRDEU*, *supra*, p. 238

The *GVRDEU* majority then turned to the question of whether such policies can be saved under section 1 of the *Charter* and whether that analysis must be conducted on a case-by-case basis, noting that the answer to that question turned on an interpretation of the Supreme Court of Canada decision in *McKinney*, its companion cases, and later decisions which considered *McKinney*.<sup>3</sup>

The *GVRDEU* majority turned first to *McKinney*, one of four concurrent decisions of the Supreme Court of Canada involving mandatory retirement<sup>4</sup>. *McKinney* concerned the mandatory retirement of eight professors and a librarian at several Ontario universities. The principle majority judgment was that of Mr. Justice LaForest (concurring in by Chief Justice Dickson and Mr. Justice Gonthier).

*McKinney* dealt with two issues. One was whether the universities' mandatory retirement policies were contrary to the *Charter*. The other was whether Ontario's *Human Rights Code*, which prohibited discrimination on the basis of age only up to the age of 65 (and thus did not prohibit mandatory retirement at age 65), was contrary to the *Charter*.

In *McKinney*, Mr. Justice LaForest first considered whether the *Charter* applied to the universities and concluded that it did not. Nonetheless, he then went on to address whether, assuming the *Charter* applied, the mandatory retirement policies at issue would be contrary to the *Charter*. Like all other members of the Court in *McKinney*, Mr. Justice LaForest found that the mandatory retirement policies violated section 15(1) of the *Charter*. However, after an extensive section 1 analysis which focused largely on factors unique to universities, Mr. Justice LaForest concluded that the policies were saved under section 1 of the *Charter*.

Mr. Justice LaForest then went on to conduct a separate *Charter* analysis in *McKinney* regarding the constitutionality of the *Human Rights Code* prohibition of discrimination on the basis of age only up to the age of 65. He concluded that while the *Human Rights Code* violated section 15(1) of the *Charter* in this respect, it was saved under section 1. At numerous times in this analysis, as noted by the *GVRDEU* majority, Mr. Justice LaForest stressed that the government through the *Human Rights Code* was merely *permitting* mandatory retirement, as opposed to *imposing* it.

After closely examining *McKinney*, the *GVRDEU* majority concluded that it did not support the conclusion that the Supreme Court of Canada had pronounced upon the constitutionality of all mandatory retirement policies in the public sector.<sup>5</sup>

The *GVRDEU* majority then turned to *McKinney's* companion cases and concluded that they did not change this view. To the contrary, the *GVRDEU* majority found that two of the companion cases provided support for the majority's view of *McKinney*. The first companion case relied on

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<sup>3</sup> *GVRDEU*, *supra*, p. 238, para. 52

<sup>4</sup> The three other concurrent decisions were *Harrison v. University of British Columbia* (1990), 77 D.L.R. (4<sup>th</sup>) 94; *Stoffmann v. Vancouver General Hospital* (1990), 76 D.L.R. (4<sup>th</sup>) 700; and *Douglas/Kwantlan Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4<sup>th</sup>) 94.

<sup>5</sup> *GVRDEU*, *supra*, p. 248, para. 85

in this regard was *Douglas/Kwantlan Faculty Assn. v. Douglas College, supra*, which concerned the jurisdiction of an arbitrator to consider the constitutionality of a collective agreement provision requiring retirement at age 65. As noted by the *GVRDEU* majority:

[92] All members of the Supreme Court of Canada, except Sopinka J., concluded that the provisions of the collective agreement dealing with mandatory retirement were law to which the *Charter* applied. The court was unanimous that the arbitrator had the jurisdiction to decide the *Charter* issues. It then observed that the issues of estoppel and whether s. 1 of the *Charter* applied were to be dealt with in the second phase of the arbitral hearings.

[93] It is noteworthy that there is no suggestion in *Douglas College* that the s. 1 issue was moot on the basis that *McKinney* had already decided that all mandatory retirement policies imposed by the government were saved under s. 1 of the *Charter*. Rather, the issue was left as a “live” issue to be determined in the second phase of the arbitral proceedings.<sup>6</sup>

The other companion case relied on by the *GVRDEU* majority was *Stoffman v. Vancouver General Hospital, supra*, which dealt with the mandatory retirement of doctors at Vancouver General Hospital. The doctors were not employees covered by human rights legislation, and the Supreme Court of Canada concluded that the *Charter* did not apply to the hospital. Nonetheless, the Court engaged in a full section 1 analysis of the retirement policy at issue. The *GVRDEU* majority concluded:

[99] In summary, both the majority and the minority judgments in *Stoffman* engaged in a full s. 1 analysis in accordance with the tests outlined in *Oakes*. This would have been unnecessary had *McKinney* determined the s. 1 issue with respect to all government mandatory retirement policies in the public sector.<sup>7</sup>

The *GVRDEU* majority then turned to decisions subsequent to *McKinney*, beginning with *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103. The *GVRDEU* majority rejected the Employer’s argument that a passage in *Dickason* demonstrated that *McKinney* was determinative of the constitutionality of all mandatory retirement policies in the public sector.<sup>8</sup>

The *GVRDEU* majority also considered the decision of the B.C. Court of Appeal in *Lewis v. Burnaby School District No. 41* (1995), 121 D.L.R. (4<sup>th</sup>) 41, where the Court had stated that even in the educational field the constitutionality of mandatory retirement provisions was “subject always to the special circumstances of the case”.<sup>9</sup> The *GVRDEU* majority concluded that this passage made it clear that the Court of Appeal in *Lewis* was not satisfied that *McKinney* was

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<sup>6</sup> *GVRDEU, supra*, pp. 249 – 250

<sup>7</sup> *GVRDEU, supra*, p. 251

<sup>8</sup> *GVRDEU, supra*, p. 253, para. 109

<sup>9</sup> *Lewis v. Burnaby School District No. 41, supra*, para. 3

determinative of the constitutionality of government mandatory retirement policies, even in the education field.<sup>10</sup> The *GVRDEU* majority also noted that the Court in *Lewis* had conducted a full section 1 analysis of the policy at issue.<sup>11</sup>

In addition, the *GVRDEU* majority considered the Supreme Court of Canada decision in *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, noting:

[117] In upholding the decision of the Federal Court of Appeal, Mr. Justice LaForest, speaking for the court on this issue, distinguished *McKinney*. In doing so, he described the *McKinney* decision, at 40, as follows:

The approach taken in *Andrews* was followed by this Court in *McKinney, supra*, where it was held that, assuming university policies constituted government action, mandatory retirement of university faculty members would violate s. 15(1). *Although the Court in McKinney ultimately upheld these policies, it was on the basis that the universities were not government actors and, more important for present purposes, that in the closed environment of a university, mandatory retirement could be justified under s. 1 of the Charter.* [Emphasis added.]

[118] This passage appears to restrict the scope of the *McKinney* decision. Certainly, there is no suggestion in Mr. Justice LaForest's description of *McKinney* that the court there was making a definitive statement about mandatory retirement policies at large.<sup>12</sup>

The *GVRDEU* majority then reiterated its view that the extensive section 1 analysis of the policy at issue in *Stoffman*, as well as in *McKinney* itself, was unnecessary if compliance with human rights legislation was all that was required to justify all mandatory retirement policies under section 1 of the Charter.<sup>13</sup> The *GVRDEU* majority also noted that Mr. Justice LaForest in *McKinney* and *Stoffman* had referred to the "unique" nature of the university and hospital communities.<sup>14</sup> Perhaps most convincingly, the *GVRDEU* majority stated:

[122] Further, if the majority in *McKinney* had intended to resolve the issue of the constitutionality of mandatory retirement policies in the public sector for all employment of every kind, one would have expected them to say so in no uncertain terms. They did not. Apart from one sentence in *Dickason* two years later, and remarks made by Sopinka J. in *McKinney* and *Dickason* (speaking only for himself), there is no clear statement that the court was engaged in an analysis

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<sup>10</sup> *GVRDEU, supra*, p. 254, para. 113

<sup>11</sup> *GVRDEU, supra*, p. 254 – 255, para. 114

<sup>12</sup> *GVRDEU, supra*, pp. 255 – 256

<sup>13</sup> *GVRDEU, supra*, p. 256, para. 120 and 121

<sup>14</sup> *GVRDEU, supra*, p. 256, para. 121

that would have the far-reaching effects contended for by the appellant. If anything, the majority took what it viewed to be a "cautious approach" to this issue, the same approach it observed the Ontario Legislature had taken in extending the protection of s. 9(a) of the *Ontario Code* only to those aged 65 or under.<sup>15</sup>

The *GVRDEU* majority then concluded its analysis as follows:

[123] The majority in *McKinney* and the companion decisions was well aware of the compelling arguments in favour of abolishing mandatory retirement (many of which are cogently set out in the reasons of L'Heureux-Dubé J. in both *McKinney* and *Dickason*) and of the fact that many legislatures had abolished mandatory retirement in favour of provisions incorporating reasonable and *bona fide* occupational requirements or similar provisions. The majority was also well aware of the devastating effects, both financial and psychological, which mandatory retirement policies could have on those forced to retire against their will when they were ready, willing and able to continue working. Given the significance of these considerations, I am not prepared to assume that the majority simply abandoned the traditional *Oakes* analysis, which is engaged whenever a law is found to be discriminatory, in favour of a sweeping pronouncement of constitutionality of all mandatory retirement policies in the public sector.

[124] This broad interpretation of *McKinney* is particularly unlikely given the fact that the court did not have the benefit of a variety of fact patterns before it to enable it to assess how a s. 1 analysis would impact on employment in different segments of the public sector. Certainly, the university and hospital settings could not be taken to be representative of employment in the public sector in general, assuming, as the court did, that universities and hospitals were part of government. The nature of the employment in this case, for example, is a far cry from that in the university or hospital environments.

[125] Is it reasonable to conclude that an employer such as this respondent could simply enact an admittedly discriminatory policy, which on its face does not offend the *Human Rights Code*, and do no more to justify its policy than refer to *McKinney*? In my view, the answer to this question is "no". *McKinney* is not definitive of the constitutionality of all mandatory retirement policies in the public sector, without regard to the nature of the employment or the underlying factual foundation of each case. It does not relieve an employer of the onus of establishing that its policy of mandatory retirement is justifiable under s. 1 of the *Charter* on an *Oakes* analysis. It may be that the onus on an employer will be readily met in some cases because of similarities between the case at hand and other decided cases, but the onus must still be satisfied.

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<sup>15</sup> *GVRDEU*, *supra*, pp. 256 – 257

[126] While the case-by-case approach to mandatory retirement policies does not have the benefit of certainty of result which a decision declaring all mandatory retirement policies constitutional would provide, certainty of result can be over-rated, particularly where, as here, the court is dealing with policies (laws) which are clearly discriminatory and which have potentially devastating consequences to many of those subject to them.<sup>16</sup>

Finally, the *GVRDEU* majority called for the re-examination of *McKinney* by the Supreme Court of Canada if it indeed stood for the broad proposition advanced by the Employer.<sup>17</sup>

### 3. The concurring judgment

In her concurring judgment in the *GVRDEU* decision, Madame Justice Newbury questioned, without deciding the issue, whether the Employer's mandatory retirement policy met the requirement of being "law" for the purposes of justification under section 1 of the *Charter*.

### 4. The dissenting judgment

The dissenting judgment of Mr. Justice Mackenzie focused on what he saw as the incongruity of there being different standards for government action under the *Charter* than the standards governing both government and private action under British Columbia's *Human Rights Code*:

[16] Any obligation to advance a specific occupational justification for mandatory retirement at age 65 would add a second tier to the obligation of *Code* compliance and could call in question the general justification underpinning the *Code* provisions. If this general justification is sufficient to support the *Code*, I see no reason why it should not be equally sufficient to justify a policy that is in compliance with the *Code*. The alternative would create a tension between general and specific justifications for mandatory retirement, which could lead to uncertainty, and conflict in government employment. I think that it would be incongruous to impose a higher standard than the *Human Rights Code* upon this employer simply because it is a government entity when it is an employer within provincial jurisdiction. In my view, the provision of the *Code* by necessary implication provide justification for the mandatory retirement policy under s. 1 of the *Charter* as a matter of general law applicable to both private and public sectors within provincial jurisdiction.<sup>18</sup>

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<sup>16</sup> *GVRDEU, supra*, pp. 257 – 258

<sup>17</sup> *GVRDEU, supra*, pp. 258 – 259, para. 127

<sup>18</sup> *GVRDEU, supra*, pp. 228 – 229

### III. Issues for discussion

#### A. The relationship between the *Charter* and human rights legislation

Donald Jordan, Q.C. has graciously provided me with a copy of the paper regarding the *GVRDEU* decision that he is presenting to this CLE. Mr. Jordan argues in his paper that the *GVRDEU* majority has wrongly “privileged” public sector employees.

First, Mr. Jordan says that the *GVRDEU* majority erred in relying on the fact that the Supreme Court of Canada engaged in a separate section 1 analysis of the policies at issue in *McKinney*, in addition to the section 1 analysis of the Ontario *Human Rights Code*, to support the conclusion that mere compliance with human rights legislation does not constitute justification of a specific government mandatory retirement policy. Mr. Jordan argues that no inference should have been made in this regard because the constitutional questions posed in *McKinney* required the Court to determine whether the policies were contrary to the *Charter*. With respect, this argument does not go far in my view. The Supreme Court of Canada often declines to answer some or all of the constitutional questions posed when it is unnecessary to do so. In *McKinney* it was clearly not necessary to perform a section 1 analysis of the policies at issue if the constitutionality of Ontario’s *Human Rights Code* was determinative of the issue, particularly when the Court had concluded that the *Charter* did not even apply to the universities. In any event, this was only one of numerous reasons relied on by the *GVRDEU* majority in reaching its decision.

More fundamentally, Mr. Jordan (echoing the dissenting reasons of Mr. Justice Mackenzie in the *GVRDEU* decision) argues that the government should not be held to a higher standard under the *Charter* than private employers are held to under human rights legislation. Mr. Jordan says that, if public sector employers conform with the general law, they should not be subject to further requirements of justification under the *Charter*.

In my respectful view, this argument incorrectly equates the *Charter* and its protections with human rights legislation and its protections. In addition, this argument in effect amounts to a claim that the *Charter* should not apply to the government as employer, contrary to well established law.

The *Charter* of course regulates only the relations between the government and private persons. The *Charter* does not regulate the relations between private persons. Human rights legislation, on the other hand, regulates relations between private persons (as well as relations between the government and private persons).

If mere compliance with human rights legislation were sufficient to constitute justification under the *Charter*, the government would not be bound by the *Charter* beyond what it chose to legislate for the private sector. The scope of the *Charter*’s application to the government would be determined by the extent to which the government regulated private relations.

This result might be acceptable if human rights legislation was required to afford identical protection in the private sector as the *Charter* provides in the public sector, but that is not the

case. As the Supreme Court of Canada noted in *Vriend v. Alberta* (1998), 156 D.L.R. (4<sup>th</sup>) 385, human rights legislation does not necessarily have to regulate private conduct in the same fashion that the *Charter* regulates government conduct:

[105] The respondents take the position that if the appellants are successful, the result will be that human rights legislation will always have to “mirror” the *Charter* by including all of the enumerated and analogous grounds of the *Charter*. This would have the undesirable result of unduly constraining legislative choice and allowing the *Charter* to indirectly regulate private conduct, which should be left to the legislatures.

[106] It is true that if the appellants’ position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to “mirror” the *Charter* in all cases. By virtue of s. 52 of the *Constitution Act, 1982*, the *Charter* is part of the “supreme law of Canada”, and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the notion of “mirroring” is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any “mirroring” principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.<sup>19</sup>

In addition, given that human rights legislation does not necessarily have to mirror the *Charter*, the notion that the *Charter* should not “privilege” public sector employees is in effect an attack on the *Charter*’s application to the employment relationship between government and its employees – a relationship that it is well established the *Charter* applies to (*Douglas/Kwantlan Faculty Assn. v. Douglas College, supra*; *Lavigne v. Ontario Public Service Employees Union* (1991), 81 D.L.R. (4<sup>th</sup>) 545). While this may in a sense “privilege” government employees, this is the necessary consequence of the *Charter* being restricted to the regulation of government action. In addition, there is a recognized salutary purpose served in holding the government to a higher standard than private actors in “commercial” activities such as employment relations. As Mr. Justice LaForest stated in the majority judgment in *Lavigne v. Ontario Public Service Employees Union, supra*:

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<sup>19</sup> *Vriend v. Alberta, supra*, p. 429

The respondents put forward the argument that the government will be placed at a competitive disadvantage if it has to comply with the provisions of the *Charter* when acting as a buyer or a seller in the private marketplace. In no respect is this argument compelling. It would be surprising if pragmatic concerns as to competitiveness could automatically immunize government action in the marketplace from *Charter* scrutiny. It must be borne in mind that the *Charter* is not intended to serve a simply negative role by preventing the government from acting in certain ways. It has a positive role as well, which might be described as the creation of a society-wide respect for the principles of fairness and tolerance on which the *Charter* is based. I cannot believe that this less tangible but equally important aspect of the *Charter's* role in our society would be advanced if the *Charter's* applicability fell to be determined by reference to the government's commercial competitiveness. Through the process of applying the *Charter* to government decision-making, the government becomes a kind of model of how Canadians in general should treat each other. The extent to which government adherence to the *Charter* can serve as an example to society as a whole can only be enhanced if the government remains bound by the *Charter* even when it enters the marketplace.

These considerations seem to me to be especially strong when the “commercial” activity in question is the negotiation of a collective agreement. While the example the government may be able to set by conforming with the *Charter* when buying paper clips may be minimal, the example it can set by complying with *Charter* principles when negotiating the terms and conditions of employment could be very significant.<sup>20</sup>

Similarly, as Madame Justice Wilson stated in her concurring judgment in *Lavigne*:

It is sufficient in this case, however, to say that one of the parties to the collective agreement containing the impugned provision is a government entity and that therefore the provision is subject to the *Charter*. There are very good reasons for holding that the *Charter* applies to all activities of governmental entities and not merely those we might characterize as falling within its proper governmental domain. In many respects the way in which government conducts its affairs serves as a model for organization in the private sphere. In the past government has imposed restrictions upon itself in its dealing with its employees, presumably in the hope that private employers would follow suit: see *Employment Equity Act*, S.C. 1986, c. 31. And in so far as the *Charter* is concerned there is no reason why a duty to comply with the Constitution in all its dealings should not be imposed upon those entities found to be governmental.<sup>21</sup>

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<sup>20</sup> *Lavigne v. Ontario Public Service Employees Union*, *supra*, pp. 621 – 622

<sup>21</sup> *Lavigne v. Ontario Public Service Employees Union*, *supra*, p. 569

## **B. The impact of the incorporation of mandatory retirement in a collective agreement**

The majority of the arbitration panel noted that the incorporation of mandatory retirement in a collective agreement was considered in *McKinney* to be an important factor under section 1 of the *Charter*<sup>22</sup>. The majority of the arbitration panel then concluded:

[101] In our view the S.C.C. cases contemplate a case-by-case determination of such challenges. On our reading of the majority judgments of *La Forest*, *Sopinka* and *Cory JJ.*, *it is apparent that such challenges will have little or no prospect of success if the mandatory retirement measure in question has been incorporated into a collective agreement or is otherwise consensual.* But if it is not, and if the *Charter* applies, then the employer bears the burden of establishing the basis on which its mandatory retirement policy is justified under s. 1 of the *Charter*.<sup>23</sup>

In the Court of Appeal the *GVRDEU* majority, while not definitively addressing this issue, did make the following comments:

[111] I note, parenthetically, that there is an extensive discussion in *Dickason* of the relevance to a s. 11.1 analysis of the fact that the mandatory retirement policy formed part of the collective agreement. Since the mandatory retirement policy of the Employer in this case does not form part of the collective agreement, I do not propose to discuss that issue, except to observe that the courts have stated that, as a general rule, parties cannot contract out of human rights legislation.<sup>24</sup>

In addition, the *GVRDEU* majority also stated:

[83] In my view, the difficulty with according too much deference to legislative choices and the demands of organized labour where the breach sought to be justified is of s. 15(1) of the *Charter*, is that they focus on majority rule, rather than on the protection of minority rights. It should not be assumed that collective agreements protect the rights of minorities – certainly mandatory retirement policies do not protect the rights of many older members of the workforce. In my view, the courts would give little credence to legislative or labour preferences if the groups subjected to discriminatory treatment were women or ethnic minorities. Why, then, should the courts give credence to these views where the

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<sup>22</sup> *Re Greater Vancouver Regional District and Greater Vancouver Regional District Employees' Union, supra*, p. 115, para. 65

<sup>23</sup> *Re Greater Vancouver Regional District and Greater Vancouver Regional District Employees' Union, supra*, p. 125, emphasis added

<sup>24</sup> *GVRDEU, supra*, p. 254

group discriminated against is the elderly and where the sole basis of discrimination is that they are elderly?<sup>25</sup>

In light of these comments by the *GVRDEU* majority in the Court of Appeal, it appears far from certain that the incorporation of mandatory retirement provisions in a collective agreement will have the near determinative effect suggested by the majority of the arbitration panel. It remains to be seen precisely what the effect will be.

### **C. What is “prescribed by law” for the purposes of section 1?**

Section 1 of the *Charter* guarantees the rights and freedoms set out in the *Charter* “subject only to such reasonable limits *prescribed by law* as can be demonstrably justified in a free and democratic society”.

The Union in the *GVRDEU* case did not argue that the Employer’s policy failed to meet the requirement of being “prescribed by law” within the meaning of section 1 of the *Charter*. Nonetheless, both the majority of the arbitration panel and Madame Justice Newbury’s concurring judgment in the Court of Appeal questioned whether this requirement had been met.

As Madame Justice Newbury noted, the Supreme Court of Canada has not yet carried out a comprehensive analysis of the meaning of “prescribed by law” in section 1 of the *Charter*<sup>26</sup> and it is possible that “law” may have a different meaning under section 1 than in provisions of the *Charter* such as section 15(1) which confer rights and freedoms.<sup>27</sup>

This raises an issue of significant importance in *Charter* litigation generally.

### **D. The impact of the *GVRDEU* decision in the private sector**

Finally, what impact does the Court of Appeal decision have on the private sector, and particularly existing human rights legislation that only prohibits age discrimination between the ages of 18 and 65? It appears that there is no direct impact, as the constitutionality of such legislation was not at issue in the *GVRDEU* decision and it was accepted that the constitutionality of such legislation had indeed been determined in *McKinney*.

However, the majority in the *GVRDEU* decision strongly rejected the notion that age discrimination is somehow a unique form of discrimination (a notion that Mr. Justice Laforest

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<sup>25</sup> *GVRDEU, supra*, p. 247

<sup>26</sup> *GVRDEU, supra*, p. 261, para. 133

<sup>27</sup> *GVRDEU, supra*, p. 262, para. 135

appears to have endorsed, at least in part, in his *Charter* analysis of the Ontario *Human Rights Code* in *McKinney*<sup>28</sup>):

With respect, it is not an answer to say that discrimination on the basis of age is unlike any other form of discrimination in that (nearly) everyone gets old; i.e., eventually shares the characteristics of the group discriminated against. I fail to see how that ameliorates the need to protect the elderly from discrimination, much less justifies or lessens the impact of such discrimination.<sup>29</sup>

In addition, the *GVRDEU* majority made a strong appeal for a re-examination of *McKinney* in the event *McKinney* did indeed stand for the proposition advanced by the Employer:

[127] In the event that *McKinney* is found to stand for the proposition that all mandatory retirement policies in the public sector which are not in contravention of provincial human rights legislation are, therefore, justified under s. 1 of the *Charter*, I would urge the Supreme Court of Canada to reconsider the issue. Eleven years have now passed since *McKinney* was decided. The demographics of the workplace have changed considerably, not only with respect to the university community, but also in the workplace at large. At least two other countries, Australia and New Zealand have abolished mandatory retirement. Recent studies have been done on the effect of abolishing mandatory retirement in Canada and elsewhere. (See, for example, *The Report of the Canadian Human Rights Act Review Panel* (Ottawa: Canadian Human Rights Act Review Panel, June 2000), and, Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Queen's Printer for Ontario, 28 June 2001).) The extent to which mandatory retirement policies impact on other equality rights, and on the mobility of the workforce, have become prominent social issues. The social and legislative facts now available may well cast doubt on the extent to which the courts should defer to legislative decisions made over a decade ago. The issue is certainly one of national importance.<sup>30</sup>

While this was a call for re-examination of mandatory retirement in the context of government imposed mandatory retirement, rather than in the context of human rights legislation that permits mandatory retirement, the arguments presented have force in both contexts. The *GVRDEU* decision may well provide a springboard for revisiting the constitutionality of human rights legislation which permits age discrimination after age 65 in the private sector.

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<sup>28</sup> *McKinney*, *supra*, p. 660

<sup>29</sup> *GVRDEU*, *supra*, pp. 247 – 248

<sup>30</sup> *GVRDEU*, *supra*, p. 258