

# **REPORT OF THE JOINT COMMITTEE ON MANDATORY RETIREMENT**

June 20, 2008

## **Introduction**

On June 24, 2005, the University of New Brunswick (UNB) and the Association of University of New Brunswick Teachers (AUNBT) signed a Memorandum of Understanding (“MOU”) calling for the creation of a Joint Committee to study and make recommendations concerning mandatory retirement. The MOU originally called for the formation of the Joint Committee within 30 days of the signing of the Collective Agreement (which took place on February 20, 2006), for an inaugural meeting within 60 days and report of the Joint Committee’s recommendations by June 30, 2006. By mutual agreement these deadlines were extended.

The Joint Committee’s inaugural meeting was held on August 22, 2006, and it subsequently met on October 11, 2006, February 13, 2007, April 11, 2007, September 21, 2007 and January 7, 2008. The following is the Joint Committee’s Report and Recommendations.

### **a. The Committee’s Terms of Reference**

The MOU provides the context for the Joint Committee’s work in the following introductory paragraph:

Whereas the parties recognize that mandatory retirement is likely to be eliminated in New Brunswick during the life of the Collective Agreement which commences July 1, 2005 and the Parties believe that they would mutually benefit from constructive dialogue, the Parties agree to form a Joint Committee within 30 days of the signing of this Collective Agreement to consider and study all implications and to make recommendations to the Parties.

After identifying the composition of the Joint Committee and the deadlines for our work, the MOU sets out our mandate in the following terms:

The Joint Committee will consult with knowledgeable individuals, consider and make recommendations on all issues arising from the elimination of mandatory retirement including, but not limited to: financial impacts, academic planning, and education concerning any Collective Agreement provisions related to issues such as workload reduction (Article 20A) and continuing performance review (Article 43) and the Memorandums of Understanding concerning accountability of faculty members, instructors, and librarians.

**b. The Committee's Membership**

The Joint Committee was Co-Chaired by Dean Philip Bryden (UNB Nominee) and Dr. Jack Van Der Linde (AUNBT Nominee). The other members of the Committee were Vice-President Fredericton (Academic) Angelo Belcastro (UNB Nominee); Professor David Bell (AUNBT Nominee); Ms. Barbara Cooper (UNB Nominee); Dean David Coleman (UNB Nominee); Dr. Tony Diamond (AUNBT Nominee); Vice-President (Saint John) Kathy Hamer (UNB Nominee); Dean Deborah McClatchy (UNB Nominee); and Ms. Melinda Renner (AUNBT Nominee). The two Vice-Presidents shared one seat on the Committee. Vice-President Belcastro and Dean McClatchy ceased to be members of the Committee on June 30, 2007 due to their resignations. Ms. Barbara Cooper of UNB Human Resources and Organizational Development originally served as a resource person for the Committee but with the departure of Vice-President Belcastro and Dean McClatchy she became a UNB Nominee.

**c. Change in Circumstances Since the Signing of the June 24, 2005 Mandatory Retirement MOU**

At the Joint Committee's inaugural meeting, the Co-Chairs (who were members of the Negotiations Committees of UNB and AUNBT respectively during the last round of collective bargaining) offered the following explanation of the origins of the MOU that led to the establishment of the Joint Committee. During collective bargaining, the Government of New Brunswick (at the time led by Premier Bernard Lord) introduced Bill 62, a piece of legislation that would have repealed the exemption currently found in section 3(6)(a) of the New Brunswick *Human Rights Act* that prevents a mandatory retirement provision found in a *bona fide* retirement or pension plan from being treated as a prohibited form of age discrimination. The MOU establishing the Joint Committee was signed as a way of enabling UNB and AUNBT to come to grips with the issues flowing from the abolition of mandatory retirement without delaying the progress of the ongoing negotiations. It turned out that Bill 62 died on the order paper and was not reintroduced prior to the dissolution of the Legislature for the fall 2006 general election.

The Lord government was defeated in that election and a new government, led by Premier Shawn Graham, was elected. As this report will set out in more detail below, there are reasons to believe that the legal status of mandatory retirement in New Brunswick is likely to change at some time during the tenure in office of the Graham administration. Nevertheless, the fact remains that the Graham government has not introduced legislation that would repeal section 3(6)(a) of the *Human Rights Act*, and there is reason to believe that the legal status of mandatory retirement in New Brunswick is not likely to change prior to the expiration of the current Collective Agreement in June 30, 2009.

Despite this change in circumstances, the Joint Committee agreed that it would be productive to continue to explore the issues raised by the abolition of mandatory retirement on the assumption that at some point in the future legislative action will be taken to eliminate mandatory retirement. Much of the Joint Committee's work was directed to addressing whether or not it would be desirable to recommend that UNB and AUNBT take steps to amend the current Collective Agreement to abolish mandatory retirement voluntarily.

The Joint Committee recognizes that there are several compelling reasons to end mandatory retirement without waiting for the New Brunswick Legislative Assembly to change the law governing mandatory retirement. At the same time, we recognize that the financial consequences for UNB of the alteration of our arrangements for mandatory retirement are potentially significant. We were unable to agree on whether UNB and AUNBT should take immediate steps to amend the current Collective Agreement to abolish mandatory retirement. Nevertheless, we are unanimous in recommending that mandatory retirement be removed in the Collective Agreement that succeeds the one that expires on June 30, 2009. The reasons for this view will be set out in more detail below.

#### **d. The Joint Committee's Approach to its Work**

As indicated above, we began our work by noting the change in circumstances since the signing of the MOU establishing the Joint Committee and assessing the likelihood that mandatory retirement would be abolished by law during the lifetime of the current Collective Agreement. We determined that even though there are several factors that suggest that the law governing mandatory retirement in New Brunswick is likely to change in the relatively near future, it was unlikely that these changes would take place prior to the expiration of the current Collective Agreement on June 30, 2009. We decided nevertheless to carry on with our work, and explore both the desirability of taking voluntary steps to end mandatory retirement at UNB and the adjustments to the Collective Agreement that might be desirable if mandatory retirement were to be eliminated.

We considered the Collective Agreement provisions and policies governing retirement for AUNBT members at UNB and also collected information on recent experience concerning the retirement of AUNBT members and UNB's projections concerning the anticipated dates of retirement of AUNBT members between 2008 and 2026. In addition, the AUNBT nominees to the Joint Committee arranged for AUNBT to conduct a survey of AUNBT members to determine whether members would like to work past the age of 65 and to what age they would like to work.

The Joint Committee also reviewed the state of the law governing mandatory retirement in Canada, the experience other Canadian universities have had with the elimination of mandatory retirement, and the rationales advanced for and against the abolition of mandatory retirement. We also gathered a number of

studies on mandatory retirement in the university setting, two of which were particularly helpful. The first is a report released in 2006 by a Task Force analogous to ours at the University of Alberta, a report that led to a recommendation that mandatory retirement be eliminated at that university. The second is a study done in 2005 by Statistics Canada of the effect of the elimination of mandatory retirement on the age at which faculty members retired from Canadian universities. We will refer to these studies in our Report and they are appended to it.

## **A. POLICIES AND PRACTICE GOVERNING RETIREMENT OF AUNBT MEMBERS**

The current policy governing mandatory retirement at UNB was approved by the UNB Board of Governors on May 23, 1984. The Policy reads, in relevant part:

### **POLICY**

The University of New Brunswick recognizes that through retirement it is provided with an opportunity to recruit new employees who will contribute new expertise and skills to the University. For universities especially such a process of renewal is essential to the service they provide as centers for the transmission of knowledge and culture, scholarly research, and training for employment. For this reason the University of New Brunswick has established 65 years of age as the normal retirement age for all of its employees.

### **SCHEDULED RETIREMENT DATE**

The scheduled retirement date for all employees will be June 30th following their 65th birthday. This does not preclude an employee taking an early retirement or arranging a workload reduction leading to retirement.

### **SCOPE**

This policy applies to all employees of the University of New Brunswick.

### **NOTIFICATION**

Prior to the employee reaching the June 30th retirement date, the Human Resources Consultant (Benefits and Pensions), Department of Human Resources & Organizational Development, will write the employee to arrange a meeting to discuss the status of pension and benefits.

## **POST- RETIREMENT APPOINTMENT**

In exceptional circumstances (for example, to satisfy staffing requirements and/or to maintain special expertise) an employee may be offered a post-retirement appointment of a specified duration. This decision will be made by the President or the appropriate Vice-President.

The Policy covers AUNBT members insofar as it does not conflict with the Collective Agreement. Retirement is addressed in the Collective Agreement in Article 40.01(a). While there are legal rules governing the age at which the pension entitlements of employees and former employees must vest, there is no general legal requirement that UNB have a mandatory retirement policy or set mandatory retirement at any particular age. It would be open to UNB and AUNBT to agree to abolish mandatory retirement with respect to AUNBT members, and several Canadian universities, including the University of Calgary, the University of Lethbridge and Mount Allison University, have eliminated mandatory retirement without being compelled to do so by law.

### **a. Article 40.01(a) of the Collective Agreement**

Article 40.01(a) of the Collective Agreement addresses retirement in the following terms:

No Employee shall be terminated, dismissed, laid off or suspended except in accordance with one (1) of the following:

a) Retirement - which shall normally be at the end of the academic year during which the Employee attains the age of 65.

As Article 40.01 indicates, the employment relationship between UNB and AUNBT members can end in a variety of different circumstances. For present purposes, the most important of these in addition to retirement under Article 40.01(a) is resignation with full pension entitlement, which may take place before an individual reaches the age of 65.

### **b. 85 Factor Retirement Under the Pension Plan**

The UNB Academic Pension Plan makes provision for retirement with unreduced pension in the following terms:

5.01 A Member shall be eligible to receive an unreduced early retirement pension as defined in section 6.02 if the Member's combined years of age (calculated in years, months and days) and Eligible Service total 85 or more.

When one considers whether the abolition of mandatory retirement would make a significant difference in the pattern of academic employment at UNB, it is important to take into account the extent to which AUNBT members choose to retire prior to their mandatory retirement date. It is useful both to look backward at UNB's experience with voluntary retirement in recent years, and to look forward by asking current AUNBT members about their own desires with respect to their age of retirement.

Of course, both forms of analysis represent an uncertain guide to future patterns of behaviour. Whereas mandatory retirement at age 65 was relatively common at Canadian universities five years ago, it is much less common now, partly because of voluntary agreements to abolish mandatory retirement and partly as a result of changes to human rights legislation that have made it much more difficult to justify mandatory retirement. Patterns of retirement that were common in an era when mandatory retirement was the norm may no longer hold when mandatory retirement is the exception. Similarly, the views people express about when they want to retire may change for a variety of reasons as they get closer to retirement. Nevertheless, the Joint Committee concluded that it was desirable to bring forward and consider both types of information.

### **c. Recent Patterns of Retirement at UNB**

The following tables outline both UNB's experience of early retirement among members of the Academic Pension Plan between 1998 and 2006, and the projections the Integrated Planning and Budget Team is using with respect to the expected date of retirement of members of the Academic Pension Plan between 2008 and 2026. The explanation of the assumptions underlying the projections is particularly important. Between 2002 and 2006, a weighted average of 84% of individuals who were eligible to retire with unreduced pension based on the 85 Factor did so in the year they reached eligibility. The Team based its retirement projections on the continuation of this pattern, and compared it with expected dates of retirement with no allowance for the 85 Factor. If these assumptions prove to be correct, between 2008 and 2012 we would expect to see 137 individuals retire and join the Academic Pension Plan based on the combined effect of 85 Factor retirements and mandatory retirements. If we only take into account mandatory retirements, then we would expect 86 individuals to retire and join the Academic Pension Plan during the same time frame.

**University of New Brunswick  
Early Retirements**

<b>Becoming eligible within the year and RETIRED</b>			
	<b>Retired</b>	<b>W 85 factor</b>	<b>W No 85 factor</b>
2006	10	8	2
2005	16	12	4
2004	8	8	0
2003	10	7	3
2002	7	4	3
2001	5	2	3
2000	6	2	4
1999	43	34	9
1998	7	6	1
	<b>112</b>	<b>83</b>	<b>29</b>

<b>Becoming ELIGIBLE within the year</b>			
		<b>W 85 factor</b>	<b>W No 85 factor</b>
2006	27	8	19
2005	32	12	20
2004	24	11	13
2003	33	12	21
2002	29	15	14
2001	23	10	13
2000	21	12	9
1999	59	46	13
1998	20	14	6
	<b>268</b>	<b>140</b>	<b>128</b>

<b>85-factor retirements</b>		<b>Weight</b>	<b>Weighting</b>	<b>Wt. Avg. %</b>
2006	100.0%	5	33.3%	33.3%
2005	100.0%	4	26.7%	26.7%
2004	72.7%	3	20.0%	14.5%
2003	58.3%	2	13.3%	7.8%
2002	26.7%	1	6.7%	1.8%
		<b>15</b>	<b>100%</b>	<b>84.1%</b>

**Notes:**

- 1 The above analysis by HROD does NOT include mandatory retirements
- 2 The above analysis by HROD does NOT include potential 85-Factor retirees accumulated prior to 2006. (For 2008, there are 63 potential retirees having the 85-Factor who have not yet retired.)

3 Eligibility represents those meeting or exceeding the age of 55 and having enrolment in the AEPP

### Interpretation

In 2006, of 27 persons deemed eligible (i.e. age 55 and enrolled), 8 had the 85-Factor; of 19 enrolees over age 55 who did not have 85-Factor, only 2 retired; of 8 enrolees over age 55 who had the 85-Factor, all 8 retired.

### Conclusion:

84% of those aged 55 and over during the period (excluding mandatory retirements) who had 85-Factor accepted early retirements in year eligible.

**University of New Brunswick Fredericton Campus  
Update of IPB Team Retirement Analysis performed in October 2006  
for the Joint Committee on Mandatory Retirement  
with Regard to Academic Pension Plan Members**

Information derived from Datatel:

- Both Fredericton and Saint John Campus employees included
- Work restricted to those having a continuing full-time and continuing part-time position type
- Does not reflect “budgeted employees” – reflects enrolment in the AEPP- therefore positions included which are funded by non-operating funds

Assumptions used to produce these projection reports:

- For those whose 85 Factor eligibility date occurs after to their mandatory retirement date, our Team must assume they shall leave at their mandatory retirement date.
- For those whose 85 Factor eligibility date has already occurred but have not yet retired, our Team has assumed that they will depart in equal portions within the two years just prior to their mandatory retirement date.
- For those whose 85 Factor eligibility date occurs prior to their mandatory retirement date, our Team has assumed that 84% shall opt for early retirement during the year of becoming eligible or the following year. The remaining 16% will leave at their normal mandatory retirement date. Our Team’s implementation of the weighted average to individuals was rounded to the nearest whole person – resulting in an effective rate of 93% assumed to opt for retirement once becoming eligible.

The major historical assumptions used to produce these projections (i.e. the 84/16% ratio) is based on a review of actual retirements by HROD. (Review



performed in October 2006). The study found that, of 140 historical AEPP retirements (other than mandatory retirements) from the period 2002 to 2006:

- 100% of those eligible with the 85 Factor accepted early retirement in the year eligible during 2005 and 2006.
- On a five-year weighted average (where most recent year was given most weight) an average of 84% of those eligible with the 85 Factor accepted early retirement.

**University of New Brunswick  
Comparison of Expected Date of Retire (with vs no allowance for 85 Factor)  
of Academic Pension Plan Members for both Campuses**

Calendar Year of Expected Retirement	No allowance for 85- Factor	With allowance for 85- Factor
2008	14	23
2009	16	30
2010	15	29
2011	18	27
2012	23	28
2013	23	23
2014	15	24
2015	17	23
2016	18	17
2017	26	24
2018	18	18
2019	35	27
2020	25	26
2021	21	17
2022	25	14
2023	16	16
2024	20	13
2025	32	13
2026	17	3

As is noted in the explanation of the assumptions on which these projections were based, in recent years the tendency has been for most faculty members who reach the 85 factor to retire rather than to stay until age 65. If this pattern were to hold, the impact of the abolition of mandatory retirement would be minimized since many faculty members would retire before they reached the age of 65. However, the Statistics Canada study noted above suggests that we should be cautious in assuming that patterns of retirement survive unaltered in the wake of the abolition of mandatory retirement, especially over the longer term. In addition, the results of the AUNBT mandatory retirement survey seem to indicate that there is a greater desire among AUNBT members who are between

the ages of 60 and 65 to work past age 65 than recent retirement patterns might lead one to believe.

**d. Results of AUNBT Mandatory Retirement Survey**

In February 2007, 606 AUNBT members were sent the following questionnaire:

- 1) If continuation of employment beyond your 65th year were to become an option, would you wish to continue?
- 2) To what age do you think you would like to continue employment?

Respondents were asked to give their age, sex, and years of service at UNB, but not their names or academic unit. 283 members responded. Not all included all the data requested in their responses, hence the differing totals in the tables below.

**Question 1: to continue, or not?**

131 responded “Yes” (or “probably, likely, or possibly”) to Question 1, 129 “No” (or “probably not, or unlikely”) and 22 were unsure (or responded “don’t know” or “maybe”); the remainder could not be classified clearly.

The years served by faculty have some influence on responses (below), with those early and late in their careers more likely to wish to work beyond 65:

<b>Years of service</b>	<b>Yes</b>	<b>No</b>	<b>Unsure</b>
30 and over	15	10	1
20-29	23	39	7
10-19	38	43	12
Less than 10	47	37	2

There was a difference between male and female responses, with males being more in favour than females of working beyond 65. This is unexpected given the general assumption that female faculty often experience delayed starts to their academic careers and so are less likely to achieve full pension entitlement at age 65.

<b>Sex</b>	<b>Yes</b>	<b>No</b>	<b>Unsure</b>
Male	91	77	11
Female	39	52	10

**Question 2: projected age of retirement.**

Of 211 respondents who gave an expected age of retirement, the mean age given was 66.1 (taking the mid-point where a range of ages was given). The

mean age given by those answering “Yes” to Q.1 was 70.1, and the modal (most common) age 70. Of those answering “No”, the mean age given was 61.9 and the modal age 65. Note that the mean projected age of 66.1 is 6 years more than the current mean age of retirement at UNB of around 60, which is distorted by the early-retirement incentives of the late 1990s, but is only 1 year beyond the current “normal” age of retirement used for pension-plan projections.

## **B. THE LAW GOVERNING MANDATORY RETIREMENT**

Canadian law permits employers and unions considerable leeway in establishing terms and conditions of employment that work to their mutual advantage. Human rights laws enhance the freedom of individuals by constraining the ability of employers and unions to lawfully enter into agreements that establish discriminatory terms and conditions of employment. What the law considers a discriminatory practice or term or condition of employment has changed over time and it can vary to some extent from province to province.

Generally speaking, provincially regulated employers are governed by the human rights legislation in the province in which they operate and federally regulated employers are governed by the *Canadian Human Rights Act*. For these purposes, UNB is governed by the *New Brunswick Human Rights Act*.

Generally speaking, private sector organizations that are not carrying out governmental activities are not governed directly by the equality rights provisions of section 15 of the *Canadian Charter of Rights and Freedoms*, though public sector employers and organizations carrying out governmental functions are governed by those provisions. The Supreme Court of Canada has ruled in *McKinney v. University of Guelph*, [1990] 1 S.C.R. 229,<sup>1</sup> and *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 that, at least in respect of their activities as employers, universities will be considered to be private sector organizations that are not carrying out governmental functions. Indirectly, however, private sector employers can be affected by section 15 of the *Charter*, because a provincial or federal human rights statute may offer insufficient protection to individuals in that jurisdiction and thereby violate section 15 of the *Charter*. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the Supreme Court of Canada ruled that, at least in some situations, an appropriate remedy for this type of violation of the *Charter* would be for the courts to expand the scope of the relevant human rights law to include human rights protections that are not found in the statute.

Some employers and unions have adopted collective agreement provisions that define discrimination in ways that overlap the definitions found in human rights

---

<sup>1</sup> Court cases cited in this report may be read in full text in QUICKLAW, an online legal data base purchased by the UNB Law Library and the UNB Libraries system for the use of the UNB and St. Thomas campus communities. Please ask a librarian for help in accessing QUICKLAW.

law. For example, Article 15.01 of our Collective Agreement reads, in relevant part:

15.01 There shall be no discrimination, interference, restriction or coercion exercised or practiced regarding any matter including, but not limited to: salary, rank, appointment, promotion, tenure, termination of employment, layoff, sabbatical leave, other leaves, fringe benefits, or any other terms and conditions of employment by reason of age (except for retirement as provided for through this Collective Agreement), . . . .

Employers and unions are entitled to expand the obligations they have under law not to engage in discriminatory practices, but they cannot lawfully agree to limit those obligations. The wording of Article 15.01 in respect of age discrimination is therefore premised on the assumption that mandatory retirement as provided for in the Collective Agreement is not an unlawful form of age discrimination.

**a. Section 3(6)(a) of the *New Brunswick Human Rights Act***

Sections 3(1) and 3(3) of the *New Brunswick Human Rights Act* prohibit discrimination by employers and trade unions in the following terms:

**3(1) No employer**, employers' organization or other person acting on behalf of an employer shall

- (a) **refuse to employ or continue to employ any person, or**
- (b) **discriminate against any person in respect of employment or any term or condition of employment,**

**because of** race, colour, religion, national origin, ancestry, place of origin, **age**, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity. (emphasis added)

**3(3) No trade union** or employers' organization **shall**

- (a) exclude any person from full membership,
- (b) expel, suspend or otherwise discriminate against any of its members, or
- (c) **discriminate against any person in respect of his employment by an employer,**

**because of** race, colour, religion, national origin, ancestry, place of origin, **age**, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity. (emphasis added)

On its face, mandatory retirement at age 65 constitutes discrimination in employment against employees on the basis of their age. However, the *New Brunswick Human Rights Act* contains two types of qualifications on the right of individuals to be free from discrimination as defined in sections 3(1) and 3(3) of the *Act*.

The first is a general statement, found in section 3(5) of the *Act*, that limitations, specifications or preferences that are based upon a *bona fide* occupational qualification as determined by the New Brunswick Human Rights Commission are permitted by the *Act*. The second type of qualification is found in the specific restrictions with respect to age discrimination found in section 3(6) and 3(6.1) and with respect to physical and mental disability found in section 3(7). For present purposes, the relevant provisions are those found in section 3(6), and more specifically 3(6)(a). They read as follows:

**3(6) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to**

(a) **the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan;**

(b) the operation of the terms or conditions of any *bona fide* retirement or pension plan that have the effect of a minimum service requirement; or

(c) the operation of terms or conditions of any *bona fide* group or employee insurance plan. (emphasis added)

If we assume that the policies and Collective Agreement provisions governing mandatory retirement at UNB are terms or conditions of a “*bona fide* retirement or pension plan”, then they do not constitute age discrimination within the meaning of sections 3(1) and 3(3) of the *Act*. To date, UNB has operated on the assumption that section 3(6)(a) made our mandatory retirement arrangements lawful. This assumption was tested before William Goss, sitting as a Human Rights Board of Inquiry, in *Kuun v. University of New Brunswick* (Human Rights Board of Inquiry, 1983). Mr. Goss concluded that UNB did have a “*bona fide* retirement plan” within the meaning of section 3(6)(a).

If section 3(6)(a) were repealed, as the Lord government proposed to do in 2005, this would no longer be the case and any justification of mandatory retirement would have to be based on the general protection afforded to “*bona fide* occupational qualifications” found in section 3(5). While there may be some instances in which a restriction on employment after age 65 could be justified using this test, it is difficult to believe that a general restriction on the employment of university faculty and librarians could be justified under this provision. Mr. Goss observed in his decision in the *Kuun* case: “It was not argued, and indeed there is no basis for arguing, that Dr. Kuun, either by reaching the age of 65 on June 30, 1981 or by reaching the age of 67 on June 30, 1983, thereby failed to continue to possess a “*bona fide* occupational qualification” for employment as a Professor of Political Science at the University of New Brunswick.” (emphasis added)

## **b. Judicial Interpretation of Section 3(6)(a)**

The soundness of UNB's assumption that our current mandatory retirement arrangements are lawful because of the effect of section 3(6)(a) of the New Brunswick *Human Rights Act* depends on the way that provision is interpreted. More specifically, it depends on the meaning of the statutory requirement that the retirement plan or pension plan be "*bona fide*". The Board of Inquiry's decision in the *Kuun* case would suggest that our mandatory retirement arrangements meet the "*bona fides*" test in section 3(6)(a), but considerable development has taken place in Canadian legal thinking about human rights since 1983, when that case was decided.

In order to be a "*bona fide* occupational qualification" within the meaning of section 3(5), a qualification must satisfy three criteria identified by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3, popularly known as the *Meiorin* decision: (1) It must have been adopted for a purpose rationally connected to the performance of the job; (2) It must have been adopted in the honest and good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose; and (3) It must be reasonably necessary to accomplish a legitimate work-related purpose. In order to satisfy the third branch of the test, an employer must show that it would cause undue hardship to accommodate individual employees sharing the characteristics of the employee alleging discrimination. This test, and particularly the third part of it, tends to make it extremely difficult for a university to justify a general policy of mandatory retirement as a "*bona fide* occupational qualification".

In *Potash Corporation of Saskatchewan Inc. v. Scott* (2006), 301 N.B.R. (2d) 204 (C.A.), the New Brunswick Court of Appeal faced the question of what requirements had to be met to satisfy section 3(6)(a). The majority of the Court ruled that it was not necessary for a retirement or pension plan to satisfy all of the *Meiron* tests, and more particularly the third one, in order to be a "*bona fide* retirement or pension plan" within the meaning of section 3(6)(a). In the view of Mr. Justice Robertson, writing for the majority, it is sufficient for purposes of section 3(6)(a) of the *Act* if an employer honestly believes that its pension plan is a viable alternative to forced retirement, that the plan was not adopted for purposes of defeating rights protected by the *Human Rights Act*, and that belief is objectively reasonable in the circumstances of the particular case. In Mr. Justice Robertson's view, it is not necessary to consider whether or not there are practical alternatives to mandatory retirement in individual cases for the employer's honest belief to be objectively reasonable. UNB's current mandatory retirement arrangements would almost certainly meet this test.

The New Brunswick Human Rights Commission sought and obtained leave to appeal this decision to the Supreme Court of Canada. The appeal was heard on

February 19, 2008. It is unlikely that a decision will be rendered in the case earlier than the summer of 2008. If the appeal is successful, UNB and AUNBT will probably want to obtain legal advice on what significance the decision has for the validity of our current mandatory retirement arrangements.

Whatever result the Supreme Court of Canada reaches in the *Potash Corporation* case, the New Brunswick Legislature may decide to intervene and change the legal rules governing mandatory retirement in the province. On the other hand, the best advice we have been able to obtain to date suggests that changes in the legislation are unlikely to be made before the *Potash Corporation* decision is released, and there would likely be some delay between the passage of legislative changes through the Legislative Assembly and their proclamation into law.

**c. Section 15 of the *Canadian Charter of Rights and Freedoms***

Section 15 of the *Canadian Charter of Rights and Freedoms* offers constitutional protection to individuals against laws or governmental action that discriminates against them on the basis of age. Section 1 of the *Charter* states that the rights guaranteed by the *Charter* are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In 1990, the Supreme Court of Canada decided four cases in which it was alleged that mandatory retirement schemes unjustifiably infringed equality rights protected by section 15 of the *Charter*. Two of these cases (*McKinney v. University of Guelph* and *Harrison v. University of British Columbia*) arose in university settings. As noted above, in both cases the Court decided that the *Charter* did not apply directly to the universities because they were not governmental actors and they were not carrying out governmental activity by employing faculty and staff. The Court went on, however, to address the question of whether mandatory retirement would constitute an unjustifiable infringement of equality rights in this setting. The entire Court agreed that mandatory retirement constituted an infringement of equality rights guaranteed by section 15 of the *Charter*. Nevertheless, a five member majority concluded that this infringement was justified under section 1 of the *Charter*, with two members of the Court dissenting from this conclusion.

Considerable development in the Supreme Court of Canada’s thinking about equality rights has taken place since the *McKinney* and *Harrison* decisions. Some judges have cast doubt on whether the justifications of mandatory retirement accepted by the Supreme Court majority in *McKinney* and *Harrison* ought to be accepted in other settings. A majority of the judges of the British Columbia Court of Appeal in *G.V.R.D.E.U. v. Greater Vancouver Regional District* (2001), 206 D.L.R. (4<sup>th</sup>) 220 (B.C.C.A.) did not consider that the *McKinney* and *Harrison* decisions required them to conclude that the mandatory retirement scheme employed by the Regional District was justified under section

1 of the *Charter*. The third judge on the panel disagreed and concluded that *McKinney* and *Harrison* did have the effect of creating a justification for the District's mandatory retirement policy. The majority required the Regional District to establish before an arbitration panel hearing a legal challenge to the scheme that the District's particular circumstances justified its mandatory retirement policy. Some commentators have suggested that the views on mandatory retirement expressed by the Supreme Court of Canada majority in *McKinney* and *Harrison* are outdated, and that it is time for the Court to reconsider these decisions.

#### **d. The General Direction of Legal and Policy Development**

Whether or not the Supreme Court of Canada ultimately reconsiders the *McKinney* and *Harrison* decisions, the trend at universities in Canada and the United States is strongly in favour of the abolition of mandatory retirement, whether on a voluntary basis or as a result of legislative change. All provincial human rights statutes and the *Canadian Human Rights Act* prohibit age discrimination. All these statutes contain exemptions for *bona fide* occupational qualifications that can justify some types of mandatory retirement schemes, though typically not the type of general mandatory retirement policy used at UNB.

The details of the approach taken to generalized schemes of mandatory retirement vary from jurisdiction to jurisdiction, but as a general rule the *Canadian Human Rights Act* and human rights legislation in Newfoundland, Quebec, Ontario, Manitoba, Saskatchewan, Nunavut, the Northwest Territories and the Yukon make it difficult to justify mandatory retirement schemes. On May 31, 2007, British Columbia enacted legislation that brought it into this group effective January 1, 2008. Human rights legislation in Alberta makes it somewhat easier to justify mandatory retirement, and the Supreme Court of Canada upheld the University of Alberta's mandatory retirement scheme in *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, but the University of Calgary has abolished mandatory retirement and the University of Alberta is moving in this direction as well.

The recent British Columbia initiative to abolish mandatory retirement was spurred by a recommendation found in December, 2006 Report of the Premier's Council on Aging and Seniors Issues, entitled *Aging Well in British Columbia*. On May 7, 2007, the New Brunswick Self-Sufficiency Task Force released its final report, entitled *The Road to Self-Sufficiency – A Common Cause*. Recommendation 26 of that report suggested that government "Undertake a public consultation and develop a plan for the elimination of mandatory retirement."

Whether it is viewed from the perspective of human rights and fairness, or from the perspective of improving the well-being of an aging population, or from the perspective of taking advantage of the economic potential of people who are over



the age of 65, the general tenor of the public policy debate over mandatory retirement seems to have shifted in favour of the position that mandatory retirement has outlived its usefulness.

### **C. MANDATORY RETIREMENT AT OTHER CANADIAN UNIVERSITIES**

During the time the Committee has been studying mandatory retirement at Canadian universities, the landscape has clearly shifted from an environment in which mandatory retirement was common at Canadian universities to one in which mandatory retirement has become an exception. The Committee collected a number of examples of collective agreements in which mandatory retirement has been removed, and we have included the provisions governing retirement in those collective agreements in the Appendix.

#### **a. Universities in Provinces that Restrict Mandatory Retirement**

As noted earlier, the provinces that have abolished mandatory retirement now include Newfoundland, Quebec, Ontario, Manitoba, Saskatchewan and British Columbia, so a study of the collective agreements of universities that no longer have mandatory retirement would encompass the collective agreements of most Canadian universities. In some instances universities and their unions have responded to the end of mandatory retirement by the negotiation of retirement incentives or phased or flexible retirement structures in their collective agreements. In other instances, these incentive structures were in place prior to the abolition of mandatory retirement. Finally, in some instances no retirement incentive structures were included in the collective agreements when mandatory retirement was abolished. The abolition of mandatory retirement in Newfoundland, Ontario, Saskatchewan and British Columbia is relatively recent, and it is difficult to determine what impact the presence or absence of retirement incentives has on patterns of retirement at universities in these jurisdictions. It is worth noting, however, that retirement incentives seem to be common in the collective agreements at Quebec universities, where mandatory retirement was abolished some time ago.

#### **b. Universities that have Reached Voluntary Agreements Abolishing Mandatory Retirement**

Some universities and their unions have negotiated the end of mandatory retirement even though they are currently under no legal obligation to do so. Mount Allison University is now in this group, as are most universities in Alberta. The Appendix includes the provisions that deal with the new arrangements for retirement in a number of these collective agreements.

**c. Statistics Canada Study of the Impact of the Abolition of Mandatory Retirement at Canadian Universities**

Worswick, C. 2005. *Mandatory Retirement Rules and the Retirement Decisions of University Professors in Canada*. Research Paper No. 271, Analytical Studies Branch, Statistics Canada. 29pp.

This report uses inter-provincial variation in retirement rules to assess the effects of these rules on retirement patterns of university professors across Canada. The source is the annual census of all university professors in Canada, collected by Statistics Canada. The report covers the period 1983/1984 to 2001/2002, beginning with the year in which the province of Quebec abolished mandatory retirement and ending before the province of Ontario followed suit (in 2006), giving a large sample in both categories (with and without mandatory retirement at age 65).

The author of the study, Christopher Worswick, summarized his conclusions in the following terms:

. . . The age distributions of professors at universities without mandatory retirement and those at universities with mandatory retirement at age 65 have diverged over time with a higher fraction of professors over the age of 65 at universities without mandatory retirement.

An analysis of a discrete time hazard model indicates that faculty members have exit rates at age 64 and 65 that are 30 to 35 percentage points lower than those of their counterparts at universities with mandatory retirement. Similar results are found for both men and women; however, the magnitude of this effect is somewhat smaller for women. Equivalent results were found by gender group when the sample was restricted to faculty members who received their highest degree at age 34 or older indicating that duration of the remainder of the career does not appear to be an important determinant of the exit rates of either male or female faculty members over the age of 64 at universities without mandatory retirement rules.

It is important to know not only whether professors will continue to work after the age of 65 in the absence of mandatory retirement, but how long they will continue to work. At age 69, virtually no professors are employed at universities with mandatory retirement at the age of 65. For universities without mandatory retirement, close to 40 percent of professors who were employed at the age of 64 remain employed at the university.

However, for older professors at universities without mandatory retirement, the probability of continuing to work is lower. Estimated

survival probabilities indicate that male faculty members employed at the age of 64 at a university without mandatory retirement only have a 15.8 percent probability of continuing to work at the university until age 72. This indicates that while many university professors will work past the age of 65 if allowed, the vast majority of them will retire by the age of 72. (pp. 15-16)

The main (unsurprising) finding is that mandatory retirement rules do indeed “act as a constraint” on the age of retirement at Canadian Universities. More surprising is that patterns differ little between male and female faculty, and that although many more faculty remain employed after age 65 in universities without mandatory retirement, few remain after age 70. There is also a clear pattern of the disparity between the two groups of universities increasing over time; the proportion of faculty over the age of 65 in universities with and without mandatory retirement (at age 65) differed little in 1983/84 (~1%), rose by 1988/89 (0.7% and 1.9%, respectively) and increased steadily to a difference of over 3 times by 2001/2 (0.9% versus 3.4%, respectively).

The report gives summary statistics for each of the academic years 1983/84, 1988/89, 1993/94, 1998/99, and 2001/2. This allows for a longitudinal analysis of what is essentially a cohort of faculty moving through both university communities. Results should be applied with caution to the current situation at UNB, since they are sensitive to the starting age distributions which may be different. In 1983/84, for example, the modal age-group of university professors was the 41-45 cohort, accounting for about 22-23% of the population, whereas at UNB it is currently the 51-56 group (23%).

#### **D. THE ARGUMENTS FOR AND AGAINST THE VOLUNTARY ABOLITION OF MANDATORY RETIREMENT**

This Joint Committee was established on the assumption that mandatory retirement in New Brunswick was soon to be abolished legislatively. That assumption proved to be incorrect, but it is certainly the case that the trend across the country is in favour of abolishing mandatory retirement and the Self-Sufficiency Task Force has recommended that New Brunswick follow this trend. The question that presents itself, therefore, is whether UNB should wait and react to a legislative initiative to abolish mandatory retirement or work with AUNBT, and presumably other campus unions and associations, to end mandatory retirement on its own initiative. A number of considerations point in the direction of taking the initiative into our own hands. They include the following:

- Since universities in the United States and all jurisdictions in Canada except New Brunswick, Nova Scotia and Prince Edward Island have taken steps to abolish mandatory retirement, continued use of a mandatory retirement policy at UNB will make it increasingly difficult to attract and

retain established faculty/staff. This will diminish UNB's ability to meet its Mission goal of "providing students with the highest possible quality instruction".

- Retention of mandatory retirement is inconsistent with UNB's Mission goals of being a "responsible and responsive employer" and providing an "environment conducive to the development of the whole person" (in that the "whole person" includes those over 65).
- If the UNB community agrees that abolishing mandatory retirement is the "right thing to do" it will be hard to justify expecting someone else (i.e. the Province) to do it.
- Experience teaches that those who wait for Government action may wait for a long time and ultimately be disappointed.
- Now that it is common knowledge in the UNB community that abolition of mandatory retirement is being considered seriously (e.g., by the establishment of this Committee in the last round of negotiations), it will become increasingly difficult to defend or justify forcing retirement of those who reach 65 before the change is made, further increasing the likelihood of expensive and disruptive court action.

The University of Alberta Task Force on Mandatory Retirement, in its 2006 report (included in the Appendix volume of our report) identified three main reasons for the preservation of mandatory retirement in an academic environment: (1) the promotion of academic renewal; (2) facilitation of planning and resource management; and (3) the preservation of tenure and the protection of retirement with dignity. While those reasons were once seen as an adequate justification for mandatory retirement at universities, the trend now appears to be either that mandatory retirement is considered unnecessary to further these goals or that the disadvantages of mandatory retirement are considered to outweigh the contribution mandatory retirement plays in the service of these goals, and we must find other ways of accomplishing them.

Nevertheless, the University of Alberta Task Force also identified "the cost to the University in respect of salary, pension and benefits paid to staff who choose not to retire if mandatory retirement were eliminated" as a consideration that ought to be taken into account in examining the implications of abolishing or not abolishing mandatory retirement. (page 5) The Task Force concluded that "Eliminating Mandatory Retirement would have both an ongoing and a one-time increase to the base salary budget." (page 15) The financial circumstances of the University of New Brunswick and the University of Alberta are obviously quite different, and one cannot simply take the financial implications identified by the Alberta Task Force and apply them directly to UNB. On the other hand, it would not be prudent to ignore the possibility that the abolition of mandatory retirement

could have significant financial consequences for UNB, particularly in the current financial environment.

In May of 2007, the UNB Board of Governors approved a deficit budget for the 2007-2008 fiscal year. The Board took this unusual step on the understanding that steps would be taken to bring our financial picture back into balance in relatively short order. The steps include significant efforts at revenue enhancement, notably efforts to enhance the attraction and retention of students. At the same time, the University has taken significant steps to control costs, the most important of which has been a policy of limited replacement of faculty and staff members who have retired. This policy has been controversial, not least because student demand for programs has no necessary correlation with the retirement of the faculty who deliver the programs. Nevertheless, it can be argued that non-replacement of faculty and staff who are retiring is a less disruptive way of controlling costs than other alternatives.

The abolition of mandatory retirement is likely to have an impact on this strategy. The precise level of the impact is not easy to measure, but it cannot be said with confidence that it is negligible. In itself this is not a reason for refusing to take steps to abolish mandatory retirement. Nevertheless, it is a reason for making the abolition of mandatory retirement part of the process of negotiating a new collective agreement. The abolition of mandatory retirement in the context of negotiations leading up to a new collective agreement may also have the potential for making it more attractive to both parties to make express provision for more flexible arrangements for faculty and librarians who are interested in reduced workload appointments leading up to retirement.

#### **E. ADJUSTMENTS TO THE COLLECTIVE AGREEMENT AND PENSION AND BENEFIT PLANS THAT MIGHT BE CONSIDERED WHEN MANDATORY RETIREMENT IS ABOLISHED**

In the next round of collective bargaining, the parties will undoubtedly wish to consider addressing a number of issues related to the implications of abolishing mandatory retirement. In some areas the views of the parties may coincide; in others there may be differences that will have to be reconciled through negotiation. We concluded that it made more sense for us to identify areas that are worthy of consideration than it would be for us to identify specific solutions. The collective agreement clauses in the Appendix provide a number of examples of how other Canadian universities have addressed these issues. Each of these provisions has to be understood in the context of the entire collective agreement in which it is embedded, and the impact of incorporating any particular provision into our Collective Agreement may not reproduce the effect experienced at the university providing the model. Nevertheless, the provisions collected in the Appendix may form a useful source of inspiration for the parties in developing their own proposals to be addressed during negotiations.

Having made that observation, we were able to agree that any provisions that the parties might negotiate to address the consequences of the end of mandatory retirement must not themselves be discriminatory. This does not necessarily mean that age can never be a reference point for eligibility for pension or benefit plans, for example, because human rights legislation typically makes provision for justification of some types of arrangements that might otherwise be considered to be discriminatory. Nevertheless, the parties should satisfy themselves that any new arrangements they may wish to enter into to address the consequences of the end of mandatory retirement are consistent with the laws of New Brunswick and are justifiable in light of generally accepted standards of justification in human rights law.

The areas that we considered that the parties might wish to address in a new Collective Agreement include the following:

1. The possibility of phased or flexible retirement, and the structure of any arrangements for phased or flexible retirement;
2. The possibility of a retirement incentive plan or plans, and the structure of any such plan or plans;
3. The establishment of a justifiable end point for the provision of long term disability insurance. It may also be possible to consider whether individuals who are over the age of 65 and who require a medical leave of more than 6 months duration may be deemed to have retired;
4. The possibility of differential rates of contribution to medical and dental plans for individuals above the age of 65, based on the existence of provincial contributions to medical and dental plans for individuals over the age of 65;
5. The possibility of agreeing to a more general review of the cost and scope of benefits coverage, should changing demographics warrant such a review;
6. Arrangements to govern the eligibility or obligation of individuals who are over the age of 65 to continue to make pension contributions and accrue pensionable years of service; and
7. Addressing the provisions of Article 43 governing performance review, to reflect the understanding of the parties concerning the circumstances in which it would or would not be appropriate to use the review mechanism to address concerns with respect to unsatisfactory performance.

## **Conclusion**

For the foregoing reasons the Committee is unanimous in recommending that UNB rescind its mandatory retirement policy insofar as it affects AUNBT members and that the Collective Agreement should clarify that a normal retirement age is not a mandatory retirement age. We were unable to agree on whether UNB and AUNBT should take immediate steps to amend the current Collective Agreement to abolish mandatory retirement. Nevertheless, we are unanimous in recommending that mandatory retirement be removed in the Collective Agreement that succeeds the one that expires on June 30, 2009. Should the University take this step it is likely to want to rescind the mandatory retirement policy in its entirety. We have not considered it part of our mandate to consult other unions or employees that would be affected by this change, however, and in the absence of such discussions we make no comment on this larger question.