2008

Mandatory Retirement: Termination at 65 is Ended, But Exceptions Linger on

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RECENT LEGISLATION COMMENT

MANDATORY RETIREMENT: TERMINATION AT 65 IS ENDED, BUT EXCEPTIONS LINGER ON

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I. INTRODUCTION

In employment law, mandatory retirement ("MR") is the compulsory termination of employment as a result of the employee having reached a specified age. In legal circles, MR is regarded as retirement rather than dismissal, though an individual who wishes to continue to work beyond a specified age might disagree.

The elimination of MR in British Columbia resulted from the deletion of five little words in the definition of "age" in section 1 of the British Columbia *Human Rights Code.*[1] Section 1 of the *BCHRC* formerly defined "age" as meaning "an age of 19 years or more and less than 65 years". Bill 31, later the *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007*,[2] changed the definition to mean "an age of 19 years or more". The elimination of MR fell short of total and complete annihilation, however, because of four continuing exceptions to sections 1, 13 and 41(2).[3] While other forms of prohibited discrimination in employment, such as race or sex, are absolute, human rights legislation prohibiting age discrimination invariably allows broad statutory exceptions because ageing is a fact of life that affects

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[1] R.S.B.C. 1996, c. 210 [*BCHRC*].

[2] S.B.C. 2007, c. 21 [*MREAA*].

[3] *Ibid.*, s. 1, s. 13(3)(b) and (4), s. 41(2).

everyone. For this reason, human rights provisions permit age discrimination in employment on relatively broad grounds.[4]

II. CONSEQUENCES OF ABOLITION

The effect of the amending legislation is to change a contract of employment that formerly ceased at age 65 into a contract of employment for an indefinite term (not for a lifetime job).[5] The abolition of MR has three general effects.

First, it means that termination of employment on the basis of the employee's age is now discriminatory. There is no common law principle imposing MR. Age is not in itself justification for termination of employment. Accordingly, unless termination is justified by reasonable cause, or it is preceded by reasonable notice, it amounts to wrongful dismissal.[6]

Second, it removes a limitation on the amount of damages that older workers can recover for wrongful dismissal. A wrongfully terminated employee is entitled to damages equal to the remuneration and benefits that would have accrued during the period of advance notice that the employer should have given to the employee prior to termination. When MR applied and would have ended the contract of employment in the notice period, the quantum of damages was reduced accordingly. The intervention of MR within the duration of the notice period cut off damages, because an employee who was subject to MR had no contractual right to employment after reaching the date of MR.[7]

Finally, the abolition of MR also alters previous actuarial assumptions underlying the calculation of tort damages. Employees can choose to work longer, increasing their lifetime earnings.[8] This

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[4] *R. v. Secretary of State for Work and Pensions ex parte Carson*, [2005] UKHL 37, [2006] 1 AC 173, [2005] 4 All ER 545; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' (B.C.G.S.E.U.) (Méiorin Grievance)*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1; *Qantas Airways v. Christie*, [1998] HCA 18, 193 CLR 280.

[5] See *Johnson v. CanWest Global Communications Corp. (c.o.b. CH Vancouver Island)*, 2008 BCCA 33 at paras. 44-45, [2008] B.C.J. No. 110 (QL).

[6] See *Abramson v. Windsor-Essex County Health Unit* (2006), 52 C.C.E.L. (3d) 300, [2006] O.J. No. 3406 at para. 91 (Sup. Ct. J.) (QL).

[7] *Supra* note 5 at paras 22-23.

[8] *Peterson v. Ram*, 2008 BCSC 252 at para. 47, [2008] B.C.J. No. 332 (QL).

demographic change affects the amount of damages awarded for loss of future earnings in personal injuries and wrongful death litigation, increasing the damages for permanent loss of earning capacity.[9]

II. BACKGROUND

A. VIEWS OF THE COURTS TOWARDS MR

Judicial attitudes to MR have changed over the years. In 1979, a Senate committee recommended the abolition of MR, and its replacement with flexible retirement.[10] The report influenced some courts and arbitrators in that era to strike down MR as age discrimination against workers over 64 years old.[11] However, by the 1990s, which was an era of high unemployment and job shortages, the Supreme Court of Canada upheld the validity of MR. The Supreme Court overruled the decisions of the British Columbia and other provincial courts that had tried to abolish MR.[12] The Court held that where the employer was a government agent to which the *Charter* applied,[13] MR at age 65 was discriminatory, and contrary to section 15 of the *Charter*, but justified under section 1.

In 2001, a majority of the British Columbia Court of Appeal ushered in a new era with their decision in *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District.*[14] The employer terminated the employee because he was

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[9] *Sandhu (Litigation guardian of) v. Wellington Place Apartments*, 2008 ONCA 215 at paras. 40-44, [2008] O.J. No. 1148 (QL).

[10] *Retirement without Tears*: Report of the Special Senate Committee on Retirement Age Policies (Ottawa: Canadian Govt. Pub. Centre, Supply and Services Canada, 1979) (Chair: David Croll).

[11] *Sniders v. Nova Scotia (Attorney General)* (1988), 55 D.L.R. (4th) 408, [1988] N.S.J. No. 451 (C.A.) (QL).

[12] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545; *Stoffman v. Vancouver General Hospital,* [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700; *Harrison v. University of British Columbia,* [1990] 3 S.C.R. 451, 77 D.L.R. (4th) 55; *Douglas/Kwantlen Faculty Association v. Douglas* College, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, 95 D.L.R. (4th) 439.

[13] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[14] 2001 BCCA 435, 206 D.L.R. (4th) 220.

over 65 years of age, but its policy of MR at age 65 was not demonstrably justified under the *Charter*. Henceforth, the onus was on universities and other public-sector employers to justify MR policies on a case-by-case basis.

In the *G.V.R.D.* case, Prowse J.A. (Newbury J.A. concurring) invited reconsideration of *McKinney*:

> 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. ... 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.[15]

B. VIEWS OF LABOUR ARBITRATIONS TOWARDS MR

Currently, an arbitration award may strike down MR in a workplace if it contravenes legislation, such as the *BCHRC,* as amended by the *MREAA*; if it is inconsistent with a term of a governing collective agreement; if a new policy of MR was introduced without adequate notice to the affected employees; or if the employer applies MR to employees in an arbitrary, discriminatory, or unreasonable manner.[16]

An early attempt to strike down MR occurred in 1978, when a labour arbitration award rejected MR at 65 years as discrimination, but the decision was struck down two years later by the British Columbia Court of Appeal.[17] The Court preferred the view that even though MR at 65 years was discrimination, it was permissible under the contemporary human rights legislation, and as long as

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[15] *Ibid.* at para. 127.

[16] *Ottawa-Carlton District School Board v. Ontario Secondary School Teachers' Federation, District 25 (Cassells Grievance)* (2006), 87 C.L.A.S. 224, [2006] O.L.A.A. No. 607 at para. 14 (QL) [*Cassells* cited to O.L.A.A.].

[17] *Prince Rupert Fishermen's Co-operative Association v. Prince Rupert Amalgamated Shoreworkers' and Clerks' Union, Local 1674* (1978), 19 L.A.C. (2d) 308, [1978] B.C.C.A.A.A. No. 13 (QL).

management consistently applied the policy to employees it was valid.[18]

The outcomes of more recent arbitrations in British Columbia and other provinces have been mixed: some have struck down MR policies, especially those imposed unilaterally by management, and those with a history of inconsistent application to employees reaching retirement age. Other grievances have been dismissed for lack of evidence of discriminatory effect, especially if the MR is contained in a collective agreement.[19]

C. FEDERAL AND PROVINCIAL LEGISLATIVE JURISDICTION OVER MR

In a federal system such as Canada's, federal legislation regulates some occupations such as airline pilots, military personnel and federal employees, and provincial legislation regulates the others. The *Canadian Human Rights Act*[20] regulates the MR of employees in the federal sector, and the *BCHRC* and other codes regulate MR

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[18] *International Woodworkers of America, Local 1-405 v. Crestbrook Forest Industries Ltd.* (1980), 110 D.L.R. (3d) 680, [1980] 6 W.W.R. 236 (B.C.C.A.).

[19] See *Independent Electricity System Operator v. Society of Energy Professionals (Islam Grievance)*, [2005] O.L.A.A. No. 152 (QL) (policy negotiated between employer and employee bargaining unit, and forming part of collective agreement upheld as justified; critical factor – policy forming part of collective agreement); *Lehigh Northwest Cement Ltd. v. Boilermakers' Lodge D-277 (Soh Grievance)*, [2005] 142 L.A.C. (4th) 108, 82 C.L.A.S. 189, B.C.C.A.A.A. No. 169 (QL) (collective agreement's requirement of MR at age 65 upheld in private sector collective agreement); *Pacific Newspaper Group, Inc. v. Communications, Energy and Paperworkers Union of Canada Local 2000* (2003), 123 L.A.C. (4th) 209, [2003] B.C.C.A.A.A. No. 225, aff'd [2003] B.C.L.R.B.D. No. 346 (*sub nom. Pacific Newspaper Group Inc., a division of Southam Publications (Re)*) (unilateral management policy of MR struck down as lacking justification); *Haida Harbourside Inn v. British Columbia Government and Service Employees' Union*, [2003] B.C.C.A.A.A. No. 257 (QL) (introduction of MR by management not permitted under collective agreement); *British Columbia v. British Columbia Government and Service Employees' Union (Wybert Grievance)* (2002), 113 L.A.C. (4th) 1, [2002] B.C.C.A.A.A. No. 294 (QL) (MR for public servants upheld); *Canwest Media Publications Inc. v. Victoria-Vancouver Island Newspaper Guild, Local 30223*, 2006 CanLII 23829, [2006] B.C.L.R.B.D. No. 160 (QL) (MR struck down as unilaterally introduced by employer, and inconsistent with collective agreement).

[20] R.S.C. 1985, c. H-6 [*CHRA*].

for employees in the provincial sphere. The two Acts treat MR differently for their respective work forces. Sections 7 and 10 of the *CHRA* prohibit MR of federally–regulated employees; subsections of section 15 create exceptions or qualifications whereby MR might be permissible:

- as a bona fide occupational requirement ("BFOR");[21]
- on reaching an age of retirement that is prescribed by legislation or regulation;[22]
- on reaching normal age of retirement;[23] or
- on reaching the age of compulsory vesting or locking-in of pension contributions pursuant to sections 17 and 18 of the (Federal) Pension Benefits Standards Act, 1985.[24]
- The scope of these exceptions is subject ultimately to judicial interpretation and Charter application, resulting in ongoing litigation about their interpretation. Age discrimination such as MR, though prohibited under section 15 of the Charter, can be upheld as justifiable under section 1.[25]

D. ELIMINATION OF MR IN BRITISH COLUMBIA

The *MREAA*, as provincial legislation, does not have any direct impact on the MR of employees in the federal sphere but makes a dramatic change to the MR of employees in the provincial sphere. Since 1 January 2008, the *BCHRC*, which applies to employees in provincial jurisdiction, has prohibited MR for employees who are terminated on grounds of age on or after reaching the age of 65.

Section 4 of the *MREAA* amends section 13 of the *BCHRC* to read as follows:

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[21] *Ibid.*, s. 15(1)(a).

[22] *Ibid.*, s. 15(1)(b).

[23] *Ibid.*, s. 15(1)(c).

[24] *Ibid.*, s. 15(1)(d).

[25] Department of Justice Canada, *Mandatory Retirement and the Canadian Human Rights Act* by Nasresh C. Agarwal, online: Department of Justice Canada <http://www.canada.justice.gc.ca/chra/eng/ret.html>. The paper suggests harmonizing the federal exceptions with those in the provincial and territorial sectors.

Discrimination in employment

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or
(b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or
(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

IV. WHAT IS AGE DISCRIMINATION?

MR occurs when, as the result of policy or contractual provision, an employer terminates the contract of an employee on reaching a specified age. It has long been held that forced loss of employment in these circumstances is discrimination based on age.[26]

Over the years the courts have elaborated upon the basic concept of discrimination as unequal treatment on some basis other than

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[26] *Supra* note 12.

merit. The issue of age-based discrimination in a provincial statute recently came up in the context of publicly funded treatment of children with autism. In the *Wynberg* case,[27] Ontario legislation cut off eligibility for publicly funded early treatment of autism at age six. Parents of autistic children over six attacked this cutoff as discrimination based on age. The Ontario Court of Appeal rejected the claim, concluding that tying this particular type of treatment for autism to age six years was justifiable for legitimate therapeutic reasons. Also, autistic children over six years of age would be eligible to attend school, and consequently could receive appropriate therapy through the publicly-funded school system. In its reasons for judgment, the Court provided a concise summary of the current view of "discrimination", as expressed in several prior decisions of the Supreme Court of Canada.[28]

According to the Ontario Court of Appeal, discrimination occurs when an individual suffers the violation of essential human dignity as a result of "disadvantage, stereotyping, or political or social prejudice" on a prohibited ground under section 15(1) of the *Charter*.[29] The Court further states that claims of discrimination require complainants to demonstrate inequality in their treatment as compared with a comparable group. In the context of MR, I would suggest the complainant would be someone 65 or older who seeks equality of treatment (opportunity for employment) with the comparable group, persons under 65. Then, the questions to be considered are:

(1) Is the claimant accorded differential treatment under the law?

(2) Is the treatment based on one of the prohibited grounds listed in section 15(1) of the *Charter* or a ground analogous to them? and,

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[27] *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561, 269 D.L.R. (4th) 435 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 441 (QL); see also *Association of Justices of the Peace of Ontario v. Ontario (Attorney Genereal)*, [2008] O.J. No. 2131 (QL), 2008 CanLII 26258 (Sup. Ct.) (MR of provincial justices of the peace at age 70 discriminatory).

[28] See e.g. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257.

[29] *Supra* note 27 at para. 15.

(3) Does the differential treatment discriminate in a substantive sense?[30]

According to the Ontario Court of Appeal, "discriminat[ion] in a substantive sense" involves the following considerations:

(1) Pre-existing disadvantage, stereotyping, prejudice or vulnerability;
(2) The correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacity, or circumstances of the claimant or those he or she is properly compared to [sic];
(3) The ameliorative purpose or effect of the impugned law, program or activity upon a more disadvantaged person or group in society; and
(4) The nature and scope of the interest affected by the impugned governmental activity.

I would suggest that the former section 1 of the *BCHRA*, permitting MR on the basis of age 65 or over, violated all seven considerations listed by the Ontario Court of Appeal. Particularly, by denying human rights protection to those 65 and over, section 1 formerly encouraged unfounded ageism, stereotyping and stigmatizing of the elderly, on the prohibited basis of age, and denied equal opportunity to the older worker. Thus, contrary to the public interest, the previous section 1 encouraged societal neglect, poverty, marginalization and unemployment of the elderly. Arguments have frequently been made that MR also causes discrimination on the prohibited bases of national origin and sex, because of its effect on immigrants that enter the workforce later in life, and on women who have taken time out of the workforce for family responsibilities.[31]

V. THE EXCEPTIONS

Starting on 1 January 2008, the *Human Rights Code,* as amended, prohibits MR in general, but, exceptionally, permits age-based discrimination in the following circumstances:

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[30] *Ibid.* at para. 20.

[31] For a summary of the criteria necessary to establish age discrimination, see also *Melanson v. New Brunswick (Attorney General)*, 2007 NBCA 12, 310 N.B.R. (2d) 356 at para. 12, 280 D.L.R. (4th) 69, Robertson J.A. [cited to N.B.R.].

(1) Age under 19 years;[32]
(2) Bona fide occupational requirement;[33]
(3) Operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer;[34] and
(4) Distinction on the basis of age permitted or required by any Act or regulation.[35]

Each exception needs explanation and justification. As a general guideline to the interpretation of exceptions, the Supreme Court of Canada instructed courts and tribunals to construe the prohibition against age discrimination liberally as the rule, and the exceptions narrowly so as to prevent them from impinging more than necessary upon the rule.[36]

E. AGE UNDER 19 YEARS[37]

The Legislative Assembly of British Columbia modified the definition of "age" to protect workers who were 65 years of age or more from age discrimination, but carried forward the previous exception for youthful workers less than 19 years of age, as the cut-off. Nineteen years of age, at which protection against age-discrimination commences under the *Human Rights Code*, coincides with the current age of majority in British Columbia.[38] British Columbia followed the pattern set by the province of Ontario, which amended its definition of age to abolish MR for workers who were 65 years of age or over, but continued to exclude those under 18

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[32] *BCHRC*, *supra* note 1, s. 1 (definition of "age").

[33] *Ibid.* s. 13(4).

[34] *Ibid.* s. 13(3)(b).

[35] *Ibid.* s. 41(2).

[36] *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481 at para. 44; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 at 307, 53 D.L.R. (4th) 609; *Zurich Insurance Co. v. Ontario Human Rights Commission*), [1992] 2 S.C.R. 321, 93 D.L.R. (4th) 346, [1992] S.C.J. No. 63 at paras. 18, 57-59 (QL); *Canada (Attorney General) v. Martin*, [1994] 2 F.C 524, 72 F.T.R. 249.

[37] *BCHRC*, *supra* note 1, s. 1.

[38] *Age of Majority Act*, R.S.B.C. 1996, c. 7.

years of age,[39] which coincides with the age of majority in Ontario.[40] Two further provinces limit human rights protection to those who have attained the age of majority (again defined as 18 years of age).[41] In Ontario, the exclusion of youths under the age of majority from human rights protection might make sense if it were limited to the employment context, as a message to the young "to stay in school", but the Ontario *Human Rights Code* serves purposes other than prohibiting discrimination in employment, such as the provision of public benefits and services. While the Ontario *Code* leaves vulnerable youth open to discrimination in such matters as access to public health services, it is open to *Charter* challenge.[42] This possibility is precluded by the *BCHRC*.[43] In contrast, many other Canadian jurisdictions have not enacted a definition of age in their human rights codes, which impose the same protection against age discrimination in employment for workers of any age.[44]

The definition of the "age" of prohibited age discrimination has changed over the years. From 1969 to 1992, the British Columbia Legislature felt middle-aged workers needed protection against age-discrimination in comparison to their younger counterparts, and protected only those whose ages fell between 45 and 65 years of

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[39] *Human Rights Code,* R.S.O. 1990, c. H.19, s. 10(1) [*ONHRC*].

[40] *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7, s. 1.

[41] *Human Rights, Citizenship and Multiculturalism Act,* R.S.A. 2000, c. H-14, s. 44(1)(a) [*ABHRCMA*]; *The Saskatchewan Human Rights Code,* R.S.S. 1979, c. S-24.1, s. 2(1)(a) [*SKHRC*].

[42] *Arzem v. Ontario (Ministry of Community and Social Services)*, 2006 HRTO 17, 56 C.H.R.R. D/426, [2006] O.H.R.T.D. No. 17 (QL).

[43] *BCHRC*, *supra* note 1, s. 8.

[44] *The Human Rights Code*, S.M. 1987-88, c. 45, C.C.S.M. c. H175 [*MBHRC*]; *Human Rights Code*, R.S.N.L. 1990 c. H-14 [*NLHRC*]; *Human Rights Code*, R.S.N.B. 1973, c. H-11 [*NBHRC*] (but see s. 3(6.1) which permits age discrimination in employment towards anyone who has not reached the age of majority if a statute or regulation authorizes the discriminatory treatment); *Human Rights Act,* R.S.N.S. 1989, c. 214 [*NSHRA*]; *Human Rights Act*, R.S.P.E.I., 1988, c. H-12 [*PEIHRA*]; *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [*QCHRA*]; *An Act Respecting Labour Standards*, R.S.Q. c. N-1.1, s. 122.1; *Human Rights Act*, S.N.W.T. 2002, c. 18 [*NWTHRA*]; (Nunavut) *Human Rights Act*, S. Nu. 2003, c. 12 [*NHRA*]; *Human Rights Act*, R.S.Y. 2002, c. 116 [*YKHRA*]; *CHRA*, *supra* note 20.

age.[45] In 1992, the government of the day derided this narrow definition of age as "very strange", though other provinces and the United States of America had similar definitions of age at the time.[46] To protect youthful workers, the British Columbia Legislature lowered the definition of age to anyone 19 years of age or older.[47]

Section 1, as it formerly defined "age" as falling between 19 and 65 years, assumed a view of life that is out of touch with current realities and the wishes of most Canadians regarding their opportunities for employment at, and beyond, age 65. The *BCHRC* reduced the "seven ages of man" to three mutually exclusive phases. In the first phase of life, individuals devote themselves exclusively to education and training, up to age 19 as specified in the *BCHRC*. In the second phase of life, starting at age 19, individuals pursue employment as their sole or primary activity. In this second phase, employees need protection against discriminatory ageism so that they have a fair opportunity to earn a livelihood. In the third phase, commencing at age 65, individuals retire to a full-time pursuit of leisure. The former *BCHRC* assumed that from this point in their lives onwards, retirees were entirely excluded from the workforce, did not need or want to earn a livelihood, and did not require protection against discrimination in seeking employment opportunities since they were not seeking employment in this final phase of their lives.

The assumptions no longer hold—if they ever did. Current realities are quite different from legislative assumptions. In the (assumed) first or learning phase of life, students work to earn a livelihood while pursuing their education, and training for many does not end at 19 years but continues until the mid-twenties or even later. Since society benefits from further training of its young beyond the age of 19, the codes ought to encourage it. During the second phase, employees no longer work applying only the skills and training previously learned, but rather are constantly learning new skills and upgrading their knowledge. During this phase,

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[45] *Human Rights Act*, S.B.C. 1969, c. 10, s. 5(b); *Human Rights Code of British Columbia Act,* S.B.C. 1973, c. 119, s.1; *Human Rights Code*, R.S.B.C. 1979, c. 186, s. 1; *Human Rights Act*, S.B.C. 1984, c. 22, s. 1.

[46] British Columbia, Legislative Assembly, *Hansard*, 4 No. 10 (9 June 1992) at 2417 (Hon. Anita Hagen).

[47] *Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43, s. 1(a).

employees also seek leisure pursuits in their spare time. The third phase of life, "retirement" for most people, does not necessarily begin at 65, but occurs on average at age 61 or, for some, later than 65 years, and often entails re-employment ("retire and re-hire") and/or the pursuit of further (or "life-long") learning.

Employees who pursue employment after age 65 deserve protection against discrimination as they seek opportunities to work. If this is so, don't individuals under 19 deserve the same protection? I would argue that while abolishing MR for those over 65 is a very good thing, abolishing age discrimination for employees under 19 would not make social or economic sense. Age discrimination against employees under 19 is considered socially beneficial as it encourages the young to pursue further education and training. These days, society and the economy benefit from a skilled and educated workforce, and there are few good jobs for unskilled and inexperienced workers, so the *BCHRC* encourages those under 19 to "stay in school", so to speak. In contrast, those seeking employment over age 65 often have the very skills and experience in high demand, but cannot make use of those desirable attributes because of MR.

To reinforce current perceptions of working after age 65, HSBC conducted worldwide surveys of public opinion, and found that three-quarters of the tens of thousands of individuals responding were opposed to MR. They did not wish to retire at a prescribed age, to a life exclusively devoted to leisure, but rather to combine work with leisure in their retirement years. They wanted some choice over their time of departure from the workforce.[48]

F. BONA FIDE OCCUPATIONAL REQUIREMENT ("BFOR")[49]

Just about every human rights code seems to permit age discrimination providing it qualifies as a "bona fide occupational

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[48] HSBC, *Future of Retirement 2005*, online: HSBC <http://www.hsbc.com/1/2/retirement/future-of-retirement/future-of-retirement-2005>; HSBC, *Future of Retirement 2006*, online: HSBC <http://www.hsbc.com/1/2/retirement/future-of-retirement/ future-of-retirement-2006>.

[49] *BCHRC*, *supra* note 1, s. 13(4).

requirement" (BFOR), or the equivalent.[50] Safety of the public, the worker and co-workers, and the effect of ageing on suitability for physically demanding work are the prominent rationales for this universal exemption. Illustrations of the exception are the "rule of 60" (whereby commercial air pilots must retire at 60 years of age), and comparable MR ages for police officers and firefighters. The exception is not only universal but also valid in Canada under the *Charter*, so long as the employer claiming the BFOR defence establishes all three elements of the *Méiorin*[51] test as enunciated by the Supreme Court of Canada:

> (1) That the employer adopted the standard [e.g. MR at age 60] for a purpose rationally connected to the performance of the job;
> (2) That the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> (3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. ... [In the sense] that to show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer [such as, creating a hazard or adding excessive cost].

The onus of proving undue hardship is on the employer, the party who can best support such a claim.[52] For example, Canada Post required applicants for permanent employment to pass a manual dexterity test. Passing the test was a condition of qualifying for further training leading to positions involving coding postal codes in an increasingly mechanized workplace. The complainants alleged

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[50] *ABHRCMA*, *supra* note 41, s.7(3); *SKHRC*, *supra* note 41, s. 16(7); *MBHRC*, *supra* note 44, ss. 12, 14(1); *ONHRC*, *supra* note 39, s. 24(1)(b); *NBHRC*, *supra* note 44, s. 3(5); *NLHRC*, *supra* note 44, ss. 9(1), (4); *NSHRA*, *supra* note 44, s. 6(f), (i); *PEIHRA*, *supra* note 44, s, 6(4)(a), 14(1)(d); *NWTHRA*, *supra* note 44, s. 7(4), 8(2); *NHRA*, *supra* note 44, s.9(4), 10(2), (3); *YKHRA*, *supra* note 44, s.10(a); *CHRA*, *supra* note 20, s. 15(1)(a).

[51] *Supra* note 4 at para. 54.

[52] *Ontario (Human Rights Commission) v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321.

that the test discriminated against older applicants. The complainants, who were in their 30s and 40s, contended that because of their age, they could not adapt to technological change as readily as younger applicants with less seniority, but the court rejected the contention as unproven. While the complainants established that the failure rate increased with age, Canada Post successfully defended its standardized dexterity test as a BFOR that satisfied the three requirements of the *Méiorin* test.[53]

In *Méiorin*, the complainant was a female forest firefighter employed by the province of British Columbia. The province required forest firefighters (male and female) to pass the same aerobics test and the Province terminated Ms. Méiorin's employment when she failed the test. The Supreme Court of Canada ruled that the aerobics test was discriminatory after the province had failed to establish that this met the three requirements of a BFOR. The province had not proved that passing the test was necessary to the safe and efficient performance of the work of a forest firefighter, or that another standard would result in undue hardship to the province.

Even this universal exemption elicits controversy. For example, some commercial pilots argue that the "rule of 60" is unnecessarily discriminatory, because periodic rigorous physical and mental fitness testing required by aeronautics legislation assesses individual ability to do the job far better than a blanket MR rule based on age. Less discriminatory alternatives, such as individual assessment of abilities, are preferable to age-based MR. The third element of the *Méiorin* test satisfies this concern by requiring an employer to prove that other alternatives to MR would cause undue hardship to the employer. Under the *Méiorin* test, MR is valid as a BFOR if it is an employer's only recourse.

A similar approach applies to ageing and driving. Age 65 has no magic as a milestone for assessing any individual's physical or mental decline due to ageing in any context, including ability to drive a motor vehicle. In B.C. and other provinces, there is no "rule of the road" for MR of any driver's licence on attaining a chronological age. Upon approaching the age of 80, a B.C. motorist is not automatically disqualified from driving, but must undergo biennial testing thereafter to continue driving. The Insurance

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[53] *Bastide v. Canada Post*; *Doolan v. Canada (Attorney General)*, 2005 FC 1410, [2006] 2 F.C.R. 637, aff'd 2006 FCA 318, [2007] 1 F.C.R. D-11.

Corporation of British Columbia states as follows: "[D]rivers 80 and older are asked to provide regular medical reports, because at this age people are more likely to develop or have a medical condition that may affect driving".[54] The critical factor is not age, but capacity. Commercial truck and bus drivers undergo annual testing from age 65 onwards to renew their commercial driving licences, but *no decision to revoke a commercial licence is ever made on the basis of age alone.*[55] Why should chronological age be permitted to determine employment through MR when it does not have the effect in itself of revoking a driver's licence?

If a person is capable of performing a job and wants to keep working, 65 years of age should not be a barrier to fulfillment of that aspiration. As the *Méiorin* case illustrates, the test must be appropriate to assess the real physical and mental requirements of performing the duties of the job. If MR is the only method available to the employer of dealing with the ageing employee, however, then the BFOR defence can justify MR in those circumstances.

G. BONA FIDE PLANS[56]

The Premier's Council on Aging and Seniors' Issues advised the British Columbia Legislative Assembly to repeal this troublesome exception in the former *Human Rights Code*.[57] British Columbia could have avoided unfortunate controversy and ambiguity by improved drafting.[58] Instead, British Columbia opted to follow Ontario and expand this permissible area of age discrimination,

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[54] Insurance Corporation of British Columbia, *Driver Licensing - Called for a re-exam?*, online: ICBC <http://www.icbc.com/licensing/reexam_medical.asp>.

[55] See Ontario Ministry of Transport, *Senior Drivers in Ontario* (11 January 2004), online: Transportation Research Board – Committee on the Safe Mobility of Older Persons <http://www.crag.uab.edu/safemobility/hf04/Tasca%20TRB%20HF%2004.ppt> at 9, 15.

[56] *BCHRC, supra* note 1, s. 13(3)(b).

[57] British Columbia, Ministry of Community Services, *Aging Well in British Columbia: The Report of the Premier's Council on Aging and Seniors' Issues* (November 2006), online: Ministry of Community Services <http://www.cserv.gov.bc.ca/seniors/council/ docs/Aging_Well_in_BC.pdf>.

[58] See e.g. *SKHRC, supra* note 41, s. 16(4); *NLHRC, supra* note 44, s. 9(5).

thereby leaving open the potential for continuing MR.[59] Other jurisdictions have similar provisions, though the wording varies.[60]

Age-differentiation in employee benefit plans is not discriminatory, whereas MR is age discrimination. If section 13(3)(b) only permitted age differentials in benefits based on actuarial considerations, it would be unobjectionable.[61] A fundamental ambiguity about section 13(3)(b) is whether it is a true exception to the prohibition of MR at all. In *Harrison v. University of British Columbia*,[62] for example, retired faculty members challenged the university's MR policy as age-discrimination violating section 15 of the *Charter*. The respondents and interveners argued that MR at 65 was permitted by sections 1, 8(1) or 8(3) of the *BCHRA*. Wilson J., in a memorable dissent, interpreted an earlier version of the provision as merely permitting employers to distinguish among employees by adopting age-based differentials in benefits, but not as authorizing the imposition of MR in employee benefit plans.[63] Retired faculty members challenged the university's MR policy at 65 years of age, as age-discrimination violating section 15 of the *Charter*. The respondents (the university and interveners) argued that MR at 65 was permitted by sections 1, (definition of "age" as meaning only those over 45 and younger than 65 years of age), 8(1) or by 8(3), of the *Human Rights Act* (B.C.). Subsection 8(1) protected employees between 45 and 65 years of age from MR and other forms of age-discrimination. Subsection 8(3) stated as follows:

> Section 8 ... .
> (3) Subsection (1) does not apply

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[59] *ONHRC*, *supra* note 39, s. 25(2.2); see also *MBHRC*, *supra* note 44, s. 14(7).

[60] *ABHRCMA*, *supra* note 41, s.7(2); *SKHRC*, *supra* note 41, s. 16(4); *MBHRC*, *supra* note 44, s. 14(7); *ONHRC*, *supra* note 39, s. 25(2)-(2.3); *NBHRC*, *supra* note 44, s. 3(6); *NLHRC*, *supra* note 44, s. 9(5), (5.1); *NSHRC*, *supra* note 44, s. 6(g), (h) as am. by *An Act Respecting the Elimination of Mandatory Retirement*, S.N.S. 2007, c. 11, s. 1 [*AREMA*]; *PEIHRA*, *supra* note 44, s. 11; *NWTHRA*, *supra* note 44, s. 7(2); *NHRA*, *supra* note 44, s.9(3); *YKHRA*, *supra* note 44, s.10(a); *CHRA*, *supra* note 20, s. 15(1)(d).

[61] See *Withler v. Canada (Attorney General)*, 2006 BCSC 101 at para. 136, [2006] B.C.J. No. 101 (QL).

[62] *Supra* note 12.

[63] *Ibid.*

> (a) as it relates to age, to any bona fide scheme based on seniority, or
> (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of any bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan.

The university argued, in the alternative, that even if retirees were under 65 years of age, as long as the university pension plan paid them benefits on their retirement, sections 8(3)(b) permitted their MR, as within the meaning of the phrase, "operation of any bona fide retirement ... plan". Wilson J. rejected the university's interpretation of section 8(3), stating that the provision did not authorize or permit any form of MR. Limiting the scope of section 8(3) to age-based differentials in employee benefits, Wilson J. concluded:

> [T]he University argues that s. 8(3)(b) of the Act has the effect of immunizing mandatory retirement from the reach of the prohibition against discrimination irrespective of the definition of age contained in s. 8(1) ... . In my opinion, s. 8(3)(b) does not assist the respondents. I note that the subsection refers not only to retirement but to pension and superannuation plans. I also note that the s. 8(3)(b) exemption extends not only to distinctions based on age but also to distinctions based on sex, marital status, and physical or mental disability. To my mind, these two aspects of the section provide important clues as to its intended effect. It seems to me that what the subsection meant to achieve was the exemption from the prohibition embodied in subs. (1) of those plans which draw upon age and other distinctions to meet their actuarial requirements. It refers, in other words, to the design and administration of these plans in so far as they are based on what would otherwise be impermissible distinctions. It is a matter of trite knowledge that actuarial scientists typically rely on statistics as to such things as expected lifespan of males as compared to females in formulating employee benefit plans. These are the types of considerations, I believe, that s. 8(3)(b) meant to exempt from the operation of s. 8(1). The section does not refer, however, to the use of these plans to justify compelled retirement ... . the subsection simply does not bear upon the matter at issue in these appeals, i.e. whether a person may be mandatorily [sic] retired against his or her will.[64]

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[64] *Ibid.* at paras. 47-48.

In Alberta, a learned arbitrator applied this reasoning to reject the argument that the equivalent Alberta statutory provision could validate a MR clause in a pension plan even if it resulted from free collective bargaining.[65] When the Legislature of Newfoundland and Labrador eliminated MR, it resolved this ambiguity by explicitly amending its *Human Rights Code* to disallow and strike down MR clauses in good faith retirement and pension plans by enacting subsection 9(5.1).

Section 9 of the *Newfoundland Human Rights Code* states as follows:

> Section 9... .
> (5) Notwithstanding subsection 19(1), the provisions of subsections (1), (3) and (4) as to age shall not apply to
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> > (a) prevent the operation of a good faith retirement or pension plan;
> > (b) operation of the terms or conditions of a good faith retirement or pension plan which have the effect of a minimum service requirement; or
> > (c) operation of the terms or conditions of a good faith group or employee insurance plan.
>
> (5.1) Paragraph (5)(a) does not apply to a provision of a good faith retirement or pension plan requiring a person to retire at an age set out in the plan.[66]

Subsection 9(5.1) expressly prohibits MR in pension plans, resolving ambiguity over whether MR might be permissible if it is in a plan by permitting the more common pension provisions that merely specify a "normal" age or date of retirement without imposing it as a rule of MR.

The state of the law in the other provinces, including British Columbia, that have eliminated MR without expressly resolving the uncertainty may depend on the outcome of an appeal from New Brunswick to the Supreme Court of Canada.[67] In the meantime there

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[65] *Canadian Union of Public Employees v. Canadian Staff Union (Harris Grievance)*, [2002] A.G.A.A. No. 35 at paras. 110-121 (QL) (interpreting s. 7(2) of the *ABHRCMA*, *supra* note 41).

[66] *NLHRC*, *supra* note 44 [emphasis added].

[67] *New Brunswick (Human Rights Commission) v. Potash Corp. of Saskatchewan Inc.*, 2006 NBCA 74, 271 D.L.R. (4th) 483, [2006] N.B.J. No. 306 (QL), leave to

is an unfortunate and unnecessary difference of opinion between the courts of New Brunswick and Alberta, and the Attorney General of British Columbia over whether or not MR clauses in bona fide retirement, superannuation and pension plans have survived the purported elimination of MR.

The New Brunswick Court of Appeal faced the problems of understanding, interpreting and applying this type of exception in the *Potash* case. Section 3 of the New Brunswick *Human Rights Code* prohibits age-discrimination in employment:

> 3 (1) No employer, employers' organization or other person acting on behalf of an employer shall
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> > (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.
>
> 3 (6) The provisions of subsections (1) ... 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.[68]

The disputed provision was section 3(6)(a), an exception permitting MR "because of" the terms or conditions of any bona fide pension plan.

The former employee claimed age discrimination on termination from employment at age 65 against the former employer, the Potash Corporation. The Potash Corporation, relying on its defined benefit

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appeal to the S.C.C. granted, [2006] S.C.C.A. No. 379 (QL). On February 19, 2008, the Supreme Court of Canada heard the appeal and reserved judgment. See also *Kuun v. University of New Brunswick and New Brunswick Human Rights Commission*, [1984] 56 N.B.R. (2d) 430; 146 A.P.R. 430; N.B.J. No. 265 (QL).

[68] *NBHRC*, *supra* note 44 [emphasis added].

pension plan, claimed the defence of bona fide pension plan, under section 3(6)(a). Alternatively, the former employee attacked section 3(6)(a), as contrary to the *Charter*, section 15. The appellate court was asked to define the criteria necessary for an employer to establish the defence of bona fide pension plan under section 3(6)(a). The learned judges of the appellate court divided 2:1.

The majority held that the exception must be "strictly construed"[69] and that "the employer must establish that mandatory retirement is pursuant to a *bona fide* pension plan."[70] In this result the majority contradicted themselves by construing the exception very favourably to employers. The majority held that "the employer must establish that mandatory retirement is pursuant to a *bona fide* pension plan."[71] The majority declined to apply the *Zurich*[72] or *Méiorin*[73] cases, which commentators and other tribunals had thought to be leading authorities, which would have required the employer to show objectively that it would suffer hardship without MR, and that there was no practical alternative to MR. Instead, the majority imposed an innocuous requirement on the employer to show an honest belief. The employer did not have to show that the provision for MR was reasonable, or that there was "no reasonable alternative to mandatory retirement".[74] According to the majority, all that the employer had to show was an honest belief:

> [T]hat its pension plan is a viable alternative to forced retirement and that the plan was not adopted for purposes of defeating protected rights. That belief has to be ... reasonable in the circumstances of a particular case. For example, if the employer's pension plan could not be registered under the *Pensions Act* of New Brunswick, the objective component of the *bona fides* test might be difficult to satisfy.[75]

In other words, even in such an extreme case that pension regulators found the pension plan as non-complying or woefully under-funded,

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[69] *Supra* note 67 at para. 62.

[70] *Ibid.* at para. 66.

[71] *Ibid.*

[72] *Supra* note 36.

[73] *Supra* note 4.

[74] *Supra* note 67 at para. 76.

[75] *Ibid.* at para. 80.

the employer's "reasonable" belief in the viability of the plan might nevertheless justify MR based on its terms, in the majority's limited view of the bona fide requirement. The majority upheld the validity of the MR provision in the plan, because the employer showed the requisite honest belief.

The dissenting judge criticized the phrase "*bona fide* pension plan" as "vague" and indeterminate,[76] and also expressed concern about the absence of a factual record, which required the appellate court to pronounce on the criteria as a preliminary question of law in the absence of an evidentiary record from the court below. To interpret section 3(6)(a), the dissenting judge started from its purpose and context, stating:

> the *bona fide* pension plan exemption ... is available to permit age distinctions or differentials to be drawn to accommodate the actuarial requirements of various employee benefit plans and to protect the actuarial integrity of such plans.[77]

This is similar to the view of Wilson J. (dissenting) in the *Harrison* case.[78]

The dissenting judge imposed a much more stringent set of criteria on an employer seeking to assert the defence of bona fide pension to validate MR than did the majority. Whereas the majority emphasized the honest belief of the employer as the key consideration, the dissenting judge would have imposed objective considerations (reasonableness) into the required proof, following *Zurich*[79] and *Méiorin*.[80] The dissenting judge concluded as follows:

> Thus ... the employer or pension administrator must prove the following criteria to justify the *prima facie* discriminatory policy of mandatory retirement: (1) that the mandatory retirement policy was adopted for a purpose that is rationally connected to the pension plan's effective operation or integrity; (2) that the mandatory retirement policy was adopted in good faith, in the belief that it was necessary to the fulfillment of that legitimate pension plan-related purpose or goal; and (3) that the mandatory retirement policy is

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[76] *Ibid.* at para. 10.

[77] *Ibid.* at paras. 19-20.

[78] *Supra* note 12.

[79] *Supra* note 36.

[80] *Supra* note 4.

> reasonably necessary to accomplish the chosen pension plan-related purpose or goal, in the sense that it is impossible to accommodate individual members over 65 like the complainant without imposing undue hardship upon the employer or plan administrator. [81]

The dissenting judge appears to have gone from the extreme of leniency suggested by the majority to the opposite extreme of overkill, by imposing such a heavy burden that the employer or plan administrator could never satisfy it. As a result, the dissenting judge has virtually written section 3(6)(a) out of the New Brunswick *Code*.

To see why this is so, consider that the Potash Corporation provided its retirees with a defined benefit pension plan. This type of plan offers a pension to retired employees in an amount determined by a formula applied to the retiree's average salary and years of service. The "effective operation or integrity" of the plan depends on its financial strength. The strength of a defined benefit plan depends on its assets (contributions and earnings) minus its liabilities. Pension liabilities comprise the amounts due to current retirees and the amounts that will become due to future retirees, all of which entail actuarial assumptions about retirement dates, life expectancies, and the amounts required to pay current and future pensions.

The contributions and earnings of the plan must be sufficient to meet these expected liabilities, or the employer must meet the shortfall. In this situation, if the actuarial assumption is that all employees must retire by age 65, and MR is strictly enforced, the liabilities will arise sooner than if MR is relaxed and workers continue as employees rather than being retired upon reaching 65. While the employer will be required to pay wages to the ongoing employees, this will add to the operations of the business. On the other hand, if the employees all retire at 65, they cease to be productive, and draw their pensions from the plan or, if necessary, out of the operating income of the employer. Therefore, postponing retirement also postpones the immediate liabilities of the pension plan or the employer. Later retirement than that assumed for actuarial purposes is a financial boon rather than a "hardship" to the employer or the plan administrator. The employee who continues working after retirement age postpones receiving a pension (say 70 percent of average earnings), and continues to work as an employee.

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[81] *Supra* note 67 at para. 37.

If anyone suffers a "hardship" in these circumstances, it is the employee who could have received 70 percent of previous earnings as a pension. For this reason, delaying retirement dates is often suggested as a way of relieving the well-publicized financial crisis facing so many defined benefit pension plans. Therefore, the dissenting judge's third point raises an insuperable barrier for an employer trying to establish the defence of bona fide pension plan by insisting upon strict enforcement of MR against the complainant.

In *Cline v. Valley Regional School Board*, a Nova Scotia human rights tribunal criticized the majority's reasoning in the *Potash* case for formulating an excessively subjective test that any employer could all too easily satisfy.[82] In 2004, a school board had terminated a substitute teacher's employment under its MR policy, but had voluntarily abolished its policy and reinstated the same person in 2007. The Nova Scotia tribunal held the conduct was discriminatory and did not satisfy the requirements of a bona fide retirement plan. The tribunal preferred a demanding two-part test combining both subjective and objective elements, as more consistent with Supreme Court of Canada decisions. On the subjective part, the employer had to show an honest belief that its MR policy was appropriate. To satisfy the more difficult objective part, the employer had to show that its MR policy was "reasonable" as a "sound business practice" and "a comprehensive and well thought out, sound business initiative." The tribunal applied the three-part *Méiorin* test and found the MR policy lacked rationality and was not the only alternative to the employer's undue hardship.[83] The employer's decisions to abolish MR in 2007 and reinstate the former teacher contradicted its own arguments.

There may also be an issue given that, under the *Pension Benefits Standards Act*, every pension plan must specify the age "at which a member is normally eligible to begin receiving a pension".[84] For example, an employee pension that set as the "normal retirement" the attainment of age 65, but permitted the employee to postpone retirement with the employer's consent, was held to form part of the

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[82] *Cline v. Valley Regional School Board*, [2007] N.S.H.R.B.I.D. No. 5 (QL).

[83] *Ibid.* at paras. 46-53.

[84] *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352, s. 38(1).

contract of employment and to impose MR at age 65.[85] Would this pension provision survive the abolition of MR under section 13(3)(b), because of its location in a pension plan?

Whatever the wording of section 13(3)(b) might appear to say, the Legislative Assembly intended merely to permit differential benefits out of such plans, based on age of the recipient, rather than to permit MR, by exempting age-based differentials in benefits from complaints of age discrimination. In a letter dated 9 August 2007 to Robert Clift, Executive Director of the Confederation of University Faculty Associations of British Columbia, British Columbia Attorney General Wally Oppal stated the wording only permits different levels of benefits based on age:

> I also appreciate your taking the time to advise me of your concern that the legislation would permit mandatory retirement to be imposed as a condition of belonging to a pension plan or receiving benefits from it. Please be assured that is not the intent.
>
> As you have pointed out, when the legislation is in force January 1, 2008, it will continue to be possible for bona fide pension plans to make distinctions on the basis of age. However, it will not be possible for a pension plan to impose mandatory retirement.[86]

Clarification of whether or not a pension plan can impose MR under amended section 13(3)(b) awaits the decision of the Supreme Court of Canada in the *Potash* appeal, which was heard in February 2008. The wording of the British Columbia and New Brunswick provisions are quite different, however. The disputed New Brunswick provision appears to permit MR because of the terms or conditions of a bona fide pension plan, whereas British Columbia is perhaps more restrained in providing that a person must not refuse to continue to employ a person because of age, but may use "age" in relation to "operation of a bona fide pension plan", which is wording comparable to New Brunswick's section 3(6)(c) but not directly in issue in the *Potash* case.

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[85] *Johnson v. Canwest Global Communications Corp. (c.o.b. CH Vancouver Island)*, 2008 BCCA 33 at paras. 37-40, 289 D.L.R. (4th) 193, [2008] B.C.J. No. 110 (QL).

[86] E-mail from Robert Clift to Tony Sheppard (31 August 2007) on file with the author.

The Alberta Court of Queen's Bench handed down a similar decision to that of the majority in the *Potash* case.[87] A disabled worker with 30 years' service complained of discrimination when, on reaching age 56, the formula cut off disability benefits and imposed MR upon him, thereby preventing the accumulation of further pension entitlements to his surviving spouse on his death. The *Human Rights, Citizenship and Multiculturalism Act* permits age-discrimination in the "the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan."[88] The Court upheld MR in the circumstances as the non-discriminatory operation of a bona fide employee insurance plan. Though the terms of the plan might have been discriminatory, they resulted from collective bargaining, and reflected the honest, good faith belief that the resulting compromise agreement was necessary to establish a viable and effective plan.[89] This decision did not cite the *Potash* case, nor the reasoning of Wilson J. in *Harrison,* and contradicts the opinion of the Attorney General of British Columbia.

A discussion paper issued by the Province of Alberta also criticized the exception:

> Alberta's legislation and B.C.'s pending legislation relating to mandatory retirement and discrimination against older workers focuses on human right protections, and is not as comprehensive as legislation in some other provinces. For example, Manitoba, Quebec, and most recently, Ontario, have all made "contractual mandatory retirement"–mandatory retirement arising under pension plans or stemming from collective agreements–unenforceable.[90]

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[87] *Calgary (City) v. Alberta (Human Rights and Citizenship Commission)*, 2007 ABQB 485, [2007] 12 W.W.R. 376, [2007] A.J. No. 852 (QL).

[88] *ABHRCMA*, *supra* note 41, s. 7(2).

[89] The Court cited *Saskatchewan (Human Rights Commission) v. Saskatoon (City)* (1990), 72 D.L.R. (4th) 127, 5 W.W.R. 577 (Sask. C.A.) leave to appeal to S.C.C. refused 74 D.L.R. (4th) viii.

[90] Government of Alberta, Ministry of Employment and Immigration, *Mature Workers in Alberta and British Columbia: Understanding the Issues and Opportunities (A Discussion Document)* (August 2007), online: Employment and Immigration <http://employment.alberta.ca/documents/RRM/PC_mature_workers.pdf> , at 14-15.

Reform of this exception is urgently necessary to remove its ambiguity and uncertainty of purpose.

H. DISTINCTION ON THE BASIS OF AGE PERMITTED OR REQUIRED BY ANY ACT OR REGULATION[91]

Some statutory distinctions based on age are within federal legislative jurisdiction, and beyond provincial legislative power to change. Others are within the jurisdiction of a provincial legislative assembly. Provincial statutory age distinctions should be revisited in the light of changing demographics and better understanding of ageing. An example is the exemption from jury duty of persons over 65 years of age, on application to the sheriff.[92] The legislative assembly could either raise the age of exemption, or preferably repeal it as obsolete.

Statutes also impose MR on holders of federal public office. For example, superior court judges must retire by age 75 years.[93] Prior to 1961, judges of superior courts could continue in office during good behaviour, to any age.[94] The *British North America Act, 1960*, introduced the MR age of 75 years for judges of superior courts across Canada, to the consternation of the judiciary at that time.[95]

Seventy-five years is the standard age of MR for appointees to the Supreme Court of Canada and the Federal Court of Canada.[96] At one time certain Federal Court appointees were subject to MR at 70 years, others at 75 years of age, but a Federal Court judge successfully challenged this disparity.[97] Seventy-five years is becoming the age of MR for provincial court judges, as they are encouraged to continue after normal retirement age on a

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[91] *BCHRC*, *supra* note 1, s. 41(2).

[92] *Jury Act*, R.S.B.C. 1996, c. 142, s. 7.

[93] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 99(2).

[94] *Ibid.* See Department of Justice Canada, *Endnotes - Constitutional Act*, online: Department of Justice <http://laws.justice.gc.ca/en/const/endnts_e.html#(52)>.

[95] (U.K.), 9 Eliz. II, c. 2, s. 1 (adding s. 99(2)).

[96] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 9(2); *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 8(2).

[97] *Addy v. Canada*, [1985] 2 F.C. 452, 22 D.L.R. (4th) 52 (T.D.).

supernumerary or part-time basis.[98] It is the common age of MR for holders of legal office at the provincial level. Masters of the B.C. Supreme Court must retire by 70 years of age.[99] Across Canada, some jurisdictions require that provincial court judges and justices of the peace must retire by age 65, others at age 70, still others at age 75 and some do not impose any retirement age.[100] In British Columbia, judicial justices of the peace must retire at 65 years of age, subject to extension of their appointments to a maximum age of 70 years.[101] Other jurisdictions have also preserved MR for public and judicial office-holders.[102]

The exception for MR fixed by statute or regulation does not necessarily imply these legislated ages are immutable. However, change will require legislative action for each specific occupational group. British Columbia's government has already invited public discussion of changing the MR provisions governing provincially-appointed judicial officers, who enjoy a special public status whereby independence is paramount.[103] Preserving the independence of the judicial function is a consideration favouring fixed retirement ages, lest continuation at the pleasure of a supervisory body appear to compromise independence. On the other hand, past experience augurs against conferring judicial officers absolute personal freedom

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[98] *Provincial Court Act*, R.S.N.B. 1973, c. P-21, ss. 4.2-4.21; *Provincial Court Act*, R.S.A. 2000, P-31, ss. 9.23, 9.3.

[99] *Supreme Court Act*, R.S.B.C. 1996, c.443, s. 11(6).

[100] *Association of Justices of the Peace of Ontario, supra note 27, Schedule B to the reasons for judgment; Provincial Court Act*, R.S.B.C. 1996, c. 379, s. 17(3) [*PCABC*]; *Provincial Court Act*, R.S.N.S. 1989, c.238, s. 6(2), as am. by *Justice Administration Amendment (2004) Act*, S.N.S. 2004, c. 6, s. 27 (applying to Family Court judges).

[101] *PCABC*, *ibid.*, s. 33. See also *Association of Justices of the Peace of Ontario*, *supra* note 27 (disparity between MR provisions for provincial court judges and for justices of the peace in Ontario struck down as discriminatory and replaced by identical MR at age 75 years being read into the legislation by the court).

[102] *ONHRC*, *supra* note 39, s. 24(1)(e)-(h); *NLHRC*, *supra* note 44, s. 9(7); *NSHRA*, *supra* note 44, as am. by *AREMA*, *supra* note 60, s. 2; *CHRA*, *supra* note 20, s. 15(1)(b).

[103] British Columbia, Ministry of Attorney General: Strategic Planning and Legislation Office, *Consultation Paper: Retirement Age for Provincially-Appointed Judicial Officers* (November 2007), online: Ministry of Attorney General <http://www.ag.gov.bc.ca/legislation/pdf/MandatoryRetirement_JudicialOfficers.pdf>.

to choose their retirement dates. A legislative amendment raising the age of MR to 75 years is an appealing compromise that makes the terms of provincial judicial office consistent with those of federally appointed judges, and reduces the discriminatory effect of MR by allowing judicial officers to continue to an age beyond which most people would hope to retire, according to public opinion surveys.

Though Manitoba has abolished MR generally, the provincial universities—the Universities of Manitoba and Winnipeg—were singled out for special treatment. Abolition of MR in Manitoba generally results from *The Human Rights Code*, of which section 14(1) permits MR for "bona fide and reasonable requirements or qualifications for the employment or occupation."[104] MR is deemed to be a bona fide occupational requirement for managerial, professional and academic staff at the University of Manitoba, and at the other universities.[105] Under the collective agreement at the University of Manitoba in effect since 1999 a faculty member must retire in full, or go half-time, at his or her 69th birthday. In 2002, the University of Winnipeg administration sought to introduce MR for the first time. The Faculty Association bargained a compromise MR age of 69 years by collective agreement.[106]

The *Human Rights Code* exception permitting age distinctions imposed by a provincial statute or regulation preserves age as a basis for discrimination. Attainment of age 65 will continue to cause the loss of statutory disability benefits under workers' compensation and public automobile insurance where the victim was under 65 at the time of injury.[107] Workers who continue to work after 65 and who suffer an injury on the job are eligible for two years' disability benefits. There is a comparable insurance provision for automobile

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[104] *MBHRC*, *supra* note 44, s. 14(1).

[105] See e.g. *The University of Manitoba Act*, R.S.M. 1987, c. U60, s. 61.1; *The Brandon University Act*, S.M. 1998, c. 48, s. 27; *The University of Winnipeg Act*, S.M. 1998, c. 50, s. 32.

[106] "Collective Agreement between The Board of Regents of the University of Winnipeg and University of Winnipeg Faculty Association 2002–2007", art. 31.01(c), online: <http://www.uwinnipeg.ca/faculty/admin/hr/agreements/uwfa2-7.pdf>. The agreement is subject to ongoing dispute: *Tomchuk v. University of Winnipeg Faculty Association*, 2008 MBQB 168.

[107] *Workers Compensation Act*, R.S.B.C. 1996, c. 492, ss. 23.1, 23.3 and 24; and *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83, s. 86(1).

insurance disability benefits to employees over 65 years who are injured in motor-vehicle accidents. The Legislature should revisit these provisions for inconsistency with the elimination of age discrimination at 65 years, although they are valid in their current form.[108] By way of contrast with provincial schemes that take age into consideration in limiting benefits, employees who continue to work after 65 years of age remain fully eligible for federal Employment Insurance benefits on loss of employment.[109]

I. SHOULD THE B.C LEGISLATURE HAVE INCLUDED AN EXCEPTION TO MR FOR "NORMAL RETIREMENT AGE"?

The B.C. Legislature was very wise not to have adopted the *CHRA*'s exception to MR for "normal age of retirement" because it does not offer a clear or stable standard of reference. Normal retirement ages are in a state of flux nowadays. In *Vilven v. Air Canada*,[110] airline pilots who were subject to MR in 2005 at the age of 60 years failed in their challenge of Air Canada's application of the "rule of 60". The year of the pilots' MR was 2005, which is critical to the tribunal's reasoning. While the norm in the international airline industry was the "rule of 60" in 2005, more recently this age has increased to 65 years.[111]

J. NO RETROACTIVE EFFECT

The amendments to the *BCHRC* that eliminate MR took effect on 1 January 2008, and did not have retroactive application to previous

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[108] *Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2007 NBCA 10, 312 N.B.R. (2d) 173, 280 D.L.R. (4th) 97.

[109] British Columbia Ministry of Community Services, *Seniors' Guide: Finances: Employment Insurance Benefits,* online: Ministry of Community Services <http://www.cserv.gov.bc.ca/seniors/guide/finances/EI_benefits.htm>.

[110] 2007 CHRT 36, [2007] D.C.D.P. No. 36, [2007] C.H.R.D. No. 36 (QL).

[111] *Thwaites v. Air Canada Pilots Assn*, 2007 CHRT 54, [2007] C.H.R.D. No. 53 (QL), [2007] D.C.D.P. No 53; International Civil Aviation Organization, *Convention on International Civil Aviation (9th ed.)*, 23 November 2006, Doc 7300, Amendment 167 to Annex 1, §2.1.10.1, online: ICAO: Air Navigation Bureau <http://www.icao.int/icao/en/trivia/peltrgFAQ.htm#30> ("Chicago Convention"). 65 years is the maximum age for pilots and in an aircraft with two more pilots, one pilot may be between ages 60 and 65 years.

retirements. None of the jurisdictions abolishing MR have done so retroactively. Therefore, those who have previously reached the age of MR and have been retired are not entitled to invoke the legislation to eliminate their MR, and thereby claim reinstatement in their former positions. On the other hand, if these retirees were to seek reinstatement or new employment after 1 January 2008, the amendments prohibit their prospective employer from using their age as a ground of rejecting their application.

VI. TRANSITIONAL CHALLENGES

Employees who faced imminent MR in 2007 suffered considerable anxiety over the lapse of time between the announcement that MR would be abolished and its implementation. Though Bill 31 passed Third Reading and received Royal Assent on 31 May 2007, section 7 of the Bill stated that the Act would take effect on 1 January 2008. Thus, until 31 December 2007 there was a transitional period of potential unfairness and uncertainty for employees whose dates of MR were scheduled to occur prior to 1 January 2008. The legislated transitional period was at odds with the recommendation in the report of the Premier's Council. B.C.'s Legislative Assembly adopted a shorter transitional period than other Canadian jurisdictions in abolishing MR, which amounted to eight months, compared to up to two years in the case of Nova Scotia.[112]

For employers, and those employees reaching their dates of MR in the transitional period, the basic challenges were fair treatment and certainty of future employment status. Should such employees be treated like their younger co-workers whose dates of MR would occur after 1 January 2008, or should anyone whose date of MR occurred before 1 January 2008 be subjected to the strict application of MR? At the University of British Columbia, for example, a UBC Board of Governors Policy required that of faculty members who reached age 65, those with birthdays in the first half of the year must retire on 30 June of that year and those with birthdays in the latter half of the year must retire on 31 December. The two cohorts scheduled to retire in 2007 during the transitional period, memorably

[112] *AREMA*, *supra* note 60, s. 4(2).

dubbed "swimmers sinking within sight of shore",[113] began a grievance/arbitration under their collective agreement. Collective bargaining between the university administration and the Faculty Association successfully reached an agreement to impose a moratorium on the MR policy that permitted those with retiring dates between 15 May 2007 and 1 January 2008 to receive the same treatment as those reaching normal retirement age later.

Employers, such as the University of Regina, that insist on the strict enforcement of MR against employees caught during the transitional phase run the risk of costly and divisive litigation initiated by the individuals who are being forced out, or by their unions.[114]

Some have advised employers to regard a transitional period as the last chance to clean out the "deadwood," or to use the plight of those "sinking in sight of shore" as a bargaining chip. As a faculty member caught in the transition, I did not care for these suggestions and much prefer being treated like my younger colleagues.

The dilemma for employees facing MR in the transitional period, but who wished to continue working, was poignantly raised in a recent arbitration award.[115] According to the MR policy governing the workplace, the employee was due to retire on his 65th birthday, 23 August 2007. In June, the employer gave notice that effective 1 July it would abolish the MR policy in anticipation of the legislation taking effect on 1 January 2008. The union fought this change of policy on the ground that it was unfair to those previously retired and that the change affected the collective agreement, thus requiring the union's concurrence. The MR policy contained in the collective agreement, stated: "As a matter of Company policy, employees shall be required to retire at age 65 years."[116] The arbitrator rejected the union's objections to the change by posing three alternative situations. First, MR might have been introduced as a management

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[113] Figure of speech describing those faculty members who were scheduled for MR prior to 1 January 2008.

[114] See *Leeson v. University of Regina*, 2007 SKQB 252, 301 Sask. R. 316, [2007] S.J. No. 453 (QL).

[115] *Teamsters Local Union No. 213 v. Tree Island Industries Ltd. (Mandatory Retirement Policy – Article 22(o) Grievance)* (2008), 92 C.L.A.S. 204, [2008] B.C.C.A.A.A. No. 8 (QL).

[116] *Ibid.* at para. 2.

right, in which case management can terminate it unilaterally with proper notice. Second, MR in a workplace might have resulted from collective bargaining, in which case both management and the union must agree on its termination. Third, MR can have been introduced as a management right, and included in a collective agreement, without having been the subject of bargaining, in which case it remains a management right, and can be terminated unilaterally with notice, as in the first possibility. The learned arbitrator found the history of MR in the workplace, and the wording of the collective agreement, referring to "[c]ompany policy," were indicative of the third alternative, and ruled that it remained a management right, despite its inclusion in the collective agreement:

> The delayed effect of the new law from May 31st [date of Third Reading] to January 1st gave employers time to bring their practices in line with the impending legislative changes. Some employers were quick to act in anticipation of the legislative change because they agreed their mandatory retirement policies were anachronistic with the current demographic of our society and the current labour market. Some faced recruitment and retention problems in the current labour market. Others anticipated cost savings with no mandatory retirement.
>
> What this employer did changing its practice effective July 1, 2007 was neither unusual nor done in bad faith. In the circumstances, it cannot be concluded the employer acted to favour one employee over others ... . A new rule to abolish mandatory [retirement] is not unreasonable in all the circumstances. While there are consequences that flow from the abolishment of mandatory retirement for pension, insurance and other issues, these are questions the employer and union, like all others in British Columbia, will have to address.[117]

Whenever the elimination of MR occurs in a workplace, it begins at a starting date but excludes those who have already been retired under the former MR. Previously retired employees may try to dispute their status, but are unlikely to succeed. For example, a 2007 arbitration arose out of an agreement between a university administration and the faculty association which allowed faculty whose retirement dates were scheduled to occur on or after 1 July 2007 to continue their employment uninterrupted at their current

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[117] *Ibid.* at paras. 39-45.

salaries. As part of the agreement the faculty association agreed to discontinue a grievance on behalf of former faculty members who claimed age-discrimination on having been subjected to MR in 2006. The former faculty members tried unsuccessfully to attack the discontinuance of their grievance as arbitrary, discriminatory or bad faith representation by the union, but the agreement was upheld as a reasonable.[118]

In Ontario, the equivalent transitional period, which ran from December 2005 to December 2006, also gave rise to disputes and misunderstandings. For example, an employee's vacillation between taking MR or continuing her employment during the transitional period resulted in arbitration.[119] In August 2006, the employee indicated her wish to retire and she received retirement benefits from her employer. After the abolition of MR took effect, the former employee requested resumption of her employment, which the employer refused, resulting in a grievance and arbitration. The arbitrator upheld the employer's right to refuse reinstatement of an employee who had "voluntarily" retired under MR in the transitional period, concluding that:

> [T]he *Ending Mandatory Retirement Statute Law Amendment Act,* 2005 was aimed only at mandatory retirement. It did not alter the legal consequences of a voluntary retirement. If it must be described as having created a "right to" something, it would be more apt to say that the Act gave those aged 65 and over the right not to be retired by their employer in response to their age: the same right, no more or less, that those under 65 had previously enjoyed … .The grievor faced a difficult choice in August. She made a decision that she later came to regret. Having voluntarily made and acted on that decision, however, she could not unilaterally revoke it thereafter … .The employer breached no legal obligation by holding the grievor to the consequences of her own actions.[120]

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[118] *McNamee v. Thompson Rivers University Faculty Association*, BCLRB No. B252/2007, 2007 CanLII 48185, leave for reconsideration refused BCLRB No. B3/2008, 2008 CanLII 1155.

[119] *Ontario Federation of Labour v. Canadian Office & Professional Employees Union, Local 343*, 2007 CanLII 58575 (OLA).

[120] *Ibid.* at paras. 57-58.

VII. RECRUITMENT AND OTHER HUMAN RESOURCES PLANNING ISSUES

After 31 December 2007, Bill 31 made collective agreements and unilateral policies imposing MR illegal and unenforceable, and permits B.C. employers to recruit and retain prospective employees over 65 years of age. As a result, B.C. employers will be able to compete more effectively with the other jurisdictions in North America that have already abolished or are in process of abolishing MR, in attracting and retaining older employees, to help meet labour shortages.

An argument often made in support of MR was that it gave some certainty to human resource planning, by imposing a known deadline for retirement. A formal system of advance notice in writing might be as effective, however. Under such a system, 65 years of age continues as the normal or assumed age of retirement for planning purposes. Employers ask employees approaching the normal age of retirement to indicate their intentions reasonably far in advance of their normal retirement date. At UBC the period of advance notice is normally twelve or preferably eighteen months ahead of the normal retirement date. There, it is assumed that a faculty member intends to continue full-time after reaching 65 years of age, in the absence of advance notice indicating otherwise.

VIII. BARGAINING FLEXIBLE EMPLOYMENT ARRANGEMENTS FOR EMPLOYEE RETENTION

Studies have concluded that flexible employment arrangements will help to retain older employees, thereby alleviating shortages of skilled and experienced workers.[121] Overall, workers prefer other

[121] See William B.P. Robson and A BNAC Statement, *Aging Populations and the Workforce* (October 21, 2001), online: CD Howe Institute <http://www.cdhowe.org/pdf/BNAC_Aging_Populations.pdf>; B.C. Business Council, "Aging and Employment in B.C.: Trends and Policy Directions" (Paper presented to the Premier's Council on Aging & Senior's Issues, 27 June 2006), online: BC Business Counsel <http://www.bcbc.com/documents/LE_20060627_Presentation_PremiersCouncilonAgingandSeniorsIssues.pdf>; Human Resources and Social Development Canada, *Addressing the Challenges and Opportunities of Ageing in Canada*, online: Human Resources and Social Development Canada <http://www1.servicecanada.gc.ca/en/publications_resources/research/categories/population_aging_e/madrid/madride.pdf>.

options than simply going from full-time work to complete unemployment. Therefore, employers and unions might wish to consider bargaining options for workers approaching the normal age of retirement. Canadian universities have developed a very popular range of options from which faculty can choose their preference, from the following:

- Early retirement, upon or after reaching a specified age (ages 60 up to 65 years, possibly with a buy-out);
- Full retirement at the normal date of retirement;
- Going part-time at a fixed proportion of full-time duties (51-80 percent of full-time);
- Phased-in retirement (incrementally reducing workload ultimately leading to complete cessation of work – 75 percent, 50 percent, 33 1/3 percent);
- Continuing full-time after reaching 65 years of age; or
- Changed workload.[122]

The problem of age-based benefits is an emerging issue. As demonstrated in the collective bargaining between the UBC Faculty Association and the administration, the benefits package in the aftermath of eliminating MR is largely age-based. Most benefits elapse by age 71 at the latest. Though one can continue working after reaching that age, the university will not pay premiums for benefits thereafter.[123] The reduction or elimination of benefits to older workers on the basis of age raises the prospect of further litigation about age-based discrimination, but the early cases are not encouraging from the employees' perspective. Age-based reductions of death benefits to surviving dependents of deceased employees, or of group life entitlements on the death of older employees, do not amount to age-based discrimination.[124] Freezing pension entitlements at age 71 years also withstands *Charter* challenge. The imposition of a cut-off at age of 71 years complies with income tax

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[122] See *Retirement Information for Faculty Members, Librarians & Program Directors in Continuing Studies* (18 January 2008), online: The University of British Columbia, Human Resources, Faculty Relations <http://www.hr.ubc.ca/faculty_relations/retirement/>.

[123] *Ibid.*

[124] *Withler v. Canada (Attorney General)*, 2006 BCSC 101, [2006] 146 A.C.W.S. (3d) 64, [2006] B.C.J. No. 101 (QL).

rules limiting tax deferral, and does not amount to age-based discrimination.[125]

IX. BRINGING RETIRED WORKERS BACK AS CONTRACTORS

As is currently the practice following MR or voluntary retirement, a former employer can entice a former employee to return to work by rehiring the individual as a contractor or consultant. For tax purposes, the former employee can receive consulting fees that qualify as "business income", which is not subject to the same withholding of deductions at source (such as Employment Insurance) that have such a drastic impact on an employee's take-home pay. Another tax advantage of changing one's status to that of independent contractor is that business income qualifies for the deduction of far more expenses than employment income. On the downside, GST is chargeable on fees for services. Elimination of MR will reduce the need for the "retire-and-rehire" phenomenon, which will probably just fade away. However, unions have no authority to bargain on behalf of retired former employees who are no longer part of the bargaining unit, with the result that the "retire-and-rehire" option can be neglected in the bargaining process as other options would receive higher priority at the bargaining table.

X. TAX CONSEQUENCES AND THE CANADA PENSION PLAN

Recent taxation amendments facilitate phased retirement by permitting employees covered by defined benefit pension plans to continue working while drawing pro-rated pension benefits and accruing further benefits, starting at the normal retirement date.[126] Concerns about the appearance of double-dipping arise if civil servants can claim both a salary and a pension.[127] Usually a continuing employee covered by a defined benefit plan maximizes their entitlement to benefits on reaching normal retirement age, and

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[125] *Gill v. Canada*, 2008 FC 185, [2008] F.C.J. No.237 (QL).

[126] *Budget and Economic Statement Implementation Act, 2007*, S.C. 2007, c. 35, s. 83(3), amending *Income Tax Regulations*, C.R.C., c. 945, s. 8503(16)-(25).

[127] *Supra* note 125 at para. 6.

is not required to make further contributions thereafter. On the other hand, employees may not draw pension benefits under a defined contribution plan while continuing to claim tax deductible contributions to the same plan.

The Report of the Premier's Council recommended changes to the Canada Pension Plan that would neutralize its much criticized incentive to take early retirement and encourage phased retirement:

> Pension rights must be respected, and we believe people should be able to retire when they choose to do so. The Canada Pension Plan (CPP) should continue to be available to people who choose to retire as early as age 60, but with its benefit rates adjusted so they neither encourage nor discourage such a choice. People reaching the age of 65 should have the option of retiring and collecting a full CPP pension, phasing in retirement while receiving a pro-rated pension, or continuing to work full-time while contributing to a larger pension when they do choose to retire. We are well aware that extending *Human Rights Code* protection to people over the age of 65 will have a cascade of consequences for pension plans, collective agreements, workers' compensation and other workplace provisions. Government should bring together employers, unions, and other interested parties to discuss how to bring about these changes quickly and smoothly. [128]

The suggestions of the Premier's Council for allowing phased retirement while receiving a pro-rated Canada Pension Plan have not been adopted by the federal government as yet. Currently, an employee can claim the full Canada Pension Plan after age 65 while continuing to work, or can postpone receiving the pension up to age 70, with an increasing benefit. An employee cannot simultaneously receive the Canada Pension Plan and make further contributions to it. [129]

XI. CONCLUSION

At the end of day, the recent spate of amendments to human rights legislation across Canada has left a hodge-podge of statutory exceptions in the wake of the general elimination of MR. The

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[128] *Supra* note 57 at 9ff.

[129] British Columbia Ministry of Community Services, *Seniors' Guide: Finances: Canada Pension Plan*, online: Ministry of Community Services <http://www.cserv.gov.bc.ca/seniors/guide/finances/cpp.htm>.

myriad exceptions perpetuate ageism and MR. The scope of the exceptions is controversial and litigious. All the Canadian jurisdictions face universal issues of an aging workforce. Since the goal of the amendments is the same across the jurisdictions, the lack of uniformity creates unnecessary complexity, and imposes barriers to labour mobility within the Canadian economic union. The current legislation does not go far enough in eliminating MR, and there is a need for further reform of the exceptions. Better treatment of an aging workforce is an important part of a stronger economic union.