
Has Mandatory Retirement been Banned Across Canada?

By Jennifer Costin

The answer to this question is, surprisingly, not clear. For Ontario, Quebec, Manitoba and the Yukon, the provincial human rights legislation treats mandatory retirement as age discrimination regardless of what age it is imposed at. Federally, an amendment to the *Canadian Human Rights Act* will abolish mandatory retirement as of December 15, 2012 by way of Bill C-13.

It is in the other provinces and territories where the answer is more complicated. Although all of these other jurisdictions prohibit discrimination on the basis of age and, therefore, make mandatory retirement illegal by defining it as age discrimination, all have some stated exceptions. New Brunswick human rights legislation allows mandatory retirement where the terms or conditions of any *bona fide* retirement or pension plan provide for it. Saskatchewan, British Columbia, Alberta, Prince Edward Island, Nunavut and the Northwest Territories legislation provide an exception for the operation of a *bona fide/genuine/good faith* retirement or pension plan. Nova Scotia legislation provides an exception for the operation of a *bona fide* pension plan.

Newfoundland and Labrador's *Human Rights Act* provides that age discrimination does not apply to a good faith retirement or pension plan, but this exception does not apply to a good faith retirement or pension plan that requires a person to retire at an age set out in the plan. Generally, this would mean that mandatory retirement at a certain age is not allowed, even pursuant to a good faith retirement or pension plan. However, the legislation has yet to be interpreted by a court or tribunal.

What does the operation of a *bona fide* pension plan mean? The Human Rights Board of Inquiry dealt with that question in regards to the Nova Scotia legislation in *Therault v. Conseil Scolaire Acadien Provincial (CSPA)*, [2008] NSHRBID No 2. In *Therault*, the Board of Inquiry held that employers seeking to rely on this exception must prove that the *bona fide* pension plan must be prevented from operating if participants continue working past a defined retirement age. The Human Rights Panel addressing this issue with respect to the PEI legislation found much the same in *Nilsson v. University of Prince Edward Island*, [2010] PEIHRBID. In *Nilsson*, the Panel differentiated the language of affecting the "operation" of a *bona fide* pension or retirement plan versus the New Brunswick language which uses the

broader language of affecting the “terms or conditions” of any *bona fide* retirement or pension plan.

What does a *bona fide*/genuine/good faith retirement plan look like? The Supreme Court of Canada dealt with that issue in regards to the New Brunswick legislation in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] 2 S.C.R. 604. In that case, the Supreme Court of Canada held that a retirement or pension plan must be subjectively and objectively *bona fide*. Specifically, it must be a legitimate plan that was adopted in good faith and was not for the purpose of defeating protected rights.

For companies that are operating in different jurisdictions across Canada, special attention must be paid to the differing rules. However, the trend is moving towards banning mandatory retirement across Canada, as can be seen in the legislative changes removing the upper age limit to age discrimination in human rights legislation over the last number of years making any efforts to continue to impose mandatory retirement by a company fraught with difficulty.

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