

**TO: CLIENTS AND OTHER INTERESTED PARTIES**

**RE: ROPER GREYELL NEWSLETTER –  
NOVEMBER / DECEMBER 2006**

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## ELIMINATION OF MANDATORY RETIREMENT

*“[A] silver tsunami ... is going to spread across our country and we want to make sure we can ride the tsunami and make it something that is positive and constructive.”*

B.C. Premier Gordon Campbell when promising, on or around  
December 1, 2006, to eliminate mandatory retirement

*“We want to see a future where older people are seen as an integral part of our social and economic life.”*

*“Older people should be welcomed to use their talent and experience ...”*

*“There are as many stages in life between 65 and 85 as there are between 35 and 65 ... You can't just put everyone into the same category and call them senior. That homogenization is inappropriate.”*

*“We want workers to be able to choose among retirement with full pension benefits at 65, part-time work while receiving a pro-rated pension, or continued full-time work while still contributing toward an enhanced pension.”*

*“[Mandatory retirement is] a symbol of ageist attitudes that dismiss older people as no longer able to contribute. We recommend it be changed as soon as possible.”*

Patricia Baird, chair of the Premier's Council on Aging and Seniors' Issues,  
when delivering, on or around December 1, 2006, a report of the Council

### Introduction

On December 2, 2006, the following headline was splashed across the front page of *The Vancouver Sun*: “Premier Promises to End Mandatory Retirement”. The newspaper reported that “the B.C. government plans to follow most other provinces in outlawing mandatory retirement at age 65”.

British Columbia now appears poised to join other Canadian provinces that have taken or are taking steps to eliminate mandatory retirement at age 65.<sup>1</sup> In this newsletter, we:

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<sup>1</sup> A number of provinces across Canada have extended or are extending human rights protections to eliminate mandatory retirement. In Ontario, the *Ending Mandatory Retirement Statute Law Amendment Act, 2005*, S.O. 2005,

- set out various considerations that are driving initiatives to eliminate mandatory retirement;
- briefly discuss legislation applicable to the question of eliminating mandatory retirement; and
- provide pointers to employers wishing to guard against allegations of ageism or age-related discrimination.

### What Considerations Are Driving Initiatives to Eliminate Mandatory Retirement?

The following are among the statistics that have been cited to support the elimination of mandatory retirement:<sup>2</sup>

- "... Canadians are living two decades longer than they did in 1920 ... "
- "... [T]he percentage of working seniors has been increasing over the years ... "
- "By 2031, there will be 1.3 million British Columbians over 65 – double the number today."
- "... [O]ne quarter of the population ... will be over 65 within 25 years."
- "In 2005, 23 per cent of men and 10 per cent of women aged 65 to 74 were working, up from 19 per cent and six per cent, respectively, in 1992."

There are a number of other considerations, apart from the above statistics, that have provided the impetus for initiatives to eliminate mandatory retirement. Those considerations include the following:

- There is no magic in age 65 as a predictor of physical or mental decline on account of ageing.
- It makes little sense to jettison a rich reservoir of skills, talent and knowledge at a time when healthy life expectancies are improving and labour is in widespread demand.
- Wage-earning seniors find extra income useful, count on continued employment as part of their self-image, and welcome the opportunity to meet people and stay physically and mentally active.

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c. 29 was approved by the legislative assembly in an overwhelming 60 to 5 vote in December 2005, and came into effect on December 12, 2006.

<sup>2</sup> The above statistics were referenced in the following newspaper articles: K. Gram and M. Kane, "Premier Promises to End Mandatory Retirement: Why It's Time to Update Our Old Attitude to the Elderly", *The Vancouver Sun* (December 2, 2006) at pp. A1 and A9; M. Kane, "Anything But Retiring: No Throwing in the Towel Here", *The Vancouver Sun* (December 2, 2006) at pp. B1, B2 and B3; and M. Kane, "Most Will Go Quietly at 65", *The Vancouver Sun* (December 2, 2006) at p. B2.

## Legislative Framework

There are two distinct groups of employees in British Columbia: one group (which is composed of employees working for federally-regulated employers) is governed by the *Canadian Human Rights Act*<sup>3</sup>, and the other group is governed by the B.C. *Human Rights Code*<sup>4</sup> (the “Code”).

In this newsletter, we focus on the latter group of employees. As well, we focus on the private sector. Notwithstanding that the Code applies to both private and public sector employers, public sector employers that are governmental actors, or otherwise exercise governmental functions, are subject to direct constitutional regulation by the *Canadian Charter of Rights and Freedoms*<sup>5</sup>.

At present, section 13 of the Code prohibits mandatory retirement of employees between the ages of 19 and 65. Section 13 of the Code reads, in part, as follows:

“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 ... age of that person ...*”

[Emphasis added.]

Notwithstanding the above, the word “age” is defined under section 1 of the Code to mean “an age of 19 years or more and less than 65 years”.

The upshot of the foregoing Code provisions is that, at present:

- mandatory retirement of employees aged 65 or older is permitted (but not required);
- employees aged 65 or older are not protected from age discrimination; and
- employees aged 65 and older do not have the same job security or entitlements as employees under age 65.<sup>6</sup>

<sup>3</sup> *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

<sup>4</sup> *Human Rights Code*, R.S.B.C. 1996, c. 210.

<sup>5</sup> *Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>6</sup> We note that, under the Code, it is permissible to subject certain types of employees to mandatory retirement before they reach age 65. Mandatory retirement may be justified, for example, as a *bona fide* occupational requirement.

## Some Helpful Pointers ...

With elimination of mandatory retirement imminent in British Columbia, we suggest that employers in this province give serious consideration as to how they will guard against allegations of ageism or age-related discrimination.

Here are some pointers that should be helpful:<sup>7</sup>

- Be proactive in reviewing internal policies and procedures to ensure compliance of same with applicable human rights legislation.
- In unionized workplaces, consider whether changes will be required to collective agreements. For example, a mandatory retirement provision in a collective agreement may well cease to be lawful or enforceable.
- Give thought as to how older workers with age-related disabilities will be accommodated. Respond in a flexible, individualized way. For instance, make modifications to work hours, workplaces, job requirements and work equipment. On a related note, keep in mind that older workers may have ailing spouses or partners who will require care. Such workers may have to be accommodated through modifications to their work hours.
- Avoid making age-related statements in job advertisements or eliciting age-related information during job interviews.
- In the course of hiring, promotion and dismissal, do not discount – on the basis of age – the potential of job applicants or employees. Avoid communicating to a job applicant or employee that he or she is “overqualified”, lacks “career potential”, or will not facilitate “succession planning”.
- As always, keep detailed and accurate records of job performance. If a decision is made to promote a younger employee rather than an older one, or to dismiss an older employee, records of job performance will be critical.
- When laying off or downsizing, be sure you can establish that employees were not targeted on the basis of age. Be alive to the fact that older employees will face challenges locating alternate employment. Note that age-related discrimination may form a basis for so-called *Wallace* damages<sup>8</sup> or punitive damages. Also, keep in mind that – if mandatory retirement is eliminated – the severance entitlement of a dismissed employee will no longer be capped at age 65. A dismissed employee could argue that, but for his or her dismissal, he or she would have stayed on the job

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<sup>7</sup> A number of these pointers were outlined in the following newspaper article: H. Levitt, “No Age Limit on Skills: Right to Remain Employed”, *Financial Post* (October 4, 2006) at pp. WK1 and WK5.

<sup>8</sup> In *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.), the Supreme Court of Canada made it clear that bad faith conduct or unfair dealing on the part of an employer at or around the time of dismissal may result in an increase to the severance entitlement of a dismissed employee.

well past age 65 and should be compensated accordingly through an award of damages.

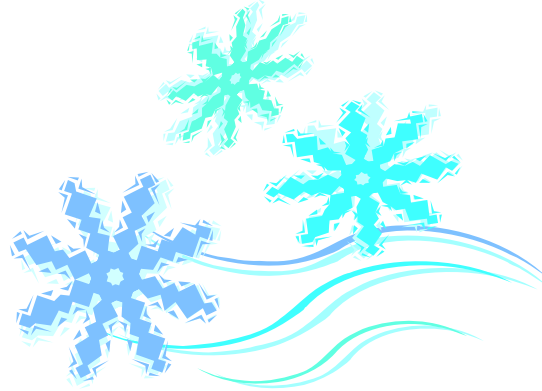
- Consider whether the elimination of mandatory retirement will impact employer-sponsored pension and benefit plans. Be proactive in checking with pension and insurance providers to ensure such plans are not in violation of applicable human rights legislation.

Please do not hesitate to contact any member of our firm if you have questions relating to the elimination of mandatory retirement, or if you wish to have information on any other employment or labour law issue.

Lawyer contact information can be obtained by telephoning us at (604) 806-0922 or visiting our website at [www.ropergreyell.com](http://www.ropergreyell.com).

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\* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. \*



**SEASON'S GREETINGS  
FROM THE  
LAWYERS AND STAFF  
OF  
ROPER GREYELL**

*We wish you and your family a wonderful holiday season and  
happiness, health and prosperity in 2007*

