



Mandatory Retirement

By

[M.J. \(Peggy\) O'Brien](#)

and Deborah Cushing (Law Student)

*This paper was presented at the BC HRMA Conference in Vancouver, BC
on October 5, 2005*

*This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.
For specific legal advice on the information provided and related topics,
please contact the author or any member of the Labour and Employment Law Group.*

*Copyright © 2005, Lawson Lundell LLP
All Rights Reserved*

MANDATORY RETIREMENT

AUGUST 2005

Prepared by

M.J. (Peggy) O'Brien, Partner
and Deborah Cushing, Law Student

LAWSON LUNDELL LLP

BARRISTERS & SOLICITORS

1600 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Direct Line: 604-631-9201
pobrien@lawsonlundell.com
www.lawsonlundell.com

VANCOUVER ▼ CALGARY ▼ YELLOWKNIFE

LAWSON LUNDELL LLP IS A BRITISH COLUMBIA LIMITED LIABILITY PARTNERSHIP

1. INTRODUCTION

The Supreme Court of Canada last considered the issue of mandatory retirement in 1990. Since that time, the demographics of the workforce have changed such that the proportion of retired workers to employed workers is rapidly increasing. This change is due partially to the aging of the baby boom generation and partially due to longer life expectancies of people after retirement. Coupled with this shift in demographics, a trend is developing in Canada to end the practice of mandatory retirement. The provinces of Quebec and Manitoba prohibit mandatory retirement and now Ontario has introduced legislation to ban mandatory retirement in that province as well.

This paper will consider the background of the move to eliminate mandatory retirement. The current state of the law will be reviewed, including application of the *Canadian Charter of Rights and Freedoms* and human rights code provisions across Canada. After considering the arguments for and against mandatory retirement, the implications of a ban on mandatory retirement for the human resource practices of employers in British Columbia will be examined. Finally, independent of any change to the legal environment, the implications of demographic changes for workplace practices will be discussed.

2. CURRENT STATE OF THE LAW IN CANADA

(a) *Canadian Charter of Rights and Freedoms*

Generally, the *Charter* applies to government actors such as federal, provincial and municipal governments. Legislation that applies to private employers, such as human rights codes, may also be subject to challenge under the *Charter*. In particular, section 15(1) provides that,

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹

However, even if a law or policy is found to violate section 15(1), the infringement may be allowed under section 1 if it is found to be a reasonable limit “as can be demonstrably justified in a free and democratic society”.

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11.

(b) *Supreme Court of Canada Decisions*

The Supreme Court of Canada addressed the issue of mandatory retirement in 1990 in a series of decisions in the post secondary education and hospital sectors.² In the lead decision, *McKinney*, the court found that the University of Guelph was not a government entity, but the court proceeded to consider the retirement policy as if the *Charter* did apply. All members of the court found that the policy violated section 15(1) of the *Charter* as it discriminated on the basis of age, but the majority found that in the context of the university, the policy was justifiable under section 1.

The court also considered whether the *Ontario Human Rights Code*, which prohibited discrimination in employment between the ages of 18 and 65, violated the *Charter*. Again all members found that the provisions violated section 15(1) but the majority found the provisions were justified under section 1. This section 1 analysis was done on a broad basis and not restricted to the university context. Based on social and economic analysis at that time, the majority found that the legislature had acted reasonably by balancing the competing interests involved and permitting mandatory retirement to continue.

¶ 121 Involved here, as I indicated, are important social as well as economic values. The present situation allows the parties concerned, the employers and the employees, the freedom to agree about an issue of central importance to their lives and activities. The freedom of employers and employees to determine conditions of the workplace for themselves through a process of bargaining is a very desirable goal in a free society. Certainly, the parties involved desire it. The employers are contesting this action. The labour movement, which represents a significant portion of the labour force and whose efforts have benefited other workers, both through legislation adopting standard conditions in collective agreements and through private agreements that emulate them, contests it as well.³

The companion decisions to *McKinney* originated in British Columbia. The decision in *Harrison v. University of B.C.* followed *McKinney*: if the mandatory retirement policy were subject to the *Charter*, it would be justified under section 1. In *Douglas/Kwantlen College*, the collective agreement was found to be subject to the *Charter* and the matter was sent back to arbitration to be resolved. In *Stoffman*, the court went through a full section 1 analysis of a mandatory retirement policy in the hospital context. Again, the majority found the policy to

² *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [*McKinney*]; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 [*Harrison*]; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 [*Douglas/Kwantlen*]; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 [*Stoffman*].

³ *McKinney*, at para. 121.

be justified under section 1. The provisions of the *B.C. Human Rights Code* were not considered because the doctors were not considered to be employees.

(c) *Current Judicial Position*

Almost fifteen years have passed since the *McKinney* set of decisions by the Supreme Court of Canada. In that time, the social, economic and demographic bases for the decisions made in 1990 have changed and it may be opportune for the court to again consider mandatory retirement. In *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*, the B.C. Court of Appeal upheld an arbitration panel decision that struck down the mandatory retirement policy of the regional district, a government entity.⁴

In this case, the union grieved the termination of employment of an employee solely on the basis of being age 65. The arbitration panel found that the mandatory retirement policy violated section 15 of the *Charter* and was not saved by section 1. The employer on appeal argued that the policy was permitted under the terms of the *B.C. Human Rights Code*. The B.C. Court of Appeal held that even if the policy complied with the *Human Rights Code*, the employer still had the onus of showing that its policy was reasonable. The majority agreed with the arbitration panel that *McKinney* and its companion decisions did not stand for the proposition that “all mandatory retirement policies in the public sector are saved under s. 1 of the *Charter* simply because they do not contravene relevant provincial human rights legislation.”⁵ The employer was required to provide evidence other than the provisions of the *Human Rights Code* to show that the policy was justified under section 1 of the *Charter*.

If its conclusion about *McKinney* was wrong, the Court of Appeal urged the Supreme Court to again look at the issue of mandatory retirement,

[127] In the event that *McKinney* is found to stand for the proposition that all mandatory retirement policies in the public sector which are not in contravention of provincial human rights legislation are, therefore, justified under s. 1 of the *Charter*, I would urge the Supreme Court of Canada to reconsider this issue. Eleven years have now passed since *McKinney* was decided. The demographics of the workplace have changed considerably, not only with respect to the university community, but also in the workplace at large. ... 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

⁴ *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*, [2001] B.C.J. No. 2026 (C.A.) [GVRD].

⁵ GVRD, at para 120.

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.⁶

Since the Court of Appeal decision in *GVRD*, public sector employers challenged on their mandatory retirement policies under the *Charter* must justify their policies as reasonable limits on equality rights or as bona fide occupational requirements.

(d) *Legislative Framework*

On June 7, 2005, the Government of Ontario introduced Bill 211, *Ending Mandatory Retirement Statute Law Amendment Act, 2005*. Among its provisions, the bill will amend the *Ontario Human Rights Code* so as to remove the cap of age 65 for protection against discrimination in employment. Mandatory retirement will only be permitted if age is a bona fide occupational requirement. The bill provides for a one-year transition period to allow employers, employees and unions to adjust to the elimination of mandatory retirement.⁷ The bill is expected to pass and will effectively end the practice of mandatory retirement in Ontario.

The provinces of Quebec and Manitoba already prohibit mandatory retirement. Mandatory retirement has not been permitted in the federal civil service since 1986. The human rights codes in the other provinces permit mandatory retirement either directly, such as in British Columbia, where the code only protects those people between the ages of 19 and 64 against discrimination in employment, or indirectly, such as in Nova Scotia, where mandatory retirement is not considered discriminatory if it is the standard practice in the workplace. The *Canadian Human Rights Act* also permits mandatory retirement if “an individual’s employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.”⁸ However a survey of organizations in the federal sector found that only one-fourth of federally regulated, private sector organizations have mandatory retirement policies for all employees.⁹ Mandatory retirement continues to be permitted throughout Canada if age is a bona fide occupational requirement, as for example for firefighters.

⁶ *GVRD*, at para. 127.

⁷ Ontario, *Statement to the Legislature by the Honourable Christopher Bentley Minister of Labour Regarding: Ending Mandatory Retirement Statute Law Amendment Act, 2005*, (Queen’s Park: 7 June 2005).

⁸ *Canadian Human Rights Act*, R.S. C. 1985, c.H-6, s. 15(1)(c).

⁹ Canada, Department of Justice, *Canadian Human Rights Act Review* (Ottawa: 21 June 2000) [*CHRA Review*].

Outside of Canada, mandatory retirement is already prohibited in the United States, Australia and New Zealand.

The pending legislation in Ontario and the questioning by the courts of the practice of mandatory retirement may signal a move to end mandatory retirement across Canada. In its February 2005 throne speech, the Government of British Columbia stated that, “it will consider the issue of mandatory retirement, to engage senior and all citizens in a fruitful dialogue on what changes, if any, should be made to improve seniors’ independence and quality of living in the modern world.”¹⁰ Ontario preceded its legislative change with an extensive consultation process.

3. ARGUMENTS FOR AND AGAINST MANDATORY RETIREMENT

(a) *Arguments in Favour of Mandatory Retirement*

Similar to the approach taken by the Supreme Court in *McKinney*, mandatory retirement can be viewed as a condition of employment that the parties are permitted, but not required, to adopt. As long as mandatory retirement is not banned, employers, employees and unions have the freedom to contract for a mandatory retirement policy that benefits all parties. If mandatory retirement were banned, these parties would lose this freedom to contract.

Possible benefits of mandatory retirement include:

- Ensure job opportunities for younger workers – retirement of older workers opens up their jobs for others;
- Assist in succession planning – employers know the maximum length of time that a person may remain employed;
- Allow employees to retire with dignity;
- Reduce need for performance management of older workers – employers may be willing to tolerate a decline in performance in later years when the employee in question has a firm departure date;
- Provide rationale for private and public pension plans – pension benefits are developed around a normal retirement date of age 65;
- Encourage loyalty to the organization – employees may be less likely to leave an organization if they will be rewarded with a pension at age 65;

¹⁰ British Columbia, Legislative Assembly, *Speech from the Throne*, 37th Parl. (8 February 2005).

- Support deferred compensation theory in which employees are underpaid relative to their efforts at beginning of their career and overpaid at the end;
- Benefit women by opening up job opportunities when older workers retire; and
- Maintain relationship with other employment practices and benefits that are generally designed on the basis that retirement would occur no later than age 65.¹¹

As mentioned in *McKinney*, many unions have spoken out against banning mandatory retirement. The labour movement has worked to obtain pension benefits for workers and a ban on mandatory retirement is viewed as a threat to the ability of workers to retire with an adequate pension. For example, the Canadian Union of Public Employees has taken a position against a ban,

The reality is that ending mandatory retirement does not give workers genuine freedom to choose to work longer. Making it possible for workers to work longer because that is the only way they can survive does nothing to expand workers options when it comes to retirement. On the contrary, eliminating mandatory retirement will mean that workers without adequate pension coverage (including vast numbers of women and immigrants) will never have the option of retiring. ...

It is CUPE's position that the individual right of a worker to not retire would diminish the rights of the vast majority of our members to a timely, financially-secure retirement.¹²

Rather than a ban on mandatory retirement, the labour movement has argued for enhanced public and private pension benefits so that workers can retire earlier with increased pension income.

(b) *Arguments Against Mandatory Retirement*

Proponents for a ban of mandatory retirement take issue with some of the positions of opponents of a ban. They do not agree that parties to the employment relationship have true freedom to contract regarding mandatory retirement. Mandatory retirement policies are prevalent in large employers and in workplaces covered by collective agreements. In such situations, the individual has little freedom to contract but instead is bound to the decision of

¹¹ See Morley Gunderson, *Banning Mandatory Retirement: Throwing Out the Baby With the Bathwater* (Toronto: C.D. Howe Institute, 2004).

¹² Canadian Union of Public Employees, "CUPE's response to banning mandatory retirement", online: Canadian Union of Public Employees <http://www.cupe.ca/www/Pensions/15420>.

the majority. Women and workers who immigrated to Canada, who may want to work longer because of absences from the work, are seen as particularly disadvantaged.¹³

The argument for the need to create opportunities for younger workers has also been questioned. Even if mandatory retirement was banned, research indicates that the total number of people who elected to retire later would be quite small as the trend is toward earlier retirement. Furthermore, projected skill shortages in the near future create a need to retain older workers not encourage them to depart. As to the desire to let employees retire with dignity and reduce the need to address work performance, studies have not found a marked decline in work performance at age 65 for most occupations.¹⁴

Arguments in favour of ending mandatory retirement include:

- Demographics – Currently the ratio of workers to retired persons in Canada is 6:1; by 2020, the ratio will decline to 3:1;¹⁵
- Longer life spans – Canadians now retire earlier and live longer than when income security programs were established. Canadians may now live another 20 years after retirement;
- Active involvement in the labour force for some occupations may enhance the worker’s health and prolong their life expectancy;
- Negative economic impact of decline in income tax revenues and increase in public pension and benefit costs – In Canada, public pensions accounted for 5.1% of GDP in 2001 and are predicted to account for 13% of GDP in 2050;¹⁶
- Predicted skill shortages – In Canada, the United Kingdom and the United States, the percentage of the population in the labour force age group of 15 to 64 is predicted to

¹³ Jonathan R. Kesselman, *Mandatory Retirement and Older Workers: Encouraging Longer Working Lives* (Toronto: C.D. Howe Institute, 2004) [Kesselman] at p.3-5.

¹⁴ *CHRA Review*

¹⁵ HSBC, *The Future of Retirement* (12 May 2005), online: HSBC http://www.hsbc.ca/hsbc/business_en/about-hsbc/news-releases/2005 [HSBC].

¹⁶ “Retiring Mandatory Retirement” CBC News (10 June 2005), online: CBC News http://www.cbc.ca/news/background/retirement/mandatory_retirement.html (CBC News).

stagnate or shrink. Employers in some industries are already experiencing skill shortages and this trend is expected to increase;¹⁷

- Enhance organizational performance and profitability by retaining older workers with needed skills; and
- Global opinion against mandatory retirement – Research funded by HSBC and conducted in 10 countries covering half the world’s population found a “resounding global rejection of age-based restrictions on working, with people throughout the world being opposed to a mandatory retirement age and any government or corporate rules preventing older people from working in retirement.”¹⁸

4. ENDING MANDATORY RETIREMENT BY LEGISLATION OR PRACTICE

With the move now to end mandatory retirement in Ontario, given its large numbers of employers, unions and employees, other provinces may decide to follow the trend. Even without legislative change, employers with workers in more than one province may find it difficult to justify enforcing mandatory retirement in one province while employees in another province are free to choose their retirement date. The University of Toronto and its faculty association negotiated an end to mandatory retirement for faculty and librarians prior to the introduction of Bill 211 in Ontario because the parties wanted the freedom to consider a full range of options. With a large number of faculty nearing mandatory retirement age and the risk of losing faculty to the United States where mandatory retirement is prohibited, the university needed to find ways to retain its valued faculty members.¹⁹ Similarly, employers in provinces that allow mandatory retirement may consider ending their mandatory retirement policies independent of legislative change because the option to work beyond a normal retirement date may benefit both the business and the workers involved.

Demographic trends indicate that younger workers will become a scarce resource. The impact of this trend has been delayed in Canada but has been already evident in the United Kingdom and the United States. A report prepared for the British-North American Committee commented on how employers are taking action to retain senior employees,

¹⁷ William B.P. Robson and British-North American Committee, *Aging Populations and the Workforce Challenges for Employers* (Winnipeg: Printcrafters Inc., 2001) [Robson] at p.5.

¹⁸ HSBC

¹⁹ University of Toronto, News Release, “U of T agrees to end mandatory retirement” (May 2005), online: University Affairs <http://www.universityaffairs.ca/issues/2005/may> [University of Toronto].

Stories of businesses making special accommodations to retain older workers are becoming familiar; General Electric, Chevron, Prudential Insurance, and Monsanto are some of the companies whose efforts in this regard have recently attracted attention. The US armed forces recently began to pay cash bonuses to retirees who come back for one more tour of duty. Many large employers have joined Wal-Mart and McDonald's in explicitly targeting retirees for hiring: Days Inn, Disney, Home Shopping Network, and temporary help firms, such as Express Services and Kelly Services, are making increasing use of senior workers. And Travelers Group, Cigna, Boeing, and Whirlpool, along with major hospitals such as the Cleveland Clinic, are among the organizations that have launched efforts to bring back their own retirees. The Royal Bank of Canada has responded to the aging of both the workforce and its customers by employing its own retirees to sell retirement products.²⁰

Employers, who are concerned about the impact of these demographic trends on their ability to attract and retain workers with needed skills, may wish to take a proactive look at their retirement policies. Like the University of Toronto, employers in some industries may find that clearly addressing options of phased and later retirement along with related issues of compensation and benefits may encourage valued employees to stay longer and enhance the profitability of the business.

5. CONSEQUENCES OF ENDING MANDATORY RETIREMENT

(a) *Public Policy Issues*

The consequences of ending mandatory retirement will be felt at a broad, public policy level as well as at the level of individual employers. Relevant public policy issues include the design of public pension plans, the Canada Pension Plan and Old Age Security. The age for receiving a full-unreduced pension was set when life expectancies were shorter and the proportion of retired workers to the rest of the population was lower. In the 1960s, Canadians age 65 and over represented 7.6% of the population. In 2030, Canadians in this group are projected to be 23% of the total population.²¹ The financial burden of providing full pensions at age 65 to a larger percentage of the population for a longer period of time may require increasing the age for receiving full public pensions. The change would likely require some exceptions for people who are unemployed or who work in physically demanding occupations.

²⁰ *Robson*, at p.10.

²¹ *Kesselman*, at p. 17.

Current provisions of the *Income Tax Act* may operate to discourage phased retirement. Employment income is taxed at a high level and employees may be discouraged from delaying retirement given the income tax consequences of their decision. The *Income Tax Act* requires that tax-sheltered savings plans begin disbursements no later than age 69. If employees were able to work beyond age 65, these rules around retirement income would need to be reviewed.

Other pieces of legislation that would be affected by an end to mandatory retirement include the *Workers Compensation Act* and the *Employment Standards Act*. The provincial government would need to establish the end date of payment of WCB benefits independent of mandatory retirement. In Ontario, workers' wage loss benefits will cease at age 65 under the proposed legislation. If mandatory retirement is ended, *Employment Standards Act* provisions, such as the payment of notice on termination, could apply to employees terminated from employment after normal retirement age.

(b) *Human Resources Issues at the Organizational Level*

(i) Retirement Policies

With a ban on mandatory retirement, employers would no longer be permitted to have mandatory retirement policies or to have similar provisions in their collective agreements. However, retirement policies would be needed to set out options available for employees on retirement, which could include early, normal, phased, and delayed retirement dates. Employers may require employees to advise them in writing of their planned retirement dates. The University of Toronto's new policy requires employees to give one year's notice of their retirement date and the notice once given is irrevocable.²² Employers will also want to ensure that the language of their retirement policies is clear so that retirement is voluntary and exercisable at the discretion of the employee. If employees are compelled to retire, the employer may be subject to a human rights complaint.²³

(ii) Performance Management

Employers with mandatory retirement policies may have been less likely to performance manage workers who were nearing retirement. Without mandatory retirement, employers need to ensure they have performance management programs in place and that they apply these programs consistently to employees throughout their careers. If an employee is to be disciplined or dismissed for performance reasons, the employer needs to show consistent

²² *University of Toronto*

²³ John W. Saunders and Sean M. Sells, "The End of Mandatory Retirement" in *New and Emerging Issues in Employment Law*, Proceedings of a Conference Held February 28 – March 1, 2005 (Toronto: Insight Information Co., 2005).

application of the policy in order to be able to rely on it. If an employee were dismissed, in the absence of cause for dismissal, the employer would be required to pay reasonable notice even if the date of termination was after the normal retirement date. A practice of dismissing employees who reach age 65 and paying reasonable notice would not be an alternative to mandatory retirement as the practice would be discrimination on the basis of age and thus contrary to the *Human Rights Code*.

(iii) Duty to Accommodate and Bona Fide Occupational Requirement

If an employee is unable to perform all aspects of their job due to age, the employer may have a duty to accommodate. The Supreme Court of Canada in *Meiorin* set out a three-part test for determining whether an employer had established that a standard is a bona fide occupational requirement (BFOR):

1. The standard was adopted for a purpose rationally connected to the performance of the job;
2. The standard was adopted in an honest and good faith belief that the standard was necessary for a legitimate work-related purpose; and
3. The standard is reasonably necessary for the accomplishment of that legitimate work-related purpose - that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.²⁴

The third stage of this analysis requires the employer to show it is impossible to accommodate an individual short of undue hardship. With an aging workforce, employers may be faced with an increase in requests for accommodation. It may be timely for employers to review their accommodation policies and procedures in preparation for this change. Employers are expected to assess each situation on an individual basis, consult with relevant parties and develop reasonable accommodation options. Accommodation measures for older workers may often be straightforward and become more common as the workforce ages. For example, accommodation measures in an office environment might include adjustable chairs and work surfaces, large screen monitors, and volume-adjustable telephones.²⁵

The courts have recognized age as a BFOR for some occupations such as police and firefighters. If mandatory retirement is prohibited, some employers may wish to establish age

²⁴ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 at para 54 [*Meiorin*].

²⁵ *Robson*, at p.55

as a BFOR for other safety sensitive occupations. They would need to meet the three-part test in *Meiorin* as set out above. For some occupations, this may require regular physical testing of all employees.

(iv) Employment Agreements

Organizations should revise employment agreements that require mandatory retirement and reference instead their retirement policy. Employers should also review any provisions in the agreements regarding notice on termination, as these provisions would apply to all employees regardless of age.

(v) Compensation

Employers may wish to review the design of their compensation programs. Many organizations provide salaries that increase with years of service with the company. Though the size of salary increases may level off over time, employee salaries are not decreased. In the absence of mandatory retirement, employers may wish to consider performance-based compensation. Otherwise if an employer decides to decrease an employee's compensation, the employee could claim constructive dismissal and, if the reason for the decrease appears to be age related, the employee could also claim discrimination.

Employers may be able to design their compensation packages so that benefits that are of value to older workers such as flexible working hours are used to offset the move from a traditional salary trajectory. Some employers have used compensation design to retain needed workers in occupations experiencing high rates of early retirement. For example, the Dutch chemicals group DSM “responded to an aging workforce that had a predisposition to early retirement by setting aside 2.5% of the salary of its shift workers – the group among which attrition was most severe – in individual saving accounts from which they could finance a move to less demanding and less remunerative work schedules later in their careers.”²⁶

(vi) Pension Benefits

Without mandatory retirement, employers will need to review the provisions of their pension plans, including those provisions regarding enrolment of new employees after normal retirement age and accrual of pension benefits when retirement is deferred or phased in. Some of the changes may be dependent on any amendments made to pension benefits standards legislation and the *Income Tax Act*. Organizations will also want to ensure that their plan design does not encourage employees with needed skills retiring from the organization to receive their pension while going on to work at a competitor.

²⁶ *Robson*, at p.43.

(vii) Other Employee Benefits

Even without an end to mandatory retirement, employers may be considering the structure of their benefit programs given an aging workforce. The type of benefits offered and the cost-sharing arrangement may need to change with the demographics of the employee group. Benefits such as life insurance may be very expensive for employees after normal retirement age and coverage needs may decline as these employees usually have fewer dependents and higher lifetime savings. Similarly, the relevance of components of dental and extended health benefits will change for employees based on their age, health and family circumstances. Flexible benefit plan designs that allow employees to choose how to spend their available benefit dollars may be most appropriate to respond to changing employee demographics. Benefit providers may also respond by tailoring their products to an older workforce.

If mandatory retirement was prohibited, an end date for long term disability payments would still need to be stated. Depending on amendments to legislation, provincial human rights codes may allow termination of benefits at normal retirement age. For example, in Manitoba, the Commission allows for long term disability benefits to end at age 65 unless there are grounds for expecting recovery and a return to work.²⁷

6. WORKPLACE TRENDS

Regardless of whether mandatory retirement is prohibited, changing demographics are having an impact on employer practices. As already mentioned, the proportion of older workers to younger workers is increasing. Employers should also be aware that the gender make-up of their workforce might shift as women have longer life expectancies than men and their workforce participation rate is increasing. “The share of over-65 workers who are female has risen from one-quarter to almost one-third in Canada and to 42 percent in the United States.”²⁸ These changes in workforce demographics are impacting the ways that organizations manage their workforces.

(a) *Workforce Planning*

Organizations need to be able to track and forecast workforce trends. If certain occupational groups show trends to early retirement, organizations may want to address the trend or at least plan as to how skilled replacements will be found. Workforce planning may assist organizations in identifying potential skill gaps and whether these gaps should be filled on an ongoing or intermittent basis.

²⁷ *Kesselman*, at p.15.

²⁸ *Robson*, at p.8-9.

(b) *Recruitment*

Employers who currently rely on younger workers to fill vacancies may have difficulty continuing this practice in the future. New immigrants are also predicted to be a diminishing source for new recruits as countries increase competition for available talent and developing countries are better able to provide employment opportunities at home. Organizations are now looking at ways to attract older workers, particularly women, and are reviewing their recruitment practices to ensure that they are not designed to attract and select younger workers. A variation on this theme is provided by organizations that have an uneven demand for particular skills. Organizations such as IBM Canada Ltd., with its retiree on call program, are drawing on the skills of their retirees on an as needed basis.²⁹ Travelers Insurance Company has a very successful program of bringing back its own retirees as well as retirees from its competitors. Travelers found that, “replacing agency temporaries with its own pool both saved money by reducing agency fees and improved reliability by reducing absenteeism.”³⁰

(c) *Training*

Employers may be concerned about investing in training of older workers but retention rates are actually higher for older workers than for younger workers. As well, people with more education stay in the workforce longer and the trend is for older workers to have higher education levels than in the past. Post secondary education has become more readily available, so the inverse relationship between age and years of education is declining. With a decline in the availability of skilled new recruits, employers are finding it profitable to invest in on-going training across their workforce. The experience of companies that designed special training programs for older workers showed that not only were such special programs not necessary, but they were resented by both older and younger workers. Older workers may also provide a valuable pool of trainers and mentors.³¹

(d) *Retention*

Employers who wish to retain their older workers may look to offering workplace benefits to address the needs of this work group. Flexible work schedules have often been put in place to address the responsibilities of employees with children but these plans may be attractive to older workers as well. Flexible schedules may be particularly attractive to women, who make

²⁹ *CBC News*

³⁰ *Robson*, at p.20.

³¹ See *Robson*, at p.32-39.

up an increasing proportion of the older workforce, as women more often have responsibility for caring for relatives. Work may also be packaged differently, for example in four-hour modules – “long enough for the completion of serious tasks but short enough to permit a variety of work weeks and work schedules.”³²

Employers may consider offering opportunities to older workers to redefine their job to focus on certain work responsibilities. Phased retirement programs allow employees to reduce their responsibilities and amount of time spent at work while enabling the organization to retain key skills or contacts. A 1999 Watson Wyatt survey in the United States found that 70% of employers in the United States did not have phased retirement programs because they had simply not considered them and not due to any concerns about costs, productivity or pensions.³³ With changing demographics, employers may wish to take a closer look at the mutual benefits that a phased retirement program may offer.

7. CONCLUSION

Mandatory retirement will soon be prohibited in Ontario, Quebec and Manitoba. The B.C. Court of Appeal has invited the Supreme Court of Canada to revisit the issue in the current social and economic environment. In 2005, the Government of British Columbia announced its intention to review the practice of mandatory retirement. Even if the government makes no legislative changes and mandatory retirement remains available to employers in British Columbia, workforce demographics call for organizations to actively consider whether the practice of mandatory retirement makes sense for their workplace. In particular, organizations with employees in more than one province, with significant numbers of employees nearing retirement age, or with anticipated skill shortages, should consider alternatives to a practice of requiring employees to exit the organization at normal retirement age. Flexible rather than mandatory retirement policies may better satisfy the needs of employees and better enable employers to achieve their organizational goals.

³² *Robson*, at p.23.

³³ *Robson* at p.58.

Vancouver

1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary

3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife

P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com

