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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

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B.C. law firm's mandatory retirement policy retired by court

Partner had little control and was more like an employee: Court

| BY THOMAS GORSKY |

ONCE THOUGHT to be part of the Canadian social fabric, mandatory retirement has been under steady attack for many years. Recently, a British Columbia court took one more swipe at it by allowing a law firm partner to resist a directive to retire from practice.

Fasken Martineau, like many law firms and other professional practices, had a mandatory retirement policy for its partners. When John McCormick, a partner at Fasken's Vancouver office, reached the age of 65, Fasken attempted to enforce this policy.

Although mandatory retirement is largely prohibited across Canada, Fasken believed its partnership retirement policy to be legal because McCormick was an "equity partner" — he held a percentage ownership interest in the firm — and, as such, could not be an employee. Under traditional partnership law, if a member of a partnership is a partner, then it is not legally possible to also be an employee.

Partner can be employee: Tribunal

McCormick challenged Fasken's retirement policy before the B.C. Human Rights Tribunal, expressing his desire to continue to practice at Fasken.

Because McCormick was not in an employment relationship, Fasken moved for summary dismissal of the complaint, asserting his partnership status barred him from making a discrimination complaint. McCormick was an owner and therefore could not, in effect, sue himself, the firm argued.

The tribunal was unwilling to make such a technical distinction. For the purpose of B.C. human rights legislation, a partner could be an employee, said the tribunal in permitting the case to proceed. Although the tribunal accepted McCormick was a partner under the

tenets of partnership law, it held there could be multiple legal perspectives. Fasken was a large law firm and McCormick's interest was small, just one of many partners. In practical terms, his small interest did not allow him to exercise control, said the tribunal. A partnership management agreement placed effective control in the hands of an executive committee and a CEO, who managed Fasken's affairs and the firm's relationship with its partners. In that sense, the tribunal considered McCormick more an employee than a partner.

The tribunal applied a well-established doctrine that the interpretation of employment in human rights legislation should be broad and liberal. In addition, control has a long-standing place in employment law as the seminal consideration in distinguishing employees from independent contractors.

Fasken appealed to the B.C. Supreme Court, which upheld the tribunal's decision in June 2011.

"While in other partnerships the contract governing their relationship may not repose in a small group the power to manage the business of the firm, and the authority to exercise employment-like controls over the actions of the partners and their work product, Fasken's partnership agreement clearly contemplates the kind of control that is traditionally present in an employer/employee relationship," said the court

Lessons for employers

In the 1990 decision *McKinney v. University of Guelph*, the Supreme Court of Canada put up a powerful defence of mandatory retirement, stating it was part of the fabric of the Canadian labour market and seemingly enshrining it in Canadian law. However, since then, courts, tribunals and legislatures have questioned and restricted the application

of mandatory retirement.

The McCormick decision has ramifications for Canadian businesses of various types and sizes:

- This decision will likely have application beyond large, professional partnerships to include accounting firms, professional consulting practices and corporations with a small number of owners who exercise effective control over operations.
- Many shareholder and partnership agreements have provisions for mandatory retirement. In light of this decision, these agreements should be reviewed.
- Businesses which are potentially susceptible to similar attacks by their owners may wish to review their current management structure. Fasken's structure left the majority of its partners with little autonomy, leading the tribunal to find that equity partners were like employees. It is possible that with a management agreement permitting greater autonomy, the decision might have been different.
- McCormick is yet another reminder that employers will have to increasingly adapt to an aging workforce. As mandatory retirement disappears, other approaches will need to be taken relating to the employment of older workers. See *McCormick v. Fasken Martineau Dumoulin LLP*, 2011 CarswellBC 1340 (B.C. S.C.) and *McKinney v. University of Guelph*, 1990 CarswellOnt 1019 (S.C.C.).

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