



B. C. HUMAN RIGHTS COALITION

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Premier's Council on Aging and Seniors' Issues

Council Chair, Dr. Patricia Baird
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Executive Summary

The following submission's focus is on the issue of discrimination as experienced by older adults. In particular, it will address required revisions to the *BC Human Rights Code* (Code) that would more adequately reflect the needs unique to older adults. Specially, we recommend that the upper age limit of 64 be lifted from the definition of age and that the exemption clause found at *Section 13 (3)(b)* of the Code be removed. We also recommend that the ground of age be extended to cover all areas of Code application, or at a minimum, to the provision and area that covers accommodations, facilities and services (*Section 8*). In relation to mandatory retirement specifically, we urge Council to take a comprehensive approach to this subject matter. Any changing retirement structure requires strengthened human rights protections in the workplace as well as a corresponding commitment that the change will not alter the foundation or the adequacy of our social security system.

Our position is that B.C.'s human rights legislation is under-inclusive in terms of providing protection against age discrimination. Currently, our Code provides no protection against any form of age discrimination where an individual is beyond age 64. This has significant implications for those who wish to work (or volunteer) past age 64 and for seniors who access accommodations, facilities or services that are generally available to the public, including health and housing services. It also has implications for seniors in situations of tenancy and residence covered by strata council rules. To ensure the equality rights of seniors as enshrined in *Section 15* of the *Canadian Charter of Rights and Freedoms*, strengthened age protections must be afforded through provincial human rights legislation. Doing so will ensure seniors are able to contribute as valuable members of society without being restricted by barriers, adverse treatment, discrimination or harassment. This would help to ensure seniors are better able to enjoy continued independence and health.

The B.C. Human Rights Coalition

The B.C. Human Rights Coalition is a charitable non-profit community based organization which was formed in 1982 with the very broad mandate to promote and strengthen human rights throughout B.C. and Canada. It has a membership of over 100 individuals and groups from across the province. The Coalition's general overall purpose can be found in its Constitution as follows:

- (1) To provide an opportunity for better understanding of human rights issues among organizations and individuals with an interest in those issues;
- (2) To encourage dialogue on human rights matters from different points of view, and thus to educate members and the public about human rights problems encountered by different groups and individuals;
- (3) To educate and assist people in British Columbia with respect to human rights issues;
- (4) To provide assistance and client representation services for people in British Columbia with respect to their human rights under the provincial and federal human rights legislation; and
- (5) To encourage cross-interest awareness and involvement between and among the members of the public.

Our Involvement with Older British Columbians and Issues facing Seniors

Age discrimination has the same economic, social and psychological impact on individuals as any other form of discrimination.

The Coalition's information, education and advocacy programs extend services to all British Columbians regardless of age. Last year we responded to just over 14,000 calls from the public and clients where there was a direct protection provided in human rights legislation. Six percent of all calls listed by specific ground indicate **age** as the group characteristic where they sought further information. In addition, comparative inquiry statistics from other human rights agencies in Canada indicate that age related concerns are on the rise. The Coalition also has a province wide educational program that is offered across all sectors and often reaches into senior communities and addresses many issues discussed in this submission. For example 80% of all educational sessions offered over the past two-year period have been offered in the context of employment settings. Here we often learn of age based bias and attitudes that affect older workers. In addition, we have worked directly with seniors services such as the St. James Community Services, City Centre Care Society, the City of Coquitlam Seniors Programs, the City of Richmond Seniors Program, and the City of Vancouver's Seniors Advisory Committee. We also attended and led a workshop for seniors at the Senior's Summit Conference held in New Westminster in November 2005. Our advocacy program extends representation to individuals who have filed formal complaints of discrimination with the B.C. Human Rights Tribunal. Here our

intake statistics over the last year indicate 33% of new files were providing representation to an individual alleging some form of discrimination where the client was over age 44; 6% were over age 59 and 2% were over age 63.

Our experience working with seniors indicates there are many areas in which discrimination affects their lives and it is therefore our belief that any dialogue on revising human rights protections in relation to age ought to include all concerns expressed. By-laws and rules enforced by strata councils seem particularly harmful and insensitive to the needs of an aging population as do criteria often applied by landlords and management companies in the case of (terminating) tenancy situations. We also know that universal design concepts are not always considered in the design and implementation of new buildings and facilities which have serious implications for an aging population. We've also had many cases where seniors describe insensitive practice directions and decisions in the healthcare sector ranging from the rather egregious accusation of being denied a spot on a transplant waiting list because of age, to the rather inadvertent case where a sign displayed in a doctor's office read "one medical condition – one appointment."

As mentioned, age discrimination has the same economic, social and psychological impact on individuals as any other form of discrimination. As we outline below, our provincial human rights legislation ought to be fulfilling a much stronger role in terms of helping to minimize and prevent age-based discrimination from occurring and it ought to provide adequate and equitable recourse for when it does occur.

Age Discrimination in Employment (Section 13):

Beyond Mandatory Retirement

Discrimination in employment does not magically begin at age 19 or end at age 64, yet B.C. and Saskatchewan are the only remaining Canadian jurisdictions that continue to utilize age caps to restrict human rights protections in this area (Ontario and Newfoundland recently revised their statutes). Currently, protection against age discrimination in employment is only provided to British Columbians up to age 64. Effectively this restricts people beyond that age from filing complaints of *any form of age discrimination* – including mandatory retirement - with the B.C. Human Right Tribunal¹. This means older workers have no recourse under human rights legislation should their employer choose to treat them adversely based on their age. As *Section 13* of the Code extends protections to include volunteer relationships, it also means volunteers have no protection or recourse against age based discrimination if they are older than 64.

While we don't know with certainty how many British Columbians choose to work past age 64, we do know the trend is on the rise. Your Council's own statistics indicate that one in four seniors aged 65 to 74 and one in ten over the age of 75 received

¹ Those over age 64 can subject mandatory retirement to separate court challenges. These are usually framed as *Section 15 Charter* challenges.

employment income in 2002². We also know that older workers come into conflict with age sensitive employment practices, many of which are deeply embedded in our collective psyche and practiced as a matter of course. For example, assumptions and stereotypes based in age often result in older workers being unfairly perceived and treated, and in some cases discriminated against³. Unfortunately, decisions as to who gets fired, laid-off, or phased out, are sometimes unwittingly influenced by the age of the workforce. Who receives promotions, training, or consideration as a potential candidate may also be influenced by age. While negative bias and stereotypes will hopefully dissipate as more older workers remain in the workforce, a proper and equal balance around an ageing workforce must afford the same legal protections to workers over 64 as are currently afforded to those under 64.

Age discrimination in employment is a reality today and one that will continue to expand regardless of whether mandatory retirement is prohibited or not. To provide the same legal protections for workers over 64 as are provided to those under 64, the government must lift the age cap in our human rights legislation. By doing so, all workers beyond age 64 would be guaranteed protection against age related discrimination.

Mandatory Retirement

From a human rights perspective we support a retirement structure that provides choice, flexibility and options for everyone. We recommend this new structure requires strengthened human rights protections in the workplace and a corresponding commitment that the changing retirement landscape will not alter the foundation or the adequacy of our social security system. This balanced approach ensures choice, flexibility and options for all.

As Council heard at their June 27, 2006 meeting, mandatory retirement raises important human rights concerns, but it also raises numerous other concerns that encapsulate economic, labour and social policy issues. Council is aware that Canada's pension structure is deeply rooted in and interrelated to the notion that age 65 is the normal age of retirement. As was articulated at this meeting, many stakeholders expressed concern that a changing retirement landscape may result in an eventual rise in age of entitlement for pension benefits. This has been the case in the U.S.A. and Europe. Retirement, and the way it is experienced by some groups, such as women, immigrants and those in lower paying and labour intensive occupations, is fundamentally different than the experience of those with good jobs, good benefits and adequate retirement reserves. For those who have not had good jobs, good benefits, or the ability to build adequate retirement reserves, an increase in pension entitlement age would effectively result in the loss of their freedom to retire at age 65. Where one group in this debate stands to gain, another group may stand to lose.

2 Quick Facts About Seniors, http://www.cserv.gov.bc.ca/seniors/premiers_council/seniors_factsheet.htm

3 See for example: *Fenton v. Rona Revy Inc.*, 2004, BCHRT 143, *Perk v. Seel*, BCHFT 2004, 277, *Buchanan v. WMC Management Services*, 2006, BCHRT 339

Those with less leverage in this debate require a guarantee that their freedom to retire at age 65 will not be impeded by a changing retirement landscape. For these reasons we urge Council to recommend that government conduct a comprehensive review on the subject matter and one that is capable of addressing the continued adequacy of our social security structure.

Our remaining remarks are limited to the mechanics of our human rights legislation.

As already outlined, we suggest the upper age cap in our human rights legislation be removed in order to allow for greater age related protections for all workers. In addition to this age cap, B.C. also utilizes an exemption clause at *Section 13 (3) (b)* of the Code. This clause shields employers from human rights complaints as they relate to *bona fide* retirement, superannuation or pension plans and is often used to shield both bargained and employer imposed retirement clauses from human rights complaints. Most other Canadian jurisdictions have a similar exemption clause, which effectively permits mandatory retirement, so long as the practice can be justified as being part of a larger retirement plan. To truly eliminate blanket mandatory retirement policies from being imposed on workers, this exemption clause would also have to be removed.

Lifting both the age cap and removing the exemption clause would still allow employers to implement and incorporate retirement strategies, which in some cases may still include encouraging the workforce to retire at a set age. Lifting the age cap and removing the exemption clause would also allow unions to continue to bargain the best retirement structures for their membership. The difference however, would be that any defined practice would be subject to an employer's duty to accommodate where individuals preferred to remain in the workforce past that set age. Accommodation as a process provides choice, flexibility and options for everyone. Where an accommodation imposes undue hardship on the employer, the employers' legal duty would be discharged. Put another way, the blanket rule of requiring all employees to retire at age 65 would have to stand up to the *Meiorin* test⁴ of *bona fide occupational requirement* (BFOR) in order to justify the rule. This test dictates that in order for an occupational requirement to be valid, the three following characteristics would have to be met:

1. Is the policy, rule or standard rationally connected to its objective?
2. Is there an honest and good faith belief that the standard is necessary?
3. Is the policy, rule or standard reasonably necessary for the employer to accomplish its purpose?

At the same time, some occupations that require retirement at a set age have, and will likely continue to, stand up to the above mentioned BFOR test. Historically, these occupations have included those where public safety is an issue, such as in the case of firefighters and police.

4 British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U)(1999), 35 CHRR D/257 (S.C.C.).

Retirement norms, perceptions and practices are interwoven into the social fabric of our country. The issue of mandatory retirement and a changing retirement landscape is complex and involves a wide array of stakeholders. From a perspective based solely on our current human rights legislation, we think lifting the upper age cap and removing the exemption clause at *Section 13 (3) (b)* would provide more choice and flexibility to those affected by mandatory retirement. From a broader perspective, the whole issue of a changing retirement landscape will alter numerous labour, economic and social policy issues. To ensure the continued adequacy of our social security structure for all British Columbians, we urge Council to recommend a thorough and comprehensive governmental review on the subject matter.

No Age Protection in Accommodation, Service and Facility (Section 8)

Section 8 of the *Code* provides no protection against age discrimination. This section pertains to protections against discrimination in the provision of accommodations, facilities and services that are generally available to the public. This includes for example, government ministries and their programs and services, the provision of public transit, the provision of public and private healthcare services, the provision of services offered by strata councils, and access to everyday services such as restaurants, community centers, shopping malls and grocery stores.

British Columbia and Alberta are the only remaining Canadian jurisdictions that offer no age protection in this area (Newfoundland just extended age protection to this area in 2006). Although older people can still seek human rights recourse through a side door approach⁵ in B.C., we submit that this approach denies substantive equality and forces people to adopt a marginalized status in order to gain *Code* protection. This adopted status perpetuates negative myths and attitudes related to aging as opposed to embracing the reality that seniors have unique needs that society ought to be addressing. B.C. seniors should be afforded substantive equality based on their age and policy makers need to send the signal that age discrimination in B.C. is prohibited.

No age protection in *Section 8* means any accommodation, facility or service can deny or treat people differently based on their age. Admission, discharge, or eligibility criteria may often exclude people because of their age. Adding age protection would not jeopardize B.C.'s ability to preserve benefits afforded to seniors or to place legitimate limitations on citizens based on age (such as the need to restrict entitlements for persons below the age of majority as in the case of establishing a legal drinking age or age appropriate regulations in regards to driving privileges). Eleven other Canadian jurisdictions have overcome similar concerns and we would suggest the B.C. government could work with these jurisdictions to learn how best to overcome similar concerns.

No age protection in *Section 8* also means that the planning and design of services may not consider unique characteristics or needs associated with age. Ageism exists

⁵ Because being denied a service, facility or accommodation is often a result of interrelated reasons such as age and disability or age and sexual orientation or age and race, a distinction that can lay claim to human rights protection is often established by drawing on one or more of the other protected grounds. 6

when these needs are not considered. Public health and funding levels for specific services may currently be based on something less than legitimate age-based criteria. We also see numerous cases where strata councils inadvertently deny older adults with reasonable visitation and caregiver privileges which, save for the discriminatory outcome, would help to extend their health and independence. Adding age protection to this section of the Code would also ensure that universal design principles are incorporated into all facilities and services. We also submit that adding age protection in this area would assist in changing negative societal attitudes, stereotypes and bias that exist towards seniors.

Summary and Recommendations

The Coalition has long argued that B.C.'s human rights legislation is under-inclusive in terms of providing age protections that are in keeping with our *Section 15* equality rights. To ensure the equality rights of seniors as enshrined in the *Canadian Charter of Rights and Freedoms*, strengthened age protections must be afforded through provincial human rights legislation. As a signatory to both the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*, Canada and the Provinces have an obligation to move, in a progressive manner, towards adopting the values, principles and standards as set out in these international treaties. B.C. has an opportunity to breathe life into international standards set in relation to discrimination and older persons and we urge Council to bring this opportunity to the Premier's attention.

Specific recommendations include:

1. The upper age limit of 64 be lifted from the definition of age in the Code. This would provide greater protection in all areas where age is listed as a group characteristic worthy of Code protection (currently *Sections 7, 10, 11, 13, and 14*).
2. In relation to the issue of mandatory retirement,
 - a) we urge Council to take a comprehensive approach to this subject matter. Any new structure requires strengthened human rights protections in the workplace balanced against a corresponding commitment that the changing retirement landscape will not alter the foundation or the adequacy of our social security system.
 - b) we urge Council to recommend that government conduct a comprehensive review on the subject matter, and
 - c) we urge Council to recommend the exemption clause at *Section 13 (3) (b)* of the Code be removed.
3. We also recommend that the ground of age be extended to cover all areas of the Code, or at a minimum, to the current provision that covers accommodations, facilities and services (*Section 8*).

Respectfully submitted by

The Law Reform Committee of the B.C. Human Rights Coalition