

### LEGISLATION INTRODUCED TO ELIMINATE MANDATORY RETIREMENT IN BRITISH COLUMBIA

The British Columbia *Human Rights Code* (the “Code”) currently prohibits age discrimination against those aged 19 – 64. Therefore, it has not been discriminatory under that legislation to deny employment because a person is 65 or older. However, a planned change to the definition of “age” in the Code will change that.

On **April 25, 2007** Attorney General Wally Oppal introduced Bill 31 *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007*. Bill 31 seeks to extend the protections of the Code beyond age 64. This change will render discriminatory any policy requiring retirement at a particular age (in any industry governed by the provincial Code). It will also be discriminatory to deny employment to any person 19 or older on the basis of age. The effective date for this proposed change to the law is **January 1, 2008**.

This change will bring British Columbia in line with the majority of other provinces in Canada, including Ontario. Further, government employers in British Columbia are already obliged to demonstrate that their mandatory retirement policies meet the test under the equality section of the Charter of Rights and Freedoms. With that said there will be some major adjustments for British Columbia employers arising from this change. Many employment contracts, workplace policies, and collective agreements were negotiated with the expectation that employees would be required to retire at age 65. These documents and plans will need to be changed to reflect the new reality.

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#### Update – Canada Labour Code: Replacement Workers

On March 21, 2007 Bill C-257 was defeated in the House of Commons. The bill, which sought to amend the Canada Labour Code to prohibit the use of replacement workers by employers during a work stoppage, had passed second reading before Conservative and Liberal MP's voted to defeat it at third reading.

However, less than 24 hours after the defeat of Bill C-257, Liberal MP and Labour critic Mario Silva introduced similar legislation in the form of another private member's bill (Bill C-415, *An Act To Amend The Canada Labour Code (Replacement Workers)*). We will continue to monitor this legislation and will provide updates in future issues of this newsletter.

#### May, 2007

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## Specific Exceptions in the Legislation

### *i. BFOR Defence*

The defence of a bona fide occupational requirement (“BFOR”) will continue to be available to employers. However, under the prevailing legal test the standard to be met is very high. An employer must demonstrate that a particular age is reasonably necessary based on the physical and cognitive requirements of the position. The employer must also demonstrate that there is no way to accommodate the individual in the position without causing undue hardship to the employer’s operation. Given this standard, in practice the BFOR defence will likely continue to apply to a limited range of occupations.

### *ii. Insurance Contracts*

Bill 31 allows for distinctions based on age in relation to “the determination of premiums or benefits under contracts of life or health insurance”. Therefore, “contracts of insurance may continue to differentiate on the basis of age without contravening the Code” (as stated in the explanatory notes to Bill 31).

### *iii. Bona Fide Retirement, Superannuation, Pension and Insurance Plans*

Bill 31 also allows age-based distinctions in relation to the “operation of a bona fide retirement, superannuation or pension plan or ... a bona fide group or employee insurance plan, whether or not that plan is the subject of a contract of insurance between an insurer and an employer”. Therefore, according to the explanatory notes, “bona fide group or employee insurance plans, whether provided by a third party insurer or through self-insurance, do not contravene the Code”. In future issues of this newsletter we will discuss this language further, and in particular the term “bona fide” plan.

### *iv. Distinctions Based on Age in Other Acts*

Finally, Bill 31 provides that “nothing in this Code prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation”. This is added to section 41 of the Code (“exemptions”). At the same time, the proposed law also amends the *Public Service Act*, rescinding the requirement for employees governed by that Act to retire at age 65.

## Getting Ready for the Change

Presuming the bill is passed into law in its current form the change will become effective **January 1,**

**2008.** There are a number of steps that employers can take in advance:

- Review workplace policies, contracts and manuals in respect of references to retirement. Unless a BFOR defence can be established, any mandatory retirement language will need to be changed under the new legislation. Retirement policies that permit retirement at a particular age (but do not require it) need not be changed.
- Communicate the pending change to managers and other front line personnel (through appropriate bulletins, training, etc.). As with other forms of discrimination, an employer may be held liable for any unlawful acts of its employees. Therefore, it is important to guard against conduct that might expose the employer to a discrimination complaint.
- Consider and evaluate how your organization tends to handle performance problems with employees who are nearing retirement. Because employers have been able to insist on mandatory retirement, there may have been a tendency to avoid performance management and simply wait until such an employee turns 65. Under the new legislation this will no longer be a viable strategy as there is no certain age for retirement. Rather, employers should ensure that all employees are subject to performance standards and expectations.

For more information about this article or any other area of labour and employment law, please contact any member of our practice group.

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## EXPEDITED WORK PERMITS FOR I.T. WORKERS

In the normal course, a foreign worker who wishes to work in Canada requires a work permit from Citizenship and Immigration Canada (CIC) and can only obtain a permit once the foreign worker has a validated job offer from a local Human Resources and Skills Development Canada (HRSDC) office. However, responding to employers’ specific needs in filling critical shortages in the Information Technology industry, CIC has collaborated with HRSDC, Industry Canada and the Software Human Resource Council (SHRC) on the

development of a program to streamline the entry of workers whose skills are in high demand in the information technology industry.

Under this program, a national confirmation letter replaced the HRSDC job-specific confirmation. Accordingly prospective employees who qualify for this program may apply for their work permit relying upon the national confirmation letter. This national confirmation letter has effectively removed the delay (up to 4 months) associated with the job-specific confirmation process.

To qualify for this program, the offered position must fit within one of the following job descriptions:

1. Senior Animation Effects Editor
2. Embedded Systems Software Designer
3. MIS Software Designer
4. Multimedia Software Developer
5. Software Developer
6. Software Products Developer
7. Telecommunications Software Developer

Note that minimum educational and experiential qualifications will apply to these positions. Depending upon the prospective employee's country of citizenship, applications for work permits within this program can be obtained at any Canadian port of entry. Successful applicants will present the following:

- Employer support letter;
- \$150 (Cdn) processing fee;
- Proof of Qualifications;
- Resume;
- Offer of employment;
- Valid travel document.

We are available to assist in the preparation of the necessary paperwork for such an application and invite you to contact us with any questions you may have regarding this program.

For more information about this article or any other area of labour and employment law, please contact any member of our practice group.

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## THE IMPORTANCE OF NON-COMPETITION AND NON-SOLICITATION CLAUSES IN EMPLOYMENT CONTRACTS

### *[RBC Dominion Securities v. Merrill Lynch]*

A recent decision by the British Columbia Court of Appeal in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al*, 2007 BCCA 22 ("RBC v. ML") sets an important precedent in this province as to the information that a departing employee may lawfully take from his employer in the absence of non-competition and non-solicitation clauses in the employment contract.

The defendants in this case were investment advisors and assistants employed with RBC who were induced by ML to leave their employment, and encouraged to bring client records with them without RBC's knowledge. There were no non-competition or non-solicitation clauses in the employment contracts.

Generally speaking, a non-competition clause is an agreement limiting the employee's legal right to compete with the employer for business following the termination of the employment relationship. Similarly, a non-solicitation clause prohibits a departing employee from soliciting the customers of his previous employer.

In *RBC v. ML* the BC Supreme Court found each of the defendants liable to their former employer for damages ranging from \$250,000 from ML to varying amounts from its former employees. The Court of Appeal significantly reduced those damages, and found that there was no obligation on the part of former RBC employees not to compete unfairly as RBC did not take proper care to protect its interests by obtaining non-competition and non-solicitation covenants from its employees. The Court held that the former employees were entitled to prepare client lists when leaving RBC but were not entitled to take copies of accounts or other papers regarding RBC clients.

This case serves as a caution to employers in today's highly mobile workforce against relying on an implied duty of good faith applicable to their employees. Rather, steps should be taken to protect the employer's business interests through reasonable non-competition and non-solicitation clauses.

## Proper Content for Non-Competition and Non-Solicitation Clauses

These clauses must be carefully drafted in a manner that will withstand judicial scrutiny. Generally, once a legitimate interest worthy of protection has been established, the courts will analyze whether the protection sought is reasonable and whether the restraint upon the individual's ability to earn a living is necessary to protect the former employer's business. It is important to note that the scope of these clauses will often differ significantly based on the industry or type of work involved, however, generally speaking, temporal and spatial limits should not be overly broad. Additionally, if the non-solicitation clause alone is sufficient to protect an employer's interest, courts will not enforce a non-competition clause as well. Some of the common factors examined by our courts in restrictive covenants include:

- Geographic scope – The area of the prohibition cannot be too large. An employer's attempt to prevent competition in geographic areas where the employer does not carry on business could be fatal to the enforceability of the restrictive covenant.
- Temporal scope – The period of the covenant cannot be too long. Current case law indicates that a provision for longer than 2 years will not be protected. Generally, the length of time required to legitimately protect the company will depend upon the facts.
- Scope of Business – When the restriction is greater than what is reasonably required to protect the employer's business, the covenant may not be upheld. Clauses that attempt to catch future business endeavours not known at the time of signing or future customers are often considered too broad. The restriction should be within the business' area of expertise and apply only to the actual business and clients of the employer.
- Scope of Duties – Care must be taken to consider what duties an individual is prohibited from performing for a competing employer. The scope must not be overly broad.

- Public Policy – The clause should not be contrary to public policy. Generally, this entails an evaluation of whether the restriction unduly affects the public interest and the right of the state to benefit from competition.

For more information about this article or any other area of labour and employment law, please contact any member of our practice group.

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## REMOVAL OF CONFIDENTIAL EMPLOYER DOCUMENTS CONSTITUTES GROUNDS FOR DISCIPLINE

Due to the nature of their positions, certain employees have far-reaching access to an organization's secure and sensitive information. These employees are often said to occupy positions of trust. More and more, employees in a position of trust are privy to an organization's confidential information. Occasionally, employees are tempted to peruse this information and use it for their own purposes. However, an employee who misappropriates or misuses confidential information commits an employment offence affording the employer just cause for discipline.

In *Telus Communications -and- TWU*, December 7, 2006, (Arbitrator A. Sims, Q.C.), the arbitrator considered whether the misappropriation and misuse of confidential information constituted a breach of trust capable of supporting just cause for termination. In the process, the Arbitrator established a number of important principles regarding employee obligations in respect of confidential information.

This case involved the removal of three highly confidential documents relating to company operational and labour relations strategy from Telus' executive offices. The documents were ultimately appended to a TWU submission in proceedings with the company before the Canada Industrial Relations Board. The ensuing investigation led the company to interview four janitors having access to its executive offices. After

investigating the matter, the Company terminated three of the janitors involved.

At arbitration the union argued that the documents were not confidential as many TWU members were familiar with their contents. It contended that the company marked much of its documentation 'confidential', rendering that characterization meaningless. Finally the union argued that if company officials left confidential documents in the open without being shredded it was the company's fault if they became public.

Arbitrator Sims found that a central question was whether the documents were sufficiently confidential in appearance to overcome any defence that they might be public or abandoned. The arbitrator also held that if the grievors took the documents believing them to be confidential, and used them in prohibited ways, it did not matter whether the documents were actually less confidential than the grievors originally thought. It is the intent of the grievors that establishes the employment misconduct.

Arbitrator Sims held that it is not up to custodial employees to decide whether to treat a document as confidential or not. If the company designates it as such, the employee must treat it appropriately. Further, he found there was no general employee right to take, peruse or disseminate non-confidential documents.

After reviewing the documents and hearing the evidence, Arbitrator Sims found that the grievors were aware when they committed the alleged misconduct that they were dealing with confidential documents. On this basis, as well as the grievors' lack of honesty throughout the grievance procedure and at arbitration, Arbitrator Sims concluded that the company had established just cause for discipline and upheld the terminations.

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