



HEALTH LAW

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SURGEONS RIGHTS AND MANDATORY RETIREMENT

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PRESENTATION OVERVIEW

1. Hospital Bylaws and Mandatory Retirement – Examples
2. The Applicable Law Regarding Mandatory Retirement
 - a. “Charter” Rights Infringement
 - Case law - Stoffman v. VGH
 - b. Anti-Discrimination Provisions of Ontario Human Rights Code
 - Current Law
 - Proposed Change in Law
3. An Ounce of Prevention....Recommendations

1. HOSPITAL BYLAWS AND MANDATORY RETIREMENT

1. HOSPITAL BYLAWS AND MANDATORY RETIREMENT

Sunnybrook & Womens College By-law

- Usual Retirement Date: July 1st following 65th birthday
- May be re-appointed for one year only by the Board
- Reappointment conditional on:
 - Demonstrating necessary and special skill or service to institution
 - MAC clearly delineates Staff member's privileges
 - No automatic renewal
 - Annual reevaluation until age 70 – thereafter no renewal except as indicated below

Comments: Sunnybrook Medical Staff, in very exceptional circumstances, may be reappointed beyond 70th birthday. Test is “exceptional circumstances and skills of the member cannot be met by other means”.

1. HOSPITAL BYLAWS AND MANDATORY RETIREMENT

Toronto Hospital By-law:

- Active Staff shall be converted to Honorary Staff at Age 65
- Unless appointed to another staff category
 - Consultant Staff (may have privileges)
 - Honorary Staff (No regularly assigned privileges or responsibilities)
 - Courtesy Staff (May be granted visitor's privileges)

Comments: Mandatory retirement (to Honorary Staff) unless make a case for ongoing appointment before the “drop dead” date (age 65).

1. HOSPITAL BYLAWS AND MANDATORY RETIREMENT

Hospital For Sick Children By-law:

- Retirement Age of 65 – ineligible to apply for staff membership after 65th birthday
- Can be re-appointed only with approval of:
 - Department Chief; and
 - President of Hospital

Comments: Re-Appointment possible but very discretionary powers given to Chief and President.

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

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a. Charter Rights Infringement?

[Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11]

- Only applies to “government” actions
- S. 7 – Right to life, liberty and security of the person
- S. 15 - Protection from discrimination

b. Anti-Discrimination Provisions of Ontario Human Rights Code

[R.S.O. 1990, c. H.19]

- S. 15 - Protection from discrimination
- Applies to “private” acts
- S. 5 - Right to equal treatment with respect to employment without discrimination because of ... age

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

a. Charter Rights Infringement? [CHARTER CHALLENGE - Stoffman v. Vancouver General Hospital \[1990\] 3 S.C.R. 483 \(S.C.C.\)](#)

Facts:

- Vancouver General is the major acute care and teaching hospital in B.C. all physicians who practise there (with exception of G.P.'s) must hold teaching appointment at U.B.C.
- Doctors on medical staff are granted privileges by the Hospitals' Board of Trustees
- Board of Trustees - empowered to pass by-laws
 - 14 of 16 government appointed
- Dr. Stoffman argued that hospital's mandatory retirement policy violated his section 7 and 15 constitutional rights

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

- a. Charter Rights Infringement? **CHARTER CHALLENGE - Stoffman v. Vancouver General Hospital [1990] 3 S.C.R. 483 (S.C.C.)**

Supreme Court Ruling: 1. Board of Trustees passing by-laws is NOT government action, therefore, Charter does not apply

- Even though government can appoint 14 of 16 trustees
- Even though by-law must be approved by Minister of Health
- By-law purpose is for internal management of hospital
- Routine hospital policies are not subject to government control

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

- a. Charter Rights Infringement? **CHARTER CHALLENGE -**
Stoffman v. Vancouver General Hospital [1990] 3 S.C.R. 483 (S.C.C.)

Supreme Court Ruling: 2. However, By-law itself is Discriminatory:

The effect of the (Mandatory Retirement bylaw) and the associated policy of the Board of Trustees is to impose these deprivations on the basis of a personal characteristic attributed to individuals solely because of his association with a group, those over age 65. They are for that reason discriminatory within the meaning of s. 15(1) of the Charter.

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

- a. Charter Rights Infringement? **CHARTER CHALLENGE** - *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483 (S.C.C.)

Supreme Court Ruling: 3. Even if By-law itself is Discriminatory, it is a “Reasonable Limit” prescribed by law:

Objective of by-law is reasonable – Institutional concerns

- Need to limit growth of hospitals’ staff (i.e. resource issues)
- Make positions and resources available to younger doctors who are recently trained
- Overall – Maintain and enhance quality of care that VGH is able to provide

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- a. Charter Rights Infringement? **CHARTER CHALLENGE** - *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483 (S.C.C.)

Supreme Court Ruling: 3. Even if By-law itself is Discriminatory, it is a “Reasonable Limit” prescribed by law:

By-law is “Rationally Connected” to the Objective

- By-law which provides for retirement of doctors before skills deteriorate is rationally connected to goal of VGH in providing high quality and standard of care

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

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Minimal Impairment Test – i.e. Alternative Measures

- Court questions what else hospital could do?
- Proposal: Implement Skills testing and performance evaluation
- **Court Rejects:**
 - Costly to implement and operate
 - “invidious and disruptive” effect of such a program
 - As a trigger for the application of a rule of mandatory retirement, [skill testing and performance evaluation] would be the very antithesis of the kind of dignified departure that should be the crowning moment of a professional career...Nor is it difficult to imagine how such a scheme could sow suspicion and dissension among a hospital staff

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Conclusion: No reasonable alternative exists to the by-law and although discriminatory, it is “saved” by s. 1 of the Charter as reasonably justified in a free and democratic society.

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

b. Anti-Discrimination Provisions of Ontario Human Rights Code

- S. 5 prohibits discrimination in employment by reason only of one's age
- Unless the age component is a reasonable and bona fide qualification because of the nature of the employment
- Age prohibition in the Human Rights Code only covers persons between the ages of 18 and 65

2. APPLICABLE LAW REGARDING MANDATORY RETIREMENT PROVISIONS

b. Anti-Discrimination Provisions of Ontario Human Rights Code

- Proposed new law (Bill 211) will extend “age” protection to persons over age 65 from age discrimination
- Law has not yet passed – in 2nd reading
- Unlikely to be of any benefit to physicians and surgeons
- Physicians and surgeons not generally held to be employees
- Mandatory retirement by-law would be found to be a reasonable and bona fide qualification for job

3. AN OUNCE OF PREVENTION.....

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Realistic Recommendations

- Consult with a lawyer at least one year prior to your 65th birthday
- Obtain an analysis of your Hospital By-laws and their relationship to your type of practice
- Prepare a legally defensible and appropriately drafted proposal for your continued practice based on the legal framework in place at the time
- Be prepared to subject yourself to complete IME's, internal performance reviews and to consider potential changes in the type or level of service you provide
- Consider Appeal provisions pursuant to *Public Hospitals Act*

