Supreme Court Ruling Upholding Mandatory Retirement Of Partners Isn’t Legal In Most Provinces



There is about to be a torrent of new litigation, the advent of an entire new area of law. And as a prelude to that revelation, the Supreme Court of Canada just released a decision permitting the B.C. branch of Faskens to force its partner, John McCormick, to retire at age 65.

The ensuing press reports universally declared that Canadian partnerships could continue to enforce mandatory retirement among partners. But what the media failed to report is that the Faskens decision is limited to British Columbia and that mandatory retirement of partners in Ontario, and several other provinces, remains illegal because of the different language of the Human Rights Codes across the provinces.

Any partner in Ontario forced out of their firm because of age has a viable case before the Human Rights Tribunal, which would include reinstatement into the partnership as well as other forms of damages.

But that is the least litigation-expanding aspect of the decision.

Justice Abella of the Supreme Court noted that partnerships throughout Canada have a fiduciary relationship, one of utmost good faith, to each of their partners.

The implications of that will turn partnership relationships upside down with every potential conflictual aspect of the relationship now open to litigation.

Income and termination are among the most important of these. Generally a management committee of a professional partnership determines the annual income of each of its partners. But, let’s face it, fixing remuneration is a partly political game – who is in favour, who is seen as an up-and-comer, who has the support of those in power, who helped them get elected to their roles, who antagonized who in the preceding year or who is in a better political position to make a naked grab for power.

None of that would survive the court’s test for utmost good faith. And how much of the partnerships’ criteria – subjective as much of its determination is in assessing contribution and income – would survive a judicial challenge, let alone a challenge to the application of that criteria?

If challenged, the partnership would have to disclose all documentation and

information related to the decisions respecting each partner and their assigned incomes, all information which is kept entirely confidential by most partnerships. Assuming the partner was reasonable in his or her demands, how many cases would a partnership ever permit to get to trial?

Partnerships cannot expel its partners unless the partnership agreement permits it. As Justice Abella noted, that is why partnership agreements have such high thresholds for expulsions.

In light of this decision, those criteria will be interpreted strictly in favour of the expelled partner because of the utmost good faith partnerships must demonstrate toward their partners.

The partnership should be prepared to prove that the expelled partner was the worst, based on its objectively reasonable criteria (and subject to challenge), to be selected for expulsion. And if the clauses are as amorphous as, for instance, expulsions for good reason that reason must be demonstrably justified. Dismissals for lack of work likely won't be sufficient. The court may find the partnerships' fiduciary duty to require all of the partners to accept less income before expelling any of them.

Finally, and most significantly, the damages from such cases will be vast. If the test for expulsion isn't met, since partners can't be expelled otherwise, the damages could be 10 or 20 years pay, rather than 24 months severance – the usual limitation for an employee.

In acting for partners, I have argued that they are employees. Interestingly, the Supreme Court agreed, finding that, if the relationship is one of dependency, a partner is really an employee at law. Now since the potential for damages is so much greater, partners will be motivated to argue that they are really partners and should not have been expelled.

A new world of litigation indeed. How will professional partnerships react?

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