

January 16, 2004

The Honourable Pierre Pettigrew, PC, MP

Minister of Health, Minister of Intergovernmental Affairs
and Minister responsible for Official Languages
Minister's Office – Health Canada
Brooke Claxton Building, Tunney's Pasture
P.L. 0906C
Ottawa, Ontario K1A 0K9

Dear Minister:

On behalf of the Canadian Medical Association, I am writing to highlight the concerns of our members regarding the issue of mandatory retirement for physicians practicing medicine in Canada. The sustained interest in this subject follows as a result of a resolution adopted by the CMA General Council on August 20, 2003. This resolution reads "that CMA, its divisions and affiliates advocate for the enactment of regulations and/or legislation that will prevent mandatory retirement of physicians based on age." Your predecessor, the Honourable Anne McLellan, requested further information from the CMA with regard to the aforementioned legislation, for the purposes of further discussion with provincial counterparts.

Currently, rules governing mandatory retirement of physicians are complex and vary across jurisdictions. Nationally, the Canadian Human Rights Act governs mandatory retirement only insofar as physicians are considered *employees* of a federally regulated sector. The Act states that mandatory retirement is *not discriminatory* when a person has "reached the normal age of retirement for employees performing similar types of work."

Provincially/territorially, human rights legislation varies from jurisdiction to jurisdiction. In general, employers are not allowed to discriminate on the basis of age, although some provinces and territories only protect employees to the age of 65. Most physicians however, operate as self-employed business persons, billing provincial Medicare plans on a fee-for-service basis, according to tariffs agreed upon by provincial medical associations. This means that human rights legislation does not protect most physicians. Therefore, while physicians are still free to practice medicine after they reach the age of 65 (i.e. contract to provide medical care to patients, and bill the provincial insurer for insured services), renewal of their admitting privileges depends on the policies or regulations of individual hospitals.

In light of the evidence supporting an existing shortage of physicians, federal and provincial/territorial decision makers should be acutely aware of the detrimental effect mandatory retirement has with regard to health human resource planning initiatives. Currently, 10.7% of practising Canadian physicians are over the age of 65. Many of these physicians practice quite actively. In 2003, a CMA survey indicated that physicians over

65 reported working on average 46 hours per week, excluding on-call responsibilities. To remove this experienced cohort of practitioners from the practice setting would be to further exacerbate the growing medical professional shortage. It is shortsighted to uphold restrictions on the practice of medicine by physicians, solely on the basis of age.

Continuing professional development for practicing physicians throughout their medical careers is mandated by both the College of Family Physicians of Canada and the Royal College of Physicians and Surgeons of Canada as a requirement of maintenance of certification. In a system which self-regulates based on competency, barriers to practice that are age-based are both unnecessary and discriminatory.

The CMA respectfully requests you to follow the lead of your predecessor and raise the issue of mandatory retirement with your provincial/territorial counterparts. There should be no disparity nation wide; age-based barriers to practicing medicine should not be tolerated for physician employees or independent contractors alike. In some cases, federal, provincial and territorial human rights legislation may need to be amended. Equally as important, these concerns must be factored into discussions around health human resource planning.

Thank you for your time and interest in this very important matter. We look forward with anticipation to your response. For your information, a more detailed account of mandatory retirement follows in the addendum to this letter. Should you have any further questions, I would be pleased to discuss this issue in further detail with you and your staff.

Sincerely,

Dr. Sunil Patel
President, Canadian Medical Association

cc: Presidents, Provincial / Territorial Medical Associations

BACKGROUND: MANDATORY RETIREMENT

Preface:

Since its introduction in 1884 by German Chancellor Otto von Bismarck, the age of 65 has become firmly entrenched as “retirement age”. Mandatory retirement can be considered a form of discrimination or bias, insofar as scientific data does not support the principle of retirement on the basis of attainment of a specific chronological age. While human rights legislation governs the mandatory age of retirement for employees (including some physicians) with variations from province to province, the extent to which provincial human rights legislation applies to the mandatory retirement of physicians varies, depending on whether the physician is an employee of the hospital or an independent contractor.

Legislative and regulatory framework:

Human Rights Legislation vis-à-vis Mandatory Retirement

Federal and provincial/territorial human rights legislation govern mandatory retirement for physician employees, depending on whether their employers are under federal or provincial jurisdiction. As most health institutions are under provincial jurisdiction, the vast majority of physician employees are protected by provincial human rights legislation.

Each province and territory has enacted human rights legislation that governs in their respective areas of jurisdiction. The legislation tends to be analogous from one province to the next, but there are differences worth noting. Mandatory retirement constitutes a discriminatory measure for employers under the jurisdiction of seven provinces and territories. Four provinces do not consider mandatory retirement to be discrimination if the employee is 65 years or older. In two provinces, if mandatory retirement is provided for in a retirement or pension plan, it does not amount to discrimination.

Jurisdiction	Provisions governing mandatory retirement age
Canada	Mandatory retirement is not a discriminatory practice when a person has reached the normal retirement age for employees performing the same type of work. Consequently, in that case, the Act allows for mandatory retirement.
Alberta	Mandatory retirement constitutes a discriminatory measure for employers under the jurisdiction of this province.
British Columbia	Older employees are protected until the age of 65 against discrimination based on age. Consequently, employees aged 65 or over cannot file a complaint if they are obliged to retire for that reason.
Manitoba	Mandatory retirement constitutes a discriminatory measure for employers under the jurisdiction of this province.
New Brunswick	Termination of employment provided for in a retirement or pension plan does not constitute a discriminatory measure. In the absence of such a plan, however, employees who are obliged to retire may file a complaint for discrimination based on age, under the legislation on human rights.
Newfoundland and Labrador	Termination of employment provided for in a retirement or pension plan does not constitute a discriminatory measure. In the absence of such a plan, however, employees who are obliged to retire may file a complaint for discrimination based on age. They may use this recourse until the age of 65.

Jurisdiction	Provisions governing mandatory retirement age
Northwest Territories	Mandatory retirement constitutes a discriminatory measure for employers under the jurisdiction of this territory.
Nova Scotia	Mandatory retirement at age 65 does not constitute a discriminatory measure if it is standard in the workplace in question. However, the Human Rights Commission of this province investigates when an employee aged 65 or over is not treated in the same manner as others of the same age where retirement is concerned.
Nunavut	Mandatory retirement constitutes a discriminatory measure for employers under the jurisdiction of this territory.
Ontario	Older employees are protected against age-based discrimination up to the age of 65. Consequently, employees aged 65 or over cannot file a complaint if they are obliged to retire for this reason.
Prince Edward Island	Mandatory retirement constitutes a discriminatory measure for employers under the jurisdiction of this province.
Quebec	Mandatory retirement constitutes a form of discrimination according to the Charter of Human Rights and Freedoms and, more explicitly, is forbidden by the Act Respecting Labour Standards.
Saskatchewan	Older employees are protected against age-based discrimination up to the age of 65. Consequently, employees aged 65 or over cannot file a complaint if they are obliged to retire for this reason.
Yukon	Mandatory retirement constitutes a discriminatory measure for employers under the jurisdiction of this territory.

Employment Status of Practicing Physicians

Most physicians operate as independent contractors, billing provincial Medicare plans on a fee-for-service basis. Human rights legislation therefore does not protect the majority of physicians because the application of the legislation is limited to certain specific relationships, such as the traditional employment relationship. In other words, since physicians are more likely to be engaged by their patients to provide care than by the hospitals in which they provide it, the relationship between physicians and hospitals is more similar to a service contract than to a traditional employment contract. As a result, physicians who are independent contractors are free to practice medicine after they reach the age of 65. Depending on the hospital specific regulatory framework however, physicians may or may not be allowed to maintain their admitting privileges.

Colleges of Physicians and Surgeons

Regulatory bodies that license physicians do not place any restrictions on physician practice based solely on age. The Colleges of Physicians and Surgeons are not involved in administering hospital admitting privileges. None of the provincial or territorial colleges restrict licenses to practice medicine on the basis of a physician's age. Physicians who are employed in a traditional employment or master/servant relationship are covered by applicable human rights legislation, depending on whether their employers are federally or provincially/ territorially regulated. This means that some physicians can be forced into retirement at the age of 65, while others cannot.

Policy Considerations:

The Changing Physician Workforce

Mandatory age-based retirement for health care workers has been a contested policy for almost 25 years. The issue assumes significant value for the CMA membership. Most physicians, operating as independent contractors, are not protected by human rights legislation in terms of retirement. Hospital admitting privileges are administered by the individual institutions, and renewal of such privileges may be subject to hospital policies on mandatory retirement. As more and more physicians choose to work in a traditional employment situation, the lack of human rights protection for physicians in private practice will be thrown in sharp relief.

Health Human Resources

Labour shortages challenge arguments for mandatory retirement. The health sector in particular has been hit hard by human resource shortages, which are predicted to increase as the baby-boom generation begins to retire in 2012. According to a study released by the Institute for Research on Public Policy (IRPP), challenges associated with the aging workforce in Canada will require greater flexibility, by way of removing barriers to labour force participation among individuals nearing retirement.¹

Physician Health and Wellbeing

For many people, employment provides a fundamental sense of dignity and self-worth. Practicing medicine promotes independence, security, self-esteem and a sense of participation in the community. Involuntary termination of employment can cause psychological and emotional distress. Physician malaise is a burgeoning concern and its address has become a strategic priority for the Canadian Medical Association. Protection of physicians, be they employees or independent contractors, from mandatory retirement is a strategy which would see one dimension of physician anxiety diminished and would therefore be supported by the CMA.

Mandatory retirement can have a particularly serious financial impact on physicians. Employer pension plans are often not available in employment relationships which feature part-time or provisional employees. In order to secure or maintain their standard of living upon retirement, physicians must save extensively via RRSPs or private pension plans. Those physicians with family members to support, such as young adults in post secondary education, children with disabilities, or older family members fear that they will not be able to do so if forced to leave the practice of medicine.

Liability Issues

While the threat of malpractice may present as one logical argument in support of a mandatory retirement age, the statistics do not support such a claim. The Canadian Medical Protective Association (CMPA) maintains that there is no significant correlation between physicians' physical age and the corresponding number of lawsuits. Dr. Norman Brown of the CMPA notes that of the over 500 new lawsuits a year, there is not a significant number involving elderly physicians.

¹ Merette, Marcel. (2003) "The Bright Side: A Positive View on the Economics of Aging." Institute for Research on Public Policy. Nov 18/03.

Conclusion:

The public interest is best served by ensuring that all competent physicians, regardless of age, are able to practice medicine. Artificial barriers to practice based on age are simply discriminatory and counter productive in an era of health human resource shortages.