

## McCormick vs. Fasken

This is a case of broad interest to Canadians who are partners in law firms or patent and trade-mark agency firms.

There has been a movement in Canada to protect people from age discrimination and forced retirement.

The question boils down to whether a partner, in a limited liability partnership, is protected by the Human Rights Code.

The case at hand arose from an action taken to the B.C. Human Rights Tribunal by Mr. McCormick, a former partner in the Vancouver office of Fasken, an international law firm, operating as an extra-provincial limited liability partnership registered under the B.C. *Partnership Act*.

McCormick worked at Fasken for his entire legal career beginning in 1970, becoming an equity partner in 1979. He was a party to the Partnership Agreement governing the relationship between all of Fasken's partners.

The retirement provision of the Agreement stated that "Each Equity Partner shall retire as an Equity Partner at the end of the Year in which the Partner reaches the age of 65". When McCormick turned 65 on March 28, 2010, Fasken attempted to invoke the retirement provision.

McCormick was successful at the B.C. Human Rights Tribunal. The Tribunal found that the relationship between Fasken and Mr. McCormick was one of "employment"; hence Mr. McCormick had been discriminated against because of his age. BC Supreme Court upheld the Commission's ruling on judicial review.

At the Court of Appeal level, no employment relationship between the firm and McCormick was found; hence McCormick's complaint was not within the jurisdiction of the Tribunal.

Faskin's Appeal was allowed; the decision of the Tribunal set aside; and McCormick's complaint dismissed.

McCormick then sought leave to appeal to the Supreme Court of Canada, framing the issue as follows:

Whether a substantive analysis of the interpretation of "employment" for the purposes of Human Rights, in a modern context, should be precluded by a threshold test of technical legal form.

Leave was granted. This case is expected to be heard later this year or early in 2014.

*Inter alia*, the arguments before the Supreme Court of Canada will be:

- That the decision of the Court of Appeal creates a new test for determining employment based on the legal form of the relationship and partnership law.
- There is now a direct conflict between human rights law and partnership law.
- That the Court of Appeal decision effectively allows contracting out of human rights law through partnership.

*McCormick v. Fasken Martineau Dumoulin LLP*

