practice for an employer to adopt and apply that industry standard. Consequently employers will usually be able to raise a complete defence to complaints of wrongful termination on the basis of age simply by pointing to the practices of other employers. The Act has a similar exception for a trade union or other employee organization that terminates an individual's membership in the organization (section 9(2)).

There is also a general exception to the Act's prohibition of discrimination in employment that gives limited scope for mandatory retirement policies in relation to certain kinds of jobs. In effect, an employer is permitted to discriminate on the basis of a "*bona fide* occupational requirement" (section 14(a)). To fit within that phrase, a maximum age limit on employment must satisfy the double-barreled test set out by the Supreme Court of Canada in 1982, in a judgment rejecting a fixed retirement age of 60 for firefighters (the *Etobicoke Firefighters* case). The retirement age must have been

> imposed honestly, in good faith and in the sincerely held belief that it is...in the interests of the adequate performance of the job with all reasonable dispatch, safety and economy.

It must also be

> reasonably necessary to assure the efficient and economical performance of the job without endangering the employees and the general public.

The court also noted that this last requirement is not likely to be satisfied simply by evidence that a loss of productivity accompanies aging or, indeed, by any evidence on the effect of age on job performance that is no more than impressionistic.

The onus is clearly on the employer to come up with solid technical and medical evidence to meet the test. If it cannot do so, the employer is not obliged to retain all its older employees until they decide they are ready to retire. The employer has the option of introducing a system of performance testing for all employees that would select out those no longer capable of doing the job. Such a scheme would not offend the *Canadian Human Rights Act* if the testing standards were reasonable in relation to the essential requirements of the job.

The *Canadian Human Rights Act* applies to the federal Crown as employer as well as to private sector employers operating federally regulated undertakings, such as banks and airlines. However, there are two significant limitations in the Act that have the effect of giving special protection to the mandatory retirement policies of the federal government, putting such policies beyond the reach of the Canadian Human Rights Commission:

1. The Act provides that it is not a discriminatory practice if employment is terminated because an individual has reached the maximum age that applies to that employment by law (section 14(b)). Since mandatory retirement in the public sector invariably has its basis in laws of one kind or another, be they statutes, regulations or orders, the Act can have no application to the public sector rules.

2. That part of the Act that includes the prohibition against age discrimination does not apply to any superannuation fund or plan established by an act of Parliament enacted before March 1, 1978 (section 48(1)). Therefore, those retirement ages in the public service that are fixed by the terms of long established statutory superannuation plans may well be beyond question in any complaint proceedings brought under the *Canadian Human Rights Act*.