No. 20747

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

B E T W E E N:

DAVID WALTER McKINNEY, JR. et al.

Appellants

- and -

BOARD OF GOVERNORS OF THE UNIVERSITY OF GUELPH et al, and ATTORNEY GENERAL OF ONTARIO

Respondents

FACTUM SUBMITTED ON BEHALF OF THE APPELLANTS

SACK, CHARNEY, GOLDBLATT
& MITCHELL

Barristers & Solicitors
Suite 1130
P.O. Box 180
20 Dundas Street West
TORONTO, Ontario
M5G 2G8

Jeffrey Sack, Q.C.
(416) 977-6070

Solicitors for the Applicants

SOLOWAY, WRIGHT, HOUSTON
GREENBERG, O'GRADY, MORIN

Barristers & Solicitors
99 Metcalfe Street
OTTAWA, Ontario
K1P 6L7

Robert E. Houston
(613) 782-3222

Ottawa Agent for the Applicants

TO: THE REGISTRAR
Supreme Court of Canada

AND TO: CASSELS, BROCK & BLACKWELL
Suite 2300
130 Adeliade Street West
Toronto, Ontario
M5H 3C2

Attn: S. John Page

Solicitors for the Respondent University of Toronto

AND TO: CAMPBELL, GODFREY & LEWTAS
Suite 3600, Box 46
Toronto-Dominion Centre
Toronto, Ontario
M5K 1C5

Attn: George W. Adams, Q.C.

Solicitors for the Respondent York University

AND TO: TORY, TORY, DesLAURIERS & BINNINGTON
Suite 3200, Box 270
IBM Tower
Toronto-Dominion Centre
Toronto, Ontario
M5K 1N2

Attn: Mary Eberts

Solicitors for the Respondent Laurentian University

AND TO: HICKS MORLEY HAMILTON STEWART STORIE
Suite 1201, Box 371
Royal Trust Tower
Toronto-Dominion Centre
Toronto, Ontario
M5K 1K8

Attn: Christopher Riggs, Q.C.

Solicitors for the Respondent University of Guelph

AND TO: THE ATTORNEY GENERAL OF ONTARIO
18 King Street East
Toronto, Ontario
M5C 1C5

Attn: Janet E. Minor

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PART I - STATEMENT OF FACTS

A. NATURE OF THE APPEALS

1. These are appeals brought on behalf of certain university faculty and one librarian from the decision of the Ontario Court of Appeal, rendered December 10, 1987, in which the majority, Mr. Justice Blair dissenting, dismissed an appeal from the decision of Mr. Justice Gray, rendered October 15, 1986, which itself had dismissed the applications for declaratory and other relief.

2. The applications which are the subject of these appeals allege:

   (a) that section 9(a) of the Ontario **Human Rights Code** (the "**Code**"), which prevents persons aged 65 and over from bringing complaints respecting age discrimination in employment, denies or infringes, and is inconsistent with, the equality rights guaranteed by section 15(1) of the **Charter of Rights and Freedoms** (the **Charter**"), and cannot be demonstrably justified under section 1 of the **Charter**; and

   (b) that the mandatory retirement provisions enacted by the respondent universities are subject to the **Charter**, are contrary to section 15(1) of the **Charter**, and cannot be demonstrably justified under section 1 of the **Charter**.

B. CIRCUMSTANCES GIVING RISE TO THE APPEALS

3. The individual appellants have all been retired or were scheduled to be retired pursuant to mandatory retirement provisions established by each of the respondent Universities. These mandatory retirement provisions require faculty members to retire at age 65, subject only to the University's discretion to continue an individual's employment beyond age 65.

Reasons for Judgment, Ontario Court of Appeal, Case on Appeal, Vol. A., pp. 97-98 and p. 143

4. As the Court of Appeal found, the appellants all have distinguished academic records. Further, none of the respondent Universities raised any grounds for the termination of employment of any of the appellants, either prior to or subsequent to their attaining mandatory retirement age, other than their attaining age 65.

Reasons for Judgment, Ontario Court of Appeal, p. 97

5. As a result of their forced retirement, the appellants have suffered and will suffer severely prejudicial and detrimental effects upon their professional and working lives, including, inter alia:

(a) significant loss of income;

(b) loss of a working environment necessary to support their prior, and planned, level of academic work, including the exclusive use of an office, support staff, computer services, and technical support necessary to carry out a program of academic research;

(c) loss of eligibility for certain internal research grants, and significantly reduced opportunities for obtaining externally administered grants;

(d) loss of the collegial contact and support necessary to sustain an active teaching and research program;

(e) significantly reduced opportunities for involvement with the larger academic community, and interference with opportunities for guest lectureships, participation in symposia, colloquia and contractual or consultative work within their specialized disciplines;

(f) loss of the opportunity to participate in collegial decisions affecting their respective departments, including decisions with respect to the creation of new positions, the offering of tenured appointments and the development of departmental curriculum.

While the specific effect on each appellant varies, the impact of mandatory retirement is uniformly severe insofar as each applicant is, or was at the time of his forced retirement, an active researcher and contributor to academic life both within his own university, and within the academic community at large.

Reasons for Judgment, Ontario Court of Appeal, pp. 98-99

6. The individual appellants filed complaints with the Ontario Human Rights Commission alleging that their mandatory retirement constituted discrimination by reason of age and therefore contravened s. 4 of **Code**. On December 11, 1985, the Chairman of the Commission advised counsel for the appellants that the Commission had decided not to deal with the complaints for the following reasons:

> "The complaint is not within the jurisdiction of the Commission because "age" means an age that is eighteen years or more except in subsection 4(1) of the **Code** which deals with the area of employment where "age" means an age that is eighteen years or more and less than sixty-five years."

However, the Commission has recommended that the **Code** be amended to provide protection to individuals aged 65 and over against age-based employment discrimination.

Reasons for Judgment, **Ontario Court of Appeal**, pp. 99-100
Jones Affidavit, **Case on Appeal**, Vol. 7, Tab 3, Exhibit M.

C. THE DECISION OF THE ONTARIO COURT OF APPEAL

7. In its decision, the majority of the Ontario Court of Appeal held that:

(a) it was restricted to considering the constitutionality of s. 9(a) as it applied to the mandatory retirement of university faculty and librarians;
Reasons for Judgment, Ontario Court of Appeal, pp. 95-96, p. 142

(b) s. 9(a) of the **Code** is inconsistent with s. 15(1) of the **Charter**, since it has a prejudicial and adverse impact on university staff over the age of 65 in comparison with others under that age;
Reasons for Judgment, Ontario Court of Appeal, pp. 117-130

(c) s.9(a) of the **Code** is a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the **Charter**, insofar as it applies the policies enacted by each of the respondent universities;
Reasons for Judgment, Ontario Court of Appeal, pp. 136-53

(d) the **Charter** has no direct application to the respondent universities or to their contracts of employment with the appellant;

Reasons for Judgment, Ontario Court of Appeal, pp. 101-117

8. Mr. Justice Blair dissented, on the ground that s.9(a) of the **Code** cannot be justified under s.1 of the **Charter**. In this regard, Mr. Justice Blair held that s.9(a) of the Ontario **Code** is inconsistent with s.15(1) of the **Charter**, because s. 9(a) denies any protection whatsoever against age discrimination in employment to all persons over age 65. Further, Mr. Justice Blair held that s.9(a) cannot be justified under s.1 of the **Charter**, since there are no standards in s. 9(a) upon which a justification of the denial of protection against age discrimination can be based, and since, by affording no protection against age discrimination in employment after the age of 65, the provisions of s.9(a) of the Ontario **Human Rights Code** do not impair as little as possible the rights guaranteed by s.15(1).

Dissenting Reasons of Mr. Justice Blair, **Case on Appeal**, Vol. A, pp. 153-166

D. FACTS RELATING TO THE CONSTITUTIONAL VALIDITY OF SECTION 9(a) OF THE CODE

9. In the Courts below, the respondents sought to justify s.9(a) of the **Code** by relying upon objectives which they allege are served by mandatory retirement. These objectives include:

(a) avoiding an alleged reduction of employment opportunities for other individuals in the workforce, should mandatory retirement be abolished;

(b) avoiding alleged design and administrative issues relating to pension plans should mandatory retirement be abolished;

(c) avoiding alleged changes to existing personnel policies if mandatory retirement were abolished, including:

(i) "deferred compensation" schemes;

(ii) current practices regarding the dismissal of older workers for cause;

(iii) current monitoring and evaluation practices; and

(iv) planning uncertainty which might result if retirement were voluntary.

The respondents did not lead any evidence to justify s.9(a) of the **Code** insofar as it constitutes a blanket denial of any protection against employment discrimination on the basis of age to all persons aged 65 and over.

10. As submitted below, it is the position of the appellants that s.9(a) of the **Code** cannot be justified solely by reference to mandatory retirement of university faculty and librarians, because s.9(a) applies to all forms of age discrimination in employment, and because, even insofar as it relates to mandatory retirement, s.9(a) applies to all employess regardless of their particular occupation. It is the submission of the appellants, as set out below, that because s.9(a) applies to all forms of age discrimination in employment, s.9(a) of the **Code** cannot be justified under s.1 solely by reference to objectives and evidence pertaining to mandatory retirement. As a result, it is submitted that, as Mr. Justice Blair found, it is unnecessary for this Court, in assessing the constitutional validity of s.9(a) of the **Code**, to review the evidence relating to whether mandatory retirement can be justified. However, to the extent this Court finds it necessary to consider the evidence respecting mandatory retirement, the appellants rely upon the facts set out in sections (i) - (viii) below. In section E below, the appellants set out the facts specifically relating to mandatory retirement of university faculty and librarians; these facts are relevant to the separate challenge to the mandatory retirement provisions enacted by the respondent universities, which depends upon the **Charter** being held to be directly applicable to the respondent universities.

(i) Introduction

11. Mandatory retirement has been described in the following terms by the 1985 Federal Parliamentary Committee on Equality Rights in its Report entitled **Equality for All**:

> "In the view of the Committee, mandatory retirement is a classic example of the denial of equality on improper grounds. It involves the arbitrary treatment of individuals simply because they are members of an identifiable group. Mandatory retirement does not allow for consideration of individual characteristics, even though those caught by the rule are likely to display a wide variety of the capabilities relevant to employment. It is an easy way of being selective that is based, in whole or in part, on stereotypical assumptions about the performance of older workers. In the result, it denies individuals equal opportunity to realize the economic benefits, dignity and self-satifaction that come from being part of the workforce".
>
> Parliamentary Committee on Equality Rights, **Equality for All**, at p. 21

(ii) Productivity of Older Workers

12. Studies concerning productivity of older workers reveal that, in general, older workers are able to perform their jobs competently and effectively. While there obviously are certain biological changes associated with aging, there is no evidence that increasing age is directly related to

performance. Further there is no pattern of higher or lower productivity in any particular age group, and within age groups variability in performance is higher than is the case between age groups.

Reid Affidavit, **Case on Appeal,** Vol. 6, Tab 1, paras. 7-9
Agarwal Affidavit, **Case on Appeal,** Vol. 7, Tab 1, paras. 5, 12-13, and Exhibits B, C and G
U.S. Congress Select Committee on Aging, **Mandatory Retirement: The Social and Human Costs of Enforced Idleness,** Agarwal Cross-Examination, **Case on Appeal,** Vol. 7A, Exhibit 1, p. 34
U.S. Senate Special Committee on Aging, **The Costs of Employing Older Workers,** Krashinsky Affidavit, **Case on Appeal,** Vol. 6, Tab 3, Exhibit C, p. 4, and pp. 58-67
Special Senate Committee on Retirement Age Policies, **Retirement Without Tears,** Krashinsky Affidavit, **supra,** Exhibit D, pp 24-25
Ondrack Cross-Examination, **Case on Appeal,** Vol. 13A, Tab 1, p. 27, Q. 104-105, and p. 42-43, Q. 179-181.
Reid, **"Economic Aspects of Mandatory Retirement: The Canadian Experience"** in (1988) 43 Relations Industrielles 101 at pp. 104-5

(iii) **Inadequacy of Retirement or Pension Income**

13. Many workers are faced with the prospect of being subject to mandatory retirement with an inadequate and insufficient income. As the Special Senate Committee on Retirement Age Policies observed, "there is no doubt that the [private pension plan] system is flawed, with the result that the retirement income from private pensions is grossly deficient for many elderly, retired people." The median income of those aged 65 or over is less than half the median income in Canada, and there is a wide disparity in pension income among individuals aged 65 or over with many individuals having no, or very small, private pension incomes. For example, the two appellants from Laurentian University have a monthly private pension income of $902.45 and $1,020.15 per month, respectively.

Further, women when attaining the age of 65 are likely to have even less access to pension income since a greater proportion are in jobs where they are less likely to be offered pension plan coverage; are more likely to have interrupted work histories, partly as a result of child-care responsibilities, and thereby to have lost pension coverage; and are more likely to have lower lifetime earnings upon which pension benefits are based.

Agarwal Affidavit, **Case on Appeal,** Vol. 7, Tab 1, Exhibit C at pp. 23-37
Agarwal Cross-Examination, **Case on Appeal,** Vol. 7A, pp. 9-18; Exhibit 1 to Cross-Examination, pp. 25-31; Tab 3, Undertakings
Retirement Without Tears, Krashinsky Affidavit, **Case on Appeal,** Vol. 6, Tab 3, Exhibit D, pp. 5-7, and pp. 54-70
Swartz Affidavit, **Case on Appeal,** Vol. 7, Tab 3, para. 24

Swartz Cross-Examination, **Case on Appeal,** Vol. 7B, Tab 1, Undertakings: Social Planning Council, **Old Age Insecurity,** and **Good Pensions for Canadians**, pp. 15-43, and pp. 4-8, respectively, and Dulude, **Women and Pensions**
Chrysler Affidavit, **Case on Appeal,** Vol. 4, para. 34
Roque-Nunez Cross-Examination, **Case on Appeal,** Vol. 1B, pp. 73-76
Ondrack Affidavit, **Case on Appeal,** Vol. 13.1, Exhibit B, pp. 551-54
Human Rights and Aging in Canada, Second Report of the Standing Committee on Human Rights to Parliament, at pp. 36, and **Minutes of Proceedings and Evidence of the Standing Committee on Human Rights,** Issue No. 12, pp. 29-41.

(iv) **Prevalence of Mandatory Retirement**

14. The evidence established that approximately fifty per cent of the labour force in Canada is not subject to mandatory retirement. In fact, this percentage overestimates those presently subject to mandatory retirement, since it is based on employment in a period prior to the abolition of mandatory retirement in Manitoba, Quebec, and Alberta, and prior to the federal government's announcement of the elimination of mandatory retirement for its own employees, referred to in paragraph 32 below.

Gunderson and Pesando Affidavit, **Appeal Book,** Vol. 12, para.2
Reid Affidavit, **Appeal Book,** Vol. 6, para. 4

15. Moreover, even this statistic is not a realistic estimate of the number of employees who would actually continue to work if mandatory retirement were abolished. The number of employees who would continue in employment beyond age 65, but cannot at present because they are constrained by mandatory retirement provisions, is a "miniscule fraction of the labour force (about one-fifth of one percent)" (Reid Affidavit, para. 4). Two studies which were exhibits to the affidavit of Professor David Foot, a demographer called by the respondents, observed respectively that "mandatory retirement is not a major factor in the decision to withdraw from the workforce" (Exhibit "I", p.77), and that "mandatory retirement affects only an insignificant fraction of the workforce" (Exhibit "J", p.9). The available evidence for the United States, which shows that a relatively small number of individuals continued to work beyond age 65 following amendments to the **U.S. Age Discrimination in Employment Act**, is consistent with the Canadian data and estimates.

Reid Affidavit, **Appeal Book,** Vol. 6, Tab 1, para. 4 and para. 6
Foot Affidavit, **Appeal Book,** Vol. 13.2, para. 31, Exhibit I, pp. 84-85; Exhibit J, p.9
Gunderson and Pesando Affidavit, **Appeal Book,** Vol. 12, Exhibit F, pp. 12-20
Foot Cross-Examination, **Appeal Book,** Vol. 13A, Tab 2, pp. 23-28
Agarwal Cross-Examination, **Appeal Book,** Vol. 7A, p. 27

Krashinsky Affidavit, **Appeal Book**, Vol. 6, Tab 3, paras. 32-33
Reid, **Economic Aspects of Mandatory Retirement, supra**, pp. 103-4

(v) Unemployment Matters

16. The evidence of four economists called as expert witnesses by the appellants (Professors Reid, Riddell, Rosenbuth and Krashinsky) was that

(a) neither economic reasoning nor empirical evidence supports the hypothesis that the abolition of mandatory retirement would reduce employment opportunities for new entrants to the labour force, or for younger workers; and

(b) any changes in retirement behaviour due to banning mandatory retirement would not reduce total employment opportunities in the economy in the long term. Indeed, the empirical data reviewed in Professor Riddell's affidavit discloses that growth in labour force participation generally corresponds with overall growth in employment opportunities.

Riddell Affidavit, **Case on Appeal**, Vol. 6, Tab 2, para. 9-10
Reid Affidavit, **Case on Appeal**, Vol. 6, Tab 1, paras. 26-31
Rosenbluth Affidavit, **Case on Appeal**, Vol. 6, Tab 4, paras. 11-15
Swartz Affidavit, **Case on Appeal**, Vol. 7, Tab 3, paras. 3-15
Krashinsky Affidavit, **Case on Appeal**, Vol. 6, Tab 3, paras. 19-22.

17. Professor Foot, a demographer called by the respondents, described any concern respecting youth unemployment as "a misplaced priority", and testified that unemployment in the age group 16-24 had actually decreased, and was unlikely to be a problem given existing demographic patterns.

Cross-Examination, **Case on Appeal**, Vol. 13A, p. 66, Q. 305; p. 47, Q. 221 and 222; p. 56, Q. 267
Riddell Affidavit, **Case on Appeal**, Vol. 6, Tab 2, para. 16; and Exhibit C

18. Professors Gunderson and Pesando (economists who filed a joint affidavit on behalf of the respondents) could only state in their affidavit (paragraph 12) that the elimination of mandatory retirement could adversely affect youth unemployment, but even that evidence was inconsistent with opinions expressed by both of them in published articles written prior to the commencement of this litigation, in which they had clearly stated that economists could not say that the elimination of mandatory retirement would adversely affect youth unemployment, and that indeed it could be argued that its abolition might result in a **decrease** in youth unemployment. As summarized by

Professor Pesando at p. 23 of one of those articles, attached as Exhibit E to his joint affidavit with Professor Gunderson:

> "The argument that ending compulsory retirement would reduce the job opportunities available in the labour force is not substantiated by economic analysis, and should not be accorded the central role in the debate which it now enjoys".

Gunderson and Pesando Affidavit, **Case on Appeal,** Vol. 12, para. 12; Exhibit B, pp. 358-59; Exhibit C, pp. 11-12; Exnibit E, pp. 21-23
Pesando Cross-Examination, **Case on Appeal,** Vol. 12A, pp.43-56

19. The four economists called by the appellants, and Professors Gunderson and Pesando, all rejected the "lump of labour" fallacy, which without foundation assumes that the economy is composed of a fixed number of jobs such that the continued employment of an older worker beyond age 65 would have the effect of eliminating a job for a younger worker. As Professor Pesando himself has pointed out:

> "First-year economics students have always been warned of the 'lump of labour fallacy', the mistaken notion that there exists a fixed number of jobs that might be allocated among competing workers . . . The postponement of retirement by elderly workers does not imply a corresponding reduction of job opportunities available to others". [his emphasis]

Reid Affidavit, **Case on Appeal,** Vol. 6, Tab 1, paras. 26-31
Riddell Affidavit, **Case on Appeal,** Vol. 6, Tab 2, paras. 3-8
Rosenbluth Affidavit, **Case on Appeal,** Vol. 6, Tab 4, paras.11-12
Krashinsky Affidavit, **Case on Appeal,** Vol. 6, Tab 3, paras. 19-22
Gunderson and Pesando Affidavit, **Case on Appeal,** Vol. 12, Exhibit E, pp. 21-22
Agarwal Cross-Examination, **Case on Appeal,** Vol. 7A, Tab 1, at p. 37

20. In his affidavit, Professor Foot admitted that his estimates of the effect of abolishing mandatory retirement on overall employment rates were based on the assumption that each person staying in the labour force corresponded to the loss of a job elsewhere. As a result, his estimates were based on the "lump of labour" fallacy, which was uniformly rejected by all of the other economists called by the appellants and respondents.

Foot Affidavit, **Case on Appeal,** Vol. 13.2, para. 48 (a demographer by the respondents)
Foot Cross-Examination, **Case on Appeal,** Vol. 13A, Tab 2, pp. 39-50

21. In any event, even assuming that one other person would be unemployed if another person elected to work beyond age 65 (the "lump of labour" fallacy), as Professor Foot does, Professors Foot, Riddell, and Rosenbluth agreed that the effect of the abolition of mandatory retirement on the number of people in the labour force would be "trivially small" when viewed in the context of

increased women's participation, immigration levels, and demographic adjustments attributable to the "baby boom effect".

Riddell Affidavit, **Case on Appeal,** Vol. 6, Tab 2, Exhibit B, p. 79
Rosenbluth Cross-Examination, **Case on Appeal,** Vol. 6B, p.12
Foot Cross-Examination, **Case on Appeal,** Vol. 13A, Tab 2, p. 52

22. As noted in paragraph 15 above, a relatively small number of individuals would be likely to continue to work past age 65, if mandatory retirement were abolished, and even these individuals would be likely to work only for a relatively short period of time. Estimates of the number of such individuals ranged from 0.1% of the labour force to 0.4% of the labour force (from 5,000 to 20,000 individuals). In short, the preponderance of the evidence was that any labour market adjustment which might result from individual employees choosing to work beyond age 65, should mandatory retirement be abolished, would be transitional, of very limited duration, and would not likely be even "statistically detectable". In any event, as Professor Reid observed in paragraph 29 of his affidavit, retention of mandatory retirement does not reduce the severity of the overall unemployment problem, but at most simply redistributes unemployment from younger to older workers.

Krashinsky Cross-Examination, **Case on Appeal,** Vol. 6A, Tab C, pp. 82-84, 166-67
Riddell Cross-Examination, **Case on Appeal,** Vol. 6A, Tab B, p. 6
Rosenbluth Cross-Examination, p. 116-11.
Reid, **Economic Aspects of Mandatory Retirement, supra,** at pp. 109-110

(vi) **Pension Matters**

23. Mr. Peter Hirst, an expert witness called by the appellants, who testified concerning the effect of the abolition of mandatory retirement on pension plans, has over twenty years experience and expertise in the pension business, including fifteen years as a pension actuary. As President of a company which administered pension funds with assets in excess of $500 million, he has had experience with the administration of pension plans after legislation in Manitoba and Quebec abolished mandatory retirement in those provinces. He has also written and lectured extensively on pension and retirement programs.

Hirst Affidavit, **Case on Appeal,** Vol. 7, Tab 2, paras. 1-3, and Exhibit A

24. Hirst testified, and his evidence was not challenged in cross-examination or in evidence filed by the respondents, that:

(a) the abolition of mandatory retirement would not in any way affect the financial stability or security of pension plans; (Hirst Affidavit, para. 6, and Cross-Examination, **Case on Appeal**, Vol. 7A, Tab A, pp. 16-17)

(b) pension plans require only a normal retirement age, not a mandatory retirement age, and in that regard many plans presently provide for deferred retirement; (Hirst Affidavit, para. 12)

(c) the elimination of mandatory retirement would not pose any real difficulties for public pension plans; (Hirst Affidavit, para. 21)

(d) there have been no difficulties in the design or operation of pension plans in Manitoba or Quebec, and pension plans continue to function effectively in those jurisdictions following the abolition of mandatory retirement; (Hirst Affidavit, para. 23)

(e) any additional costs as a result of the abolition of mandatory retirement "are not material, and are likely to pale into insignificance" compared to costs associated with legislative changes such as the amendments to the **Ontario Pension Benefits Act**; (Hirst Affidavit, para. 11) and;

(f) a significant number of pension plans, namely "money purchase plans", would not be affected at all by the abolition of mandatory retirement because such plans merely define specific contributions, which with accumulated interest purchase an annuity whenever the employee retires. (Hirst Affidavit, para. 5)

Professor Pesando, the only respondents' witness with expertise in the area of pensions, agreed with Hirst's conclusion that "the issues relating to pension plans can be resolved without adversely affecting the financial stability of those plans and without affecting the financial security they provide".

Hirst Affidavit, **Case on Appeal**, Vol. 7, Tab 2
Hirst Cross-Examination, **Case on Appeal**, Vol. 7B, Tab 7
Riddell Cross-Examination, **Case on Appeal**, Vol. 6A, Tab B, p. 23
Hirst Affidavit, **Case on Appeal**, Vol. 7, paras. 6 and 11
Pesando Cross-Examination, **Case on Appeal**, Vol. 12A, pp. 3-4, 146, 148, and 149

(vii) **Personnel Policies**

(a) **"Deferred Compensation"**

25. The respondents submit that, if mandatory retirement were abolished, this would prevent employers from negotiating "deferred compensation" schemes, whereby their employees are paid less in their earlier years and more in their later years than their productivity warrants, in contrast to a wage system based upon current productivity. However, as acknowledged in cross-examination by Professor Pesando, there is no empirical evidence that such schemes are typical for the Ontario workplaces or that they are consciously or deliberately negotiated by employers and employees. Indeed, Vice-President Farr of York University expressly disclaimed that deferred compensation was a conscious or deliberate policy of the university and stated that he had not even considered whether such a policy would serve the University's objectives. Even as a theory, the notion of deferred compensation schemes is of very recent origin. The theory was not referred to in a text entitled Labour Market Economics, published in 1980 by Professor Gunderson.

Pesando Cross-Examination, **Case on Appeal**, Vol. 12A, Tab 1, pp. 6-9; Q. 26-36; p. 110, Q. 387; p. 119, Q. 417-421; and p. 140, Q. 490.
Reid Affidavit, **Case on Appeal**, Vol. 6, Tab 1, para. 20
Reid Cross-Examination, **Case on Appeal**, Vol. 6a, Tab A, pp. 18-20, Q. 59-62; pp. 38-39, Q. 111-117
Farr Cross-Examination, **Case on Appeal**, Vol. 3A, pp.115-117, Q. 629-37
Ferguson Cross-Examination, **Case on Appeal**, Vol. 5, p. 81, Q. 493-494
Gunderson Cross-Examination, **Case on Appeal**, Vol. 12A, Tab 4, p. 5, Q. 17-20

26. In any event, even if deferred compensation schemes do exist in some workplaces, and were of benefit to employers and employees, the evidence, including that of Professors Gunderson and Pesando, is that mandatory retirement is not necessary in order for such schemes to exist. Further, many employees are presently subject to mandatory retirement provisions in establishments where the employer has not implemented any deferred compensation scheme.

Gunderson-Pesando Affidavit, **Case on Appeal**, Vol. 12, para. 18 and 26
Pesano Cross-Examination, **Case on Appeal**, Vol. 12A, pp. 75-77, Q. 276-284; p. 110, Q. 384-385; p. 134, Q. 467-468
Reid Affidavit, **Case on Appeal**, Vol. 6, Tab 1, para. 21-23
Reid Cross-Examination, **Case on Appeal**, Vol. 6a, Tab A, pp. 18-19, Q. 59-62, and p. 38, Q. 110.
Rosenbluth Cross-Examination, **Case on Appeal**, Vol. 6B, p. 57, Q. 285

27. In addition, a basic assumption of deferred compensation is that a worker remains with a single employer throughout his or her working life until mandatory retirement age, an assumption

inconsistent with the evidence that over 70% of workers aged 55 will leave employment with their employer before a normal retirement age of 65, and that Canadian workers make approximately seven job changes during the course of their working lives. No explanation was offered as to how the theory of deferred compensation takes into account the majority of employees who do not stay with one employer over their working life.

Agarwal Affidavit, **Case on Appeal**, Vol. 7, Tab , para. 19
Agarwal Cross-Examination, **Case on Appeal**, Vol. 7A, Tab A, pp. 76-77, Q. 340-342
Pesando Cross-Examination, **Case on Appeal**, Vol. 12A, p. 140, Q. 489; p. 118, Q. 412-414
Krashinsky Affidavit, **Case on Appeal**, Vol. 6, Tab 3, Exhibit "B", "Retirement without Tears", p. 61
Reid Affidavit, **Case on Appeal**, Vol. 6, Tab A, para. 32
Reid Cross-Examination, Case on Appeal, Vol. 6A, Tab A, pp. 19-20, Q. 61; pp. 37-38; Q. 110

28. The inability of the theory of deferred compensation to take this evidence of work history into account is significant; only if the employee is with the same employer later in his working life will the employee be paid in excess of productivity and recover what has been lost by having been paid lower wages during much of his or her earlier working life. Further, the theory of deferred compensation assumes that employees are prepared to bear all the risks associated with being paid less now by an employer in return for being paid more later, e.g. risks of lay-off, death, disability, plant shut-down, plant bankruptcy, technological change, change in ownership, change in personnel policies, etc.

Pesando Cross-Examination, **Case on Appeal**, Vol. 12A, pp. 111-118, Q. 390-410
Reid Affidavit, **Case on Appeal**, Vol. 6, para. 32

(b) **Dismissal of Older Workers**

29. Contrary to the respondents' assertion in the Courts below, there was only speculative and impressionistic conjecture that employers continue to employ non-productive employees because they can presently be mandatorily retired at age 65, or that employers might terminate such employees before age 65 should mandatory retirement be abolished. There was no evidence to support this proposition based on experience in other jurisdictions without mandatory retirement, or experience in workplaces in Ontario without mandatory retirement.

Swartz Affidavit, **Case on Appeal**, Vol. 7, Tab 3, para. 18-20
Swartz Cross-Examination, **Case on Appeal**, Vol. 7A, Tab 3, pp. 71-74
Gunderson-Pesando Affidavit, **Case on Appeal**, Vol. 12, Exhibit "H"
Agarwal Affidavit, **Case on Appeal**, Vol. 7, Tab 1, para. 14

(c) **Evaluation and Monitoring**

30. With respect to the respondents' position that the abolition of mandatory retirement will result in increased frequency of evaluations and increased monitoring of employees, the evidence was that:

(a) such increase is occurring regardless of mandatory retirement because of other factors such as employment equity concerns, human rights legislation, pay equity, and employer concerns about productivity;

Swartz Affidavit, **Case on Appeal**, Vol. 7, Tab 3, para. 18
Ondrack Cross-Examination, **Case on Appeal**, Vol. 13A, pp. 28-29, Q. 109-112

(b) most employers would hardly find it worthwhile to change their personnel policies, including evaluations and monitoring, solely as the result of the abolition of mandatory retirement, given the small numbers of employees who would work past a normal retirement age, and the relatively short period of time that such employees would be working;

Reid Affidavit, **Case on Appeal**, Vol. 6, Tab 1, para. 34

(c) even if deferred compensation schemes did exist, according to the theory of deferred compensation, it is assumed that there will be monitoring of employee performance, and that a worker's failure to meet performance standards will "be detectable immediately". Moreover, under the deferred compensation theory, the employer clearly has a significant incentive to engage in constant monitoring, in order to avoid the continued employment of an employee during the period in which the employee is being paid more than his or her productivity;

Pesando Cross-Examination, **Case on Appeal**, Vol. 12A, Tab 1, pp. 83-91, Q300-318; and Undertaking, Tab 3
Reid Affidavit, **Case on Appeal**, Vol. 6A, Tab 1, para. 35
Rosenbluth Affidavit, **Case on Appeal**, Vol. 7, Tab 4, para. 18-19

(d) there was no evidence of any increase in evaluation and monitoring in Ontario workplaces without mandatory retirement, or in those jurisdictions where mandatory retirement has been abolished.

(d) **Planning Considerations**

31. The evidence is that the effect, if any, of the abolition of mandatory retirement on employee or employer planning would be insignificant, particularly in view of the numerous other factors and variables which presently affect planning decisions (e.g. economic conditions, illness, early retirement).

Ondrack Cross-Examination, **Case on Appeal**, Vol. 13A, pp. 58-62, Q. 257-281
Pesando Cross-Examination, **Case on Appeal**, Vol. 12A, pp. 65-67, Q. 241-249
Swartz Affidavit, **Case on Appeal**, Vol. 7, Tab 3, paras. 16-17, 26-27
Swartz Cross-Examination, **Case on Appeal**, Vol. 7B, Tab 6B, p. 59, Q. 272; p. 98, Q. 529
Rosenbluth Affidavit, **Case on Appeal**, Vol. 6, Tab 4, para. 23
Rosenbluth Cross-Examination, **Case on Appeal**, Vol. 6B, pp. 81-83, Q. 390-396
Reid Affidavit, **Case on Appeal**, Vol. 6, Tab 1A, para. 32-33
Reid Cross-Examination, **Case on Appeal**, Vol. 6A, Tab A, pp. 45-46, Q. 137-138; p. 36, Q. 107
Krashinsky Affidavit, **Case on Appeal**, Vol. 6, Tab 3, paras. 25, 28
Agarwal Affidavit, **Case on Appeal**, Vol. 7, Tab 1, para. 20

(viii) **Evidence of the Effect of The Abolition of Mandatory Retirement in other Jurisdictions**

32. The provinces of Manitoba, Quebec and Alberta have all enacted legislation to provide protection to employees beyond the age of 64 from discrimination because of age in employment, thereby protecting employees against mandatory retirement. The federal government has eliminated mandatory retirement for its own employees, and announced that the **Canadian Human Rights Act** will be amended to effectively abolish mandatory retirement in the federal private sector. In the United States, Congress in 1978 extended protection against employment discrmination to employees to age 70, and in 1986 removed the age 70 cap on age discrimination in employment altogether, with a transitional provision for university faculty which expires in 1993.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 4
Savage Affidavit, **Case on Appeal**, Vol. 9, Tab 1, para. 27-28
Age Discrimination in Employment Amendments of 1986, 99th Congress of the United States of America, Second Session

33. The information received by the Federal Parliamentary Committee on Equality Rights indicated that "there have been no serious problems in provinces which prohibited discrimination with no upper age limit". The available data from Quebec shows that the abolition of mandatory retirement has had an insignificant effect on the number of people working beyond age 65, since, consistent with general employment trends in Canada, employees continue to prefer earlier rather

than later retirement. Moreover, there was no evidence from other jurisdictions in Canada or the United States, where mandatory retirement has been abolished, to support the justifications offered for mandatory retirement by the respondents. Further there was no evidence that there are any adverse consequences in the approximately fifty per cent of workplaces in Ontario without mandatory retirement.

Boyer Committee Report, Savage Affidavit, **Case on Appeal**, Vol. 9, Tab 2, Exhibit G, p. 20
Gunderson and Pesando Affidavit, **Case on Appeal**, Vol. 12, Exhibit "M", at p. 5 and Annex 1, pp.1-4

E. FACTS RELATING TO APPLICATION OF THE CHARTER TO THE RESPONDENT UNIVERSITIES

(i) Statutory Framework and Powers of the Respondent Universities

34. Each respondent university was established by an Act of the Legislature of Ontario. These statutes, which have been amended periodically and vary somewhat from university to university, set out the powers, functions, privileges, and governing structure of the universities, by specifying, inter alia, (i) the objects and powers of the university, including the power to determine the employment conditions of faculty and librarians; (ii) the structure, composition and powers of the various governing bodies of the university; (iii) the degree-granting authority of the university; (iv) exemption or protection of university property from taxation or expropriation. Further, the statutes provide for the vesting of university property, the benefit of Crown limitation periods, and the imposition of reporting requirements. The Legislature has also enacted the **University Expropriation Powers Act**, which explicitly confers on each university in Ontario the authority to expropriate property, and the **Degree Granting Act**, which restricts those bodies which can operate a university and grant university degrees to the fifteen universities in Ontario.

The University of Toronto Act, 1971, S.O. 1971, c.56
York University Act, 1965, S.O. 1965, c. 143
The Laurentian University of Sudbury Act, S.O. 1961, c. 151
University of Guelph Act, S.O. 1964, c. 120
The University Expropriation Powers Act, R.S.O. 1980, c. 515
Degree Granting Act, S.O. 1983, c. 36

(ii) The Origins of The Respondent Universities

35. The University of Toronto was created by the Legislature as the "provincial university" in 1849. The Royal Commission on the University of Toronto, appointed by the Lieutenant-Gov-

ernor to, inter alia, report upon the government of the University of Toronto, reiterated in 1906 that the University was "the provincial university", "essentially the creation of the state", and "a state institution", the maintenance of which, as the "crown of the educational system" was "a matter of supreme interest and importance" to the Province. The Commissioners recommended that the management of the university should be assumed by a board of governors appointed by the provincial government to ensure that the university was free from inappropriate political pressure. Professor Horn, a historian, testified that the internal autonomy granted to the provincial university was not intended to change its status to a private institution, but rather to enable it to act in the public interest more effectively.

Savage Affidavit, **Case on Appeal,** Vol. 9, Tab 2, paras. 4-5
Horn Affidavit, **Case on Appeal,** Vol. 11, Tab 3, paras. 4-8
Harris "The Establishment of a Provincial University in Ontario", in Horn Affidavit, **supra,** Exhibit B
Fleming, **Post-Secondary and Adult Education**, in Horn Affidavit, **supra,** Exhibit E, pp. 142-145

36. With respect to the origins of the University of Guelph, all of its constituent elements (the Ontario Agricultural College, the Ontario Veterinary College and the McDonald Institute) originally operated under the direct control of the provincial Department of Agriculture, and faculty members were provincial civil servants. In 1964 the provincial government decided to create a new university in Guelph, using the existing colleges as a nucleus, and implemented its decision by passing the **University of Guelph Act.**

Horn Affidavit, **Case on Appeal,** Vol. 11, Tab 3, paras. 13-14
Fleming, in Horn Affidavit, **supra,** Exhibit E, pp. 101-103

37. Sacred Heart College, established as a Roman Catholic and bilingual classical college in 1913, was changed by an Act of the Legislature into the University of Sudbury in 1957, and subsequently became Laurentian University when the Legislature passed the **Laurentian University Act** in 1960. The new university was required to become non-denominational in order to qualify for provincial grants.

Horn Affidavit, **Case on Appeal,** Vol. 11, Tab 3, paras. 15-16
Fleming, in Horn Affidavit, **supra,** Exhibit E, p. 114

38. York University was established in 1959 as an affiliate of the University of Toronto which donated the land for its first campus. The affiliation ended by mutual agreement in 1965, when the provincial government introduced the **York University Act.** In 1962, the government donated

a 475 acre property in North York, where York University is now located, and between 1964 and 1970 the government provided the vast majority of the capital necessary to finance York's expansion.

Horn Affidavit, **Case on Appeal**, Vol. 11, Tab 3, paras. 17-18
Fleming, in Horn Affidavit, **supra**, Exhibit E, pp. 202-204
Farr Cross-Examination, **Case on Appeal**, Vol. 3A, pp. 19-21

(iii) The Growth of the Ontario University System

39. A substantial increase in both federal and provincial government funding brought about the expansion of the Ontario university system after World War II. This funding increase was the result of deliberate government policy to increase access to university education, and to utilize the university system to respond to scientific advances elsewhere in the world. The universities established since World War II were created directly in response to this public policy calling for university expansion.

Savage Affidavit, **Case on Appeal**, Vol. 9, Tab 2, para. 5

40. In the late 1950's, the government of Ontario became concerned that the existing university system could not meet the government's objective of increased accessibility to universities, and that the province's economic development would be slowed down as a consequence. The creation of new universities became a matter of priority for the Ontario government. The Committee on University Affairs was formed in 1958 as an advisory body to the provincial government, and was expanded in 1960. In 1964 a provincial Department of University Affairs was created. By the late 1960's a provincial university system had clearly taken shape in Ontario, consisting of older institutions which had become non-denominational in order to receive public funding and support, and new universities which came into being by direct government action.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 12
Horn Affidavit, **Case on Appeal**, Vol. 11, Tab 3, paras. 12 and 21
Fleming, in Horn Affidavit, **supra**, Exhibit E, pp. 18-85

41. In April, 1969, the Ontario Government established the Commission on Post-Secondary Education in Ontario to, inter alia, ensure the effective further development of higher education in accordance with the needs and resources of the Province. In its final report, the Commission attempted to balance the need for institutional autonomy with the public responsibilities of the system. As the Commission stated:

> "The system is almost wholly public and publicly funded. It is already shaped to serve a variety of social needs in specialized kinds of education; it is already under government

supervision through the ultimate control of the purse; and it is already widely open to public criticism for failing to meet this or that public end of job training and provision of services, whether through research or some other means. Yet it also still reflects urgent desires for a large measure of independence in the intellectual and pedagogical life of its institutions. The answer to this dilemma must be a new working out of compromise to meet the needs of the future."

Horn Affidavit, **Case on Appeal,** Vol. 11, Tab 3, para. 22-23

42. The nature of the university system by 1970 has been described in Fleming's study of the development of the relationship between the provincial government and Ontario universities in the following terms:

"During the 1950s and 1960s most of the universities of Ontario experienced a profoundly significant change in status. In effect, they became the means of discharging a publicly assumed responsibility for post-secondary education. That is, they became an extension of the public educational system."
Fleming, in Horn Affidavit, **supra,** Exhibit E, pp. 18-21
Horn Affidavit, **Case on Appeal,** Vol. 11, Tab 3, paras. 23-24

43. The Legislature of Ontario has established numerous government commissions and task forces to develop public policy for the Ontario university system. It has exercised its responsibility and authority to shape the structure of that system and to effect changes to promote such public policy goals as accessibility, enrollment, quality, expansion of the university system, allocation of funds to and among universities, and the distribution of funds among the various programs offered by universities.

Jones Affidavit, **Case on Appeal,** Vol. 9, Tab 3, para. 19
Horn Affidvit, **Case on Appeal,** Vol. 11, Tab 3, para. 22
Bovey Commission Report, Sibley Affidavit, **Case on Appeal,** Vol. 14, Exhibit B, Terms of Reference
Minister of Colleges and Universities, "Reshaping of University System", Jones Affidavit, **supra,** Exhibit H
Farr Cross-Examination, **Case on Appeal,** Vol. 3A, Part I, Tab F
Chrysler Cross-Examination, **Case on Appeal,** Vol. 4A, Q. 90-92
Cook Cross-Examination, **Case on Appeal,** Vol. 2A, Tab 1, pp. 31-32, Q. 178

44. Professor Horn testified that Ontario universities are part of a public system of higher education and are regarded by the Ontario government as instruments of public policy, although they are permitted a certain measure of autonomy in their internal affairs to enable them to perform their public functions effectively, subject always to ultimate public supervision and control.

Horn Affidavit, **Case on Appeal,** Vol. 11, Tab 3, para. 28
Horn Cross-Examination, **Case on Appeal,** Vol. 11A, Tab C, pp. 16-18
Jones Affidavit, **Case on Appeal,** Vol. 9, Tab 3, para. 19

(iv) **The Operation of the Ontario University System**

(a) **Operational Funds**

45. The vast majority of university operating funding comes directly from, or is effectively controlled or limited by, the Ministry of Colleges and Universities (the "Ministry"), pursuant to the **Ministry of Colleges and Universities Act**, R.S.O. 1980, c. 272. In this regard, provincial government grants account for the following proportion of the operating funds of the respondent universities: Guelph, 78.9%; Laurentian 76.8%; U of T, 76.8%; York, 68.8%. Furthermore, the Ministry effectively controls the second largest source of operating funds, tuition fees, as set out more fully in paragraph 53 below.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, Exhibit F
Farr Cross-Examination, **Case on Appeal**, Vol. 3A, p. 29, Q. 132

46. Pursuant to section 3(3) of the **Ministry of Colleges and Universities Act**, the Lieutenant Governor in Council has appointed an advisory committee, the Ontario Council on University Affairs ("OCUA"). One of its functions is to make annual funding recommendations to the government. However, it is the Ontario government which determines the global operating grant and, in the last ten years, has not followed the recommendations of OCUA, assuming itself sole responsibility for determining the amount of operating funds to be provided to the Ontario university system.

DesRosiers Affidavit, **Case on Appeal**, Vol. 14, paras. 7-9
DesRosiers Cross-Examination, **Case on Appeal**, Vol. 14A, Q. 86-103

47. Operating grants to individual universities are calculated according to the Ontario operating grants formula (the "formula") which is used to determine each university's share of the global grant. The formula is contained in the Ministry's Ontario Operating Formula Manual (the "Manual"). The purpose of the formula, as stated in the Manual, is to obviate the necessity for the government's detailed scrutiny of university operating budgets, so that the government can turn more of its attention and energy to more important matters such as the overall level of support, the co-ordination of long-range planning, and the impact and prediction of enrollment patterns in the future.

Ontario Operating Formula Manual, DesRosiers Affidavit, **Case on Appeal** Vol. 14, Exhibit C, pp. 2-3
DesRosiers Cross-Examination, **Case on Appeal**, Vol. 14A, Tab 4, p. 21, Q. 109

48. The government imposes specific restrictions on the use of operating funds, including a prohibition on the use of such funds for assisted or sponsored research, principal and interest payments on capital indebtedness, student aid, ancillary enterprises, and for capital purposes.

Ontario Operating Formula Manual, DesRosiers Affidavit, **supra**, Exhibit C, p. 2
DesRosiers Cross-Examination, **Case on Appeal**, Vol. 14A, p. 20, Q. 105

49. The government also sets enrollment standards for the purpose of determining eligibility for funding. The operating grants are determined on the basis of student enrollment, but the government specifies which students are to be included in the "enrollment" entitlement. In this respect, universities are required to submit annual audited statements to the Minister.

Ontario Operating Formula Manual, DesRosiers Affidavit, **supra**, Exhibit C, pp. 36 and 59
DesRosiers Affidavit, **Case on Appeal**, Vol. 14, para. 11

(b) **Capital Grants**

50. Operating grants cannot be used by universities for capital projects. Capital grants from the provincial government provide the vast majority of funds for capital expenditures by Ontario universities. Capital projects must be approved by the Ministry to qualify for public funding. In addition, capital grants are earmarked by the Ministry for specific projects, and cannot be used for other purposes or transferred to other projects. Universities submit a ranked list of capital projects for which public funding is sought, but the provincial government determines which projects are funded, and often disregards the university's priorities with respect to any particular capital project.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 15
Finlayson Affidavit, **Case on Appeal**, Vol. 8, Tab 2, para 6
Cook Cross-Examination, **Case on Appeal**, Vol. 2A, Tab 1, Q. 150, 156, 157
Ferguson Cross-Examination, **Case on Appeal**, Vol. 5A, Q. 140-149
DesRosiers Cross-Examination, **Case on Appeal**, Vol. 14A, Tab 4, Q. 93-99
Farr Undertakings, **Case on Appeal**, Vol. 3, Part II, Tab N

(c) **Special Funds**

51. In addition to operating and capital grants, the government of Ontario also earmarks special grants to universities designed to meet specific public policy objectives in the university system. These special grants include Northern grants (designed to promote university accessibility in Northern Ontario), Bilingual grants (designed to promote bilingual programs), and Differentiation

grants (designed to ensure that certain universities remain financially viable). The government has also established an employment equity fund to promote the recruitment of female faculty.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 16
DesRosiers Cross-Examination, **Case on Appeal**, Vol. 14A, Tab 4, pp. 38-39

52. Further, the government of Ontario recently established the Excellence Fund, designed to promote research, the acquisition of computer and library equipment, and hiring of new faculty. Projects and proposals for these funds are submitted to the government for approval, and a special form of accounting for these funds is required of universities. In addition, on May 26, 1986, the government announced a commitment of $84 million to the University Faculty Renewal Program which would support the appointment of 500 new faculty over a five-year period.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 17
Statement by Minister of Colleges and Universities, Hansard, May 26, 1986, p. 835

(d) **Tuition Fees**

53. The other primary source of university revenue is tuition fees, which the province regards as an important governmental concern relating to the question of accessibility. The government has established a "formula tuition fee" such that any revenue derived by the university as a result of a tuition fee in excess of 110 per cent of the formula fee is subtracted from the operating grant. This formula tuition fee, as the Vice-President of York University recognized in cross-examination, is "an influence which is very close to being determinative" of tuition fees in the Ontario university system.

Horn Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 25
Ontario Operating Formula Manual, DesRosiers Affidavit, **Case on Appeal**, Vol. 14, Exhibit C - 4
Chrysler Cross-Examination, **Case on Appeal**, Vol. 4A, pp. 9-10
Ferguson Cross-Examination, **Case on Appeal**, Vol. 5A, pp. 25-26
Farr Cross-Examination, **Case on Appeal**, Vol. 3A, p. 33, Q. 157, p. 35, Q. 168
DesRosiers Cross-Examination, **Case on Appeal**, Vol. 14A, p. 37, Q. 202-204

(e) **New Programs**

54. All new graduate and professional programs, and undergraduate programs outside the core arts and science disciplines, are eligible for public funding only if specifically approved by the Ministry on recommendation from OCUA. Further, the government requires that OCUA to submit an annual report on new undergraduate programs in the core arts and sciences to ensure

that universities manage their public funds in a fiscally responsible manner, and are seen by the public to be doing so. Virtually no programs are offered by Ontario universities which do not have government funding.

Jones Affidavit, **Case on Appeal,** Vol. 9, Tab 3, para. 18
DesRosiers Affidavit, **Case on Appeal,** Vol. 14, paras. 16-19
Farr Cross-Examination, **Case on Appeal,** Vol. 3A, Q. 169
OCUA Advisory Memorandum, Farr Undertakings, **Case on Appeal,** Vol. 3, Tab C
Letter from Minister of Colleges and Universities, Farr Undertakings, **Case on Appeal,** Vol. 3, Tab C, p. 2
DesRosiers Cross-Examination, **Case on Appeal,** Vol. 14A, pp. 30-35
Chrysler Cross-Examination, **Case on Appeal,** Vol. 4A, pp. 7-9, Q. 35-45

55. New graduate programs undergo a rigorous approval process. They must first be accredited by the Ontario Council on Graduate Studies ("OCGS"), a sub-committee of the Council of Ontario Universities ("COU"), which is an organization comprised of all universities in the province of Ontario. If the program is approved by COU, COU recommends to OCUA, the government-appointed advisory committee, that the program be funded. The program is then reviewed by OCUA, which takes into account not only academic considerations, but also evidence of societal need and student demand; duplication with an existing program in the Ontario university system; and government economic constraint considerations. A number of programs have been rejected as a result of failing to meet these non-academic criteria. In this respect, notwithstanding a recommendation from OCUA, the decision whether to provide funding rests with the provincial government. In addition, graduate programs must undergo reappraisal by OCGS on a seven-year cycle in order to retain their eligibility for public funding.

Jones Affidavit, **Case on Appeal,** Vol. 9, Tab 3, para. 18
DesRosiers Affidavit, **Case on Appeal,** Vol. 14, para. 19
DesRosiers Cross-Examination, **Case on Appeal,** Vol. 14A, pp. 32-35
Ferguson Cross-Examination, **Case on Appeal,** Vol. 5A, p. 27, Q. 167
Farr Cross-Examination, **Case on Appeal,** Vol. 3A, p. 41, Q. 212-214, and pp. 43-44, Q. 228-233
OCUA Advisory Memorandum, 83-8 at pp. 1-2, and
OCUA Advisory Memorandum, 84-7 at pp. 1-4, in Farr Undertakings, **Case on Appeal,** Vol. 3A, Tab D

(f) <u>The Ontario University System</u>

56. In short, the provincial government is responsible for a provincial university system, composed of fifteen universities, staffed by approximately 15,000 faculty serving in excess of 100,000 students, and dependent upon the provincial purse for the resources necessary to carry out its public

responsibilities. As the record demonstrates, the government has increasingly sought to rationalize and co-ordinate the delivery of post-secondary education in the province of Ontario.

F. FACTS RELATING TO MANDATORY RETIREMENT OF UNIVERSITY FACULTY AND LIBRARIANS

57. In the context of mandatory retirement of university faculty and librarians, the Court of Appeal held that considerations of faculty renewal, tenure and preservation of existing pension plans were sufficiently pressing and substantial to warrant overriding s.15(1) of the **Charter**. In this respect, the appellants rely upon the following evidence in support of their position that mandatory retirement of university faculty and librarians cannot be justified under the **Charter**.

(i) Faculty Renewal

58. Contrary to the respondents' contention that mandatory retirement is required for faculty renewal, the evidence filed not only by the appellants but also by the respondents demonstrates that, at most, the abolition of mandatory retirement would have a short-term, temporary and limited effect on the hiring of new faculty. Indeed, as set out in paragraphs 52 above, the provincial government has specifically met the concern of faculty renewal by deciding to provide additional funding targeted for the hiring of new faculty.

Reid Affidavit, **Case on Appeal**, Vol. 6, Tab 1, paras. 43-44; and Cross-Examination, Vol. 6A, Tab A, pp. 53-54
Blackburn Affidavit, **Case on Appeal**, Vol. 10.2, Tab 1, paras. 7-9
Savage Affidavit, **Case on Appeal**, Vol. 9, Tab 2, paras. 9-19
COU Brief, DesRosiers Affidavit, **Case on Appeal**, Vol. 14, Exhibit D
Bovey Cross-Examination, **Case on Appeal**, Vol. 14A, Tab 3, p. 62, Q. 335-359
Farr Cross-Examination, **Case on Appeal**, Vol. 3A, pp. 186-187, Q. 991-995

59. In 1984, the Council of Ontario Universities ("COU"), an organization representing all the universities in Ontario, and composed of all the university presidents, presented a brief to the Bovey Commission. The Bovey Commission had been appointed by the Government of Ontario "to present to the Government a plan of action to better enable the universities of Ontario to adjust to changing social and economic conditions". In its brief the COU considered the effect of an end to mandatory retirement on the faculty age profile in universities, and on the corresponding costs of operating universities. The COU stated that it was "unlikely that substantial numbers of faculty will continue full-time appointments after age 70, even if mandatory retirement by reason of age is abolished". Under the scenario which the COU considered to be the most realistic, the

abolition of mandatory retirement would result in only a slightly greater increase in average faculty age (an increase of from 3.2 to 3.5 years) and in faculty salary costs (18% instead of 17%) than would occur if mandatory retirement were not abolished. As well, the COU acknowledged that the abolition of mandatory retirement would reduce opportunities for new appointments only "in the short term", and that the need to hire new faculty arises "independent of this impending change", i.e. the abolition of mandatory retirement.

COU Brief, DesRosiers Affidavit, **Case on Appeal,** Vol. 14, Exhibit D, pp. 261-269 and p. 274; and DesRosiers Cross-Examination, **Case on Appeal,** Vol. 14A, pp. 40-50

60. In its Report in 1984, the Bovey Commission explicity did not support the enactment of legislation to override the effect of s.15 of the **Charter** (which it assumed would lead to the elimination of mandatory retirement in universities), nor did it recommend the maintenance of mandatory retirement in order to promote faculty renewal. Indeed, the Bovey Commission recognized that the hiring of sufficient new faculty to accommodate the anticipated "enrollment bulge", to cope with accelerated faculty retirements in the 1990's, and to incorporate young academics into the university environment, could all be accomplished <u>without</u> mandatorily retiring older faculty.

Savage Affidavit, **Case on Appeal,** Vol. 9, Tab 2, paras. 12-13
Bovey Commission Report, Sibley Affidavit, **Case on Appeal,** Vol. 14, Exhibit B, p. 22

61. The Bovey Commission did recognize that universities were experiencing a short-term phenomenon of a bulge in the faculty age profile as a result of their rapid expansion in the 1960's, and recommended the establishment of a one-time faculty renewal bridging fund to finance approximately 550 new five-year faculty appointments for the period 1985 to 1989. This recommendation was made independently of the abolition of mandatory retirement. As noted above in paragraph 52, in October, 1985, the Ontario Government subsequently announced the creation of a $50 million University Excellence Fund, $10 million of which was specifically targeted to promote the hiring of new faculty, and in May, 1986, the government announced the creation of an $84 million University Faculty Renewal Program to support the hiring of 500 new faculty.

Bovey Commission Report, Sibley Affidavit, **Case on Appeal,** Vol. 14, Exhibit B, pp. 145-46 and p. 166

62. In this respect, the Bovey Commission estimated that possible increased salary costs associated with the abolition of mandatory retirement were less than $25 million, spread over five years, across the entire Ontario university system. This compares with the $1.2 billion which, in the

academic year 1985-86 alone, the Province of Ontario expended in total operating grants to the Ontario university system.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, paras. 16, 17 and Exhibit G
Bovey Commission Report, Sibley Affidavit, **Case on Appeal**, Vol. 17, Exhibit B, pp. 146, 166-167

63. The experience in the United States following the raising of the mandatory retirement age does not support concerns about faculty renewal. In the United States, mandatory retirement of university faculty prior to age 70 was prohibited effective 1982, and will be eliminated altogether in 1993. Nevertheless, the average age of retirement of faculty in universities in the United States has actually decreased from approximately 63 years of age to 62 years of age. The trend in U.S. universities is towards early retirement.

Blackburn Cross-Examination, **Case on Appeal**, Vol. 10B, Tab A, pp. 26, 29, 31

64. The evidence establishes that many mechanisms, which do not require mandatory retirement, are available to facilitate faculty renewal. These mechanisms include the encouragement of the existing trend towards early retirement, severance payments, one-time early retirement incentives, reduced workload with tenure, worksharing, phased retirement and career change options, and measures to assist faculty of all ages in adapting to changes within their disciplines. In this respect, research findings in the U.S. demonstrate that properly designed and implemented flexible retirement and career-change options provide universities with a successful method of encouraging faculty renewal.

Savage Affidavit, **Case on Appeal**, Vol. 9, Tab 2, paras. 15-17, 30 and Cross-Examination, **Case on Appeal**, Vol. 9A, Tab B, pp. 25-29
Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 5
COU Brief, DesRosiers Affidavit, **Case on Appeal**, Vol. 14, Exhibit D, pp. 274-275
Finlayson Affidavit, **Case on Appeal**, Vol. 8, Tab 2, paras. 8-10, 13
Blackburn Affidavit, **Case on Appeal**, Vol. 10.2, Tab 1, para. 6
Schaie Affidavit, **Case on Appeal**, Vol. 10.1, paras. 14, 17
Willis Affidavit, **Case on Appeal**, Vol. 10.2, para. 5

65. The evidence demonstrates that resource allocation (for example, in the case of financial exigency or redundancy), is readily accomplished without mandatory retirement, since there are presently in place procedures in Ontario universities which provide for the curtailment or elimination of certain courses, programs or academic units, and the redeployment or possible lay-off of tenured faculty, as a consequence of financial exigency or redundancy. Moreover, the evidence

was that there is no relationship between the age of a professor and the need for or redundancy of the particular program or discipline in which he or she is teaching or conducting research.

Malloch Affidavit, **Case on Appeal,** Vol. 11, Tab 1, paras. 28-30, and Exhibit F
Savage Affidavit, **Case on Appeal,** Vol. 9, Tab 2, para. 22
Savage Undertakings, **Case on Appeal,** Vol. 9a, Tab 2, and see also provisions in respondent university collective agreements, **Case on Appeal,** Vols. 2-5
Farr Cross-Examination, **Case on Appeal,** Vol. 3A, p. 56, Q. 312-313
Chrysler Affidavit, **Case on Appeal,** Vol.5, Exhibit I, at 12-1 to 12-2

66. Mandatory retirement provides only one of many opportunities for universities to replace departing faculty with new faculty, as evidenced by the experience at the respondent universities:

(a) at the University of Toronto, it was projected for the 1986-87 academic year that 107 faculty would leave for other reasons, and only 30 would be mandatorily retired;

Lang Cross-Examination, **Case on Appeal,** Vol. 2A, Tab 4, pp. 23-24, 37-38 and pp. 30-31

(b) at the University of Guelph, in 1984 and 1985, 57 faculty left for other reasons (including 20 who took early retirement) and only 25 faculty were mandatoroly retired;

Ferguson Cross-Examination, **Case on Appeal,** Vol. 5A, Q. 501, and Q. 535
Ferguson Undertakings, **Case on Appeal,** Vol. 5A

(c) at Laurentian University, there have been only 9 mandatory retirements out of 149 departures since 1979.

Chrysler Undertakings, **Case on Appeal,** Vol. 4A, p. 150

(d) in addition, as the Vice-President of York University acknowledged, the forced retirement of a professor at age 65 does not necessarily result in the hiring of a young academic.

Farr Cross-Examination, **Case on Appeal,** Vol. 3A, pp. 132-133, Q. 734

(ii) Tenure and Performance Evaluations

67. The evidence does not support the position of the respondents that the abolition of mandatory retirement of university faculty and librarians would threaten tenure as a result of increased performance evaluations. In fact, performance evaluations of faculty are an integral and ongoing part of university life, and it has never been suggested that this process threatens tenure, collegiality or academic freedom. Performance evaluations take place at the hiring stage, and in the process of determining whether to grant tenure, whether to promote tenured faculty, which tenured faculty to select for administrative posts and research grants, and whether and in what amount merit increases are to be awarded to tenured faculty.

Savage Affidavit, **Case on Appeal**, Vol. 9, Tab 2, para. 3
Blackburn Affidavit, **Case on Appeal**, Vol. 10.2, Tab 1, para. 12
Finlayson Affidavit, **Case on Appeal**, Vol. 8, Tab 2, para. 15 and Cross-Examination, **Case on Appeal**, Vol. 8A, Tab A, pp. 15 and 29
Kerr Cross-Examination, **Case on Appeal**, Vol. 11A, Tab B, pp. 12-13
Chrysler Cross-Examination, **Case on Appeal**, Vol. 4A, pp. 29-33, 56
Savage Cross-Examination, **Case on Appeal**, Vol. 9A, Tab A, pp. 43-44; and Tab B, p. 49
DesRosiers Cross-Examination, **Case on Appeal**, Vol. 14A, p. 59
Jones Cross-Examination, **Case on Appeal**, Vol. 9a, Tab C, p. 10
Sibley Cross-Examination, **Case on Appeal**, Vol. 14A, Tab 3, at pp. 10-17, 25-29
Malloch Affidavit, **Case on Appeal**, Vol. 11, Tab 1, paras. 16, 17, 22
Cook Cross-Examination, **Case on Appeal**, Vol. 2A, Tab 3, pp. 23-25, Q. 98-106
Monahan, "Tenure and Academic Freedom in Canadian Universities", Malloch Affidavit, **Case on Appeal**, Vol. 11, Exhibit F, p. 100
Evans Cross-Examination, **Case on Appeal**, Vol. 14A, Tab 2, p. 16

68. In addition, each Ontario university has a procedure for dismissing tenured faculty for, inter alia, incompetence, and the evidence reveals that universities have resorted to such dismissal procedures, and have established just cause for the dismissal of faculty members. As the Association of Universities and Colleges of Canada stated in its brief to the federal Parliamentary Committee on Equality Rights (attached as Exhibit F to the DesRosiers Affidavit filed by the respondent Universities) "tenure in Canadian universities is not, in itself, a hindrance to the proper and effective management of academic staff. While it allows some security and safeguards, it does not protect from incompetence, inability to perform or misconduct. Tenure does not prevent dismissal for cause."

Malloch Affidavit, **Case on Appeal**, Vol. 11, Tab 1, paras. 11-16 and Exhibit G at p. 90 (Monahan article)
Savage Affidavit, **Case on Appeal**, Vol. 9, Tab 2, paras. 20-23
AUCC Brief, DesRosiers Affidavit, **Case on Appeal**, Vol. 14, Exhibit F, p. 294B
Farr Cross-Examination, **Case on Appeal**, Vol. 3A, pp. 139-141, Q. 766-778
Dismissal for Cause Provisions:
University of Toronto - Cook Affidavit, **Case on Appeal**, Vol. 2, Tab E, pp. 78-80
York University - Farr Affidavit, **Case on Appeal**, Vol. 3, Tab I.1, p. 63-69
University of Guelph - Ferguson Affidavit, **Case on Appeal**, Vol. 5, Tab 2, p. 29
Laurentian University - Chrysler Affidavit, Vol. 4, Exhibit I, pp. 11-6 to 11-7

69. According to the evidence, the issue of more extensive performance review of faculty, including those with tenured appointments, is separate from, and unrelated to, the issue of mandatory retirement. In this respect, university administrators and officials have proposed increased evaluation or regular reviews of tenured faculty independently of the abolition of mandatory retirement, and without any apparent concern regarding any possible effect on collegiality or

academic freedom. For example, the Bovey Commission recommended "that universities ensure that there are regular reviews of all faculty staff, including those with tenure . . . " Dr. Edward Monahan, Director of the Council of Ontario Universities, and a witness called by the respondent universities, has also stated that "tenure review should be fair and rigorous" and "there should be provision for regular peer evaluation of all faculty, including those with tenure, and a willingness to institute disciplinary action when the results of review indicate the need".

Bovey Commission, Sibley Affidavit, **Case on Appeal,** Vol. 14, Exhibit B, pp. 15-16 and p.38
Malloch Affidavit, **Case on Appeal,** Vol. 11, Tab 1, para. 3, 9-11, 13, and 17-24
Monahan, "Tenure and Academic Freedom in Canadian Universities", Malloch Affidavit, supra, Exhibit F, p. 104
Savage Affidavit, **Case on Appeal,** Vol. 9A, Tab 2, para. 23
Savage Cross-Examination, **Case on Appeal,** Vol. 9A, Tab 1, p. 44
Finlayson Affidavit, **Case on Appeal,** Vol. 8, Tab 2, para. 12, and Exhibit G at p. S-6 and S-8
Schell Affidavit, **Case on Appeal,** Vol. 8, Tab 3, para. 14
McGill Task Force, Malloch Undertakings, **Case on Appeal,** Vol. 11, Tab 3, p. 15-16
Mustard Cross-Examination, **Case on Appeal,** Vol. 14A, Tab. 1, Q. 226-237; pp. 67-68, Q. 291-294
Chrysler Cross-Examination, **Case on Appeal,** Vol. 4A, pp. 56, Q. 340-342
Evans Cross-Examination, **Case on Appeal,** Vol. 14A, Tab 2, pp. 54-56, Q. 205-214; p. 65
Sibley Cross-Examination, **Case on Appeal,** Vol. 14A, Tab 3, pp. 57-58; pp. 64-66, Q. 368-388; pp. 70-73

70. None of those witnesses called by the respondent universities who contended that increased evaluation of tenured faculty would occur if mandatory retirement were abolished based such contention on any relationship between age and declining ability of older faculty, nor was there any evidence that age was an accurate indicator of individual faculty performance. Indeed, Dr. Sibley's rationale for the need to develop more extensive review of tenured faculty following the abolition of mandatory retirement was simply that the salaries paid to older faculty are generally higher than those paid to younger faculty.

Sibley Cross-Examination, **Case on Appeal,** Vol. 14A, Tab 3, pp. 82-86
Willis Affidavit, **Case on Appeal,** Vol. 10.2, Tab 2, para. 4
Schaie Affidavit, **Case on Appeal,** Vol. 10.1, paras. 9, 11-12
Blackburn Affidavit, **Case on Appeal,** Vol. 10.2, Tab 1, paras. 3-5, and Exhibits B and C
Savage Affidavit, **Case on Appeal,** Vol. 9, Tab 2, paras. 9-10
Farr Cross-Examination, **Appeal Board,** Vol. 3A, p. 56, Q. 312-313; p. 59, Q. 329-334; pp. 60-61, Q. 339-340; p. 52, Q. 452; p. 83, Q. 457-462; pp. 125-126, Q. 687-691
Chrysler Cross-Examination, **Case on Appeal,** Vol. 4A, pp. 56-57, Q. 343-345
Ferguson Cross-Examination, **Case on Appeal,** Vol. 5A, pp. 78-79, Q. 480-482; pp. 99-101

71. York University, one of the respondent universities in these proceedings, has already agreed in principle to the elimination of mandatory retirement of university faculty. As a result, the appellants Blishen, Kuhn and Buttrick continue to carry out their duties and responsibilities as tenured faculty at York University. The administration at York has taken the position (as set out in Exhibit "K" to the Farr affidavit) that the practice of mandatory retirement at age 65 fails to reflect the ability of faculty to make valuable contributions after that age. Further, the administration at York has not taken the position in negotiations with the Faculty Association respecting mandatory retirement that, if mandatory retirement were abolished at age 65, the tenure system would have to be changed. Indeed, the President of York University has indicated that the issues relating to a shift from mandatory to flexible retirement can be "easily resolved", and since the hearing of the appeal, the mandatory age at York University has been extended to age 71.

Rinehart Affidavit, **Appeal Board,** Vol. 8, Tab 1, paras. 4-7
Farr Affidavit, **Appeal Board,** Vol. 3, para. 26 and Exhibits K and L
Farr Cross-Examination, **Appeal Board,** Vol. 3A, p. 65, Q. 365-366; p. 65, Q. 371; p. 72, Q. 402-403; pp. 73-75; p. 83; p. 109, Q. 592; pp. 111-112, Q. 608-609; pp. 141-143

72. The undisputed evidence was that, in those jurisdictions and universities in which mandatory retirement of university faculty or librarians has been eliminated, there has been no increase in so-called destructive performance evaluations, no infringement of academic freedom or collegiality, and the tenure system remains firmly in place. For example, at the University of Manitoba, there have been no administration proposals to change the policies pertaining to tenure, which continue to be determined on the basis of peer review. The grounds for dismissal of tenured faculty have not been broadened, nor has there been a weakening of the principle that tenured faculty are entitled to independent third party review where the university seeks to dismiss them for cause.

Savage Affidavit, **Case on Appeal,** Vol. 9, Tab 2, para. 24
Blackburn Affidavit, **Case on Appeal,** Vol. 10.2, Tab 1, para. 11
Kerr Affidavit, **Case on Appeal,** Vol. 11, Tab. 2, paras. 4-7, 14; and Exhibit A

73. In the United States, not a single university has abolished tenure, notwithstanding that 15% of universities have no mandatory retirement age for tenured faculty, and legislation which now precludes any university from forcibly retiring a tenured faculty member until age 70 will, under the terms of the 1986 **Age Discrimination in Employment Act**, remove the age cap altogether when the transitional provisions expire in 1993.

Blackburn Affidavit, **Case on Appeal,** Vol. 10.2, Tab 1, para. 11 and Cross-Examination, **Case on Appeal,** Vol. 10B, Tab A, p. 7

74. Carleton University, Queen's University, McMaster University and the University of Windsor presently have in place arrangements under which those individual faculty members who wish to do so are entitled to continue in employment beyond the age of 65, and so-called destructive performance evaluations have not resulted, nor have there been any changes to the tenure system in those universities.

Jones Affidavit, **Case on Appeal**, Vol. 9, Tab 3, para. 4

(iii) **Pension Plans**

75. With respect to the purported justification for mandatory retirement in the university context as it relates to pension plans, the appellants rely upon the evidence referred to in paragraphs 23 to 24 above.

PART II - POINTS IN ISSUE

76. The constitutional questions stated on this appeal are as follows:

1. Does s.9(a) of the **Ontario Human Rights Code**, 1981, S.O. 1981, c. 53 violate the rights guaranteed by S.15(1) of the **Canadian Charter of Rights and Freedoms?**
2. Is s.9(a) of the **Ontario Human Rights Code**, 1981, S.O. 1981, c.53 demonstrably justified by s.1 of the **Canadian Charter of Rights and Freedoms** as a reasonable limit on the rights guaranteed by s.15(1) of the **Charter**?
3. Does the **Canadian Charter of Rights and Freedoms** apply to the mandatory retirement provisions of the respondent universities?
4. If the **Canadian Charter of Rights and Freedoms** does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s.15(1) of the **Charter**?
5. If the **Canadian Charter of Rights and Freedoms** does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s.1 of the **Charter** as a reasonable limit on the rights guaranteed by s.15(1) of the **Charter**?

PART III - THE LAW

A. The Constitutionality of Section 9(a) of the Code

(I) The Interpretation of Section 15(1) of the Charter

(a) Purpose and Effect of Section 15(1)

77. Section 15(1) of the **Charter** provides as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

78. It is well established that constitutionally guaranteed rights and freedoms should be given a broad and liberal interpretation. This would appear particularly true in the case of s.15, in light of the recognition that a "commitment to social justice and equality" is one of the underlying values and principles essential to a free and democratic society: **R. v. Oakes**, p. 136. The recognition given by our courts to the primacy of human rights legislation, and to the corresponding need for a broad and purposive construction of its provisions, applies a fortiori to constitutional enactments prohibiting discrimination. Thus, to an even greater extent in interpreting s.15 of the **Charter**, "we should not search for ways and means to minimize those rights and to enfeeble their proper impact".

> **Action Travail Des Femmes v. Canadian National Railway Company et al.**, [1987] 1 S.C.R. 1114 at p. 1134
> R. v. Oakes [1986] 1 S.C.R. 103
> **Robichaud et al v. Canada (Treasury Board)**, [1987] 2 S.C.R. 84 at p. 90
> **Law Society of Upper Canada v. Skapinker**, [1984] 1 S.C.R. 357 at pp. 365-66
> **Hunter v. Southam**, [1984] 2 S.C.R. 145 at pp. 155-56

79. The prohibition against discrimination set out in s.15 is intended to ensure that those bodies subject to the **Charter** treat every individual "on a footing of equality, with equal concern and equal respect, to ensure each individual the greatest opportunity for his or her enhancement": **Re Blainey and Ontario Hockey Association** (1986), 26 D.L.R. (4th) 728 Ont. C.A., at p.744. Accordingly, it is submitted that the primary value which s.15(1) is intended to advance is that an individual be treated on the basis of her or his own worth, abilities and merit, and not on the basis of external or arbitrary barriers which artificially restrict individual opportunity.

> Judge Rosalie Abella, "**Limitations on the Right to Equality Before the Law**", in de Mestral et al., **The Limitation of Human Rights in Comparative Constitutional Law**, 223 at p. 226:

"Equality means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it.

If the access is genuinely available in a way that permits everyone who so wishes the opportunity fully to develop his or her potential, we have achieved a kind of equality. This is what section 15 of the **Charter** affirms: equality defined as equal freedom from discrimination.

Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth."

Action Travail Des Femmes, supra, at pp. 1138-39 (citing Abella with approval)

(b) <u>The Effect of Enumeration in Section 15(1)</u>

80. Given the primary purpose of s.15 set out above, it is submitted that the enumeration of specific grounds of prohibited discrimination reflects a political and moral consensus that individuals should have the opportunity to develop and enhance their potential as human beings without being impeded in their efforts simply because of differences among them based upon the intimate or innate human attributes specified in s.15 of the **Charter**. As a result, it is submitted that, where a legislative or governmental classification adversely differentiates between, or adversely affects, individuals on the basis of a ground or characteristic specifically enumerated in s.15(1) of the **Charter**, s.15(1) is infringed, and an obligation is placed upon the party seeking to uphold such discrimination to justify it in accordance with s.1 of the **Charter**.

Headley et al. v. The Public Service Commission Appeal Board (1987), 71 N.R. 185 (Fed.C.A.), per MacGuigan, J. at pp. 189-90:

"The Constitution itself, I believe, compels this distinction between enumerated and non-enumerated grounds. In particular, the fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings - race, national or ethnic origin, colour, religion (admittedly, not wholly a natural and unalterable fact), and sex - can only mean, I believe, that non-trivial pejorative distinctions based on such categories are intended to be justified by governments under section 15. In sum, some grounds of distinction are so presumptively pejorative that they are deemed to be inherently discriminatory."

Mahe et al v. Alta. (Gov't) [1987] 6 W.W.R. 331 (Alta C.A.), at p. 363-4:

"I say that the key to s.15 is the <u>kind</u> of distinction made, not the mere fact of distinction . . . Certainly the list of offending acts offered in s.15 have in common that Canadian society accepts that, as criteria for distinction, they primae facie offer no rational basis for distinction <u>and</u> have historically been examples of invidious discrimination".

81. This interpretation of s.15 is consistent with the meaning of the term "discrimination" under human rights legislation. Canadian courts have held that discrimination occurs where an individual is treated adversely or denied benefits because of membership in a protected group, instead of being assessed on the basis of or in accordance with individual merit, ability or needs. The courts have also recognized that discrimination against individuals occurs both where a practice or rule overtly or on its face differentiates on a prohibited ground (as is the case with s.9(a) of the Code), and where it has a discriminatory effect on individuals because of their membership in a protected group. It is submitted that the use of the word discrimination, together with the enumeration of prohibited grounds of discrimination is s.15(1) which are identical or akin to those contained in human rights legislation throughout Canada, indicates that s.15 incorporates in constitutional form the objectives and principles which underly human rights legislation, namely, that certain attributed characteristics cannot be used to deny individuals equal opportunity.

O'Malley v. Simpson-Sears Limited [1985] 2 S.C.R. 536 at p. 547:

"The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination: if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory." [emphasis added]

Action Travail Des Femmes, supra, at pp. 1134-38 (discussion of "adverse effect discrimination").

Robichaud, supra, at pp. 90-92

Re Saskatchewan Human Rights Commission and Odeon Theatres Ltd. (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), per Cameron J.A. at p. 99, and per Vancise J.A. at pp. 110-115.

Re Blainey and Ontario Hockey Association, supra, at p. 742

Judge Rosalie Abella, "**Limitations on the Right to Equality Before the Law**", in de Mestral et., **The Limitation of Human Rights in Comparative Constitutional Law**, 223 at p. 226, **supra.**

Hunter, "**Human Rights Legislation in Canada: Its Origin, Development and Interpretation**" (1976), 15 U.W.O.L. Rev., pp. 21-58 at pp. 33-34:

"Extracting a definition of discrimination for the purpose of Canadian human rights legislation from these decisions, it would be this: discrimination means treating people differently because of their race, colour, sex, etc. as a result of which the complainant suffers adverse consequences, or a serious affront to dignity; the motive for the discriminatory treatment, whether occasioned by economic or social considerations and whether those considerations are soundly or fallaciously based, is irrelevant, except possibly in mitigation of the penalty." [emphasis added]

82. Stated in other terms, while all legislation or governmental conduct necessarily involves classifications and generalizations, to deprive an individual of a benefit, or otherwise disadvantage or adversely affect an individual, solely on account of an enumerated characteristic, is to discriminate against that individual within the meaning of s.15(1) and thus to commit a per se violation of s.15. As the Supreme Court of Canada held in **O'Malley v. Simpson-Sears Limited, supra**, at p. 551:

> "Direct discrimination occurs ... when an employer adopts a practice or rule which on its face discriminates on a prohibited ground. for example, 'no Catholics or no women or no blacks employed here'... [A]dverse effect discrimination ... arises when an employer ... adopts a rule or standard which is on its fact neutral ... but which has a discriminatory effect upon a prohibited ground ... in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce."

83. In this respect, it is instructive to compare s.15(1) of the **Charter** and the Fourteenth Amendment to the **U.S. Bill of Rights**, which in their language, as well as their historical and philosophical origins, differ markedly. Unlike s.15, the Fourteenth Amendment does not enumerate specific grounds of discrimination or identify those groups which at a minimum are protected. Rather, the determination by U.S. courts as to which classifications are to be treated as "suspect", and therefore inherently discriminatory, has been conditioned by the historical evolution of the Fourteenth Amendment as a response to the institution of slavery and the subordination of blacks in American society. Since the primary purpose of equal protection in the U.S. was and continues to be the elimination of racial discrimination, the paradigm for U.S. equal protection analysis is race. In order to legitimize judicial review of legislative classifications other than race, U.S. courts have looked to the extent to which other classifications are sufficiently analogous to warrant a meaningful level of judicial scrutiny.

> Walter S. Tarnopolsky, "**The Equality Rights**", in Tarnopolsky and Beaudoin, **The Canadian Charter of Rights and Freedoms**, pp. 395-442, at p. 401
> Lynn Smith, "**A New Paradigm for Equality Rights**", in Smith, ed. **Righting the Balance: Canada's New Equality Rights**, pp. 351-407 at pp. 363-66
> Attorney General of Ontario, **Equality Rights Background Paper**, at pp. 75-80, and p. 301

84. In Canada, however, courts interpreting the **Charter** are not constrained by this limited historical vision of equality and discrimination. Indeed, the inclusion of specific enumerated grounds in s.15(1) of the **Charter** was intended to avoid many of the difficulties which U.S. courts have faced in attempting to determine the extent of protection afforded by the Fourteenth

Amendment to various groups. Having regard to the specific enumeration in the **Charter** of prohibited grounds of discrimination, and to the generally accepted understanding of discrimination as developed in the human rights context in Canadian society, it is not only legitimate but necessary, in order to give effect to the purpose of s.15(1), that Canadian courts recognize that enumerated classifications are inherently or per se discriminatory, and therefore justifiable only under s.1.

Attorney-General of Ontario, **Equality Rights Background Paper, supra**, at p. 301
Finkelstein, "**Sections 1 and 15 of the Canadian Charter of Rights and Freedoms and the Relevance of the U.S. Experience**" (1985-86), 6 **Advocates Quarterly**, 188 at p. 192

(c) **Enumerated Grounds and the Similarly Situated Criterion**

85. It has been held by some courts that, even where classifications are based upon grounds specifically enumerated in s.15(1) of the **Charter**, there is no infringement of s.15(1) of the **Charter** unless individuals are "similarly situated". However, it is submitted that, where the **Charter** signals to the courts, by the enumeration of certain characteristics, that classifications based on such characteristics are inherently discriminatory, the courts are required to examine the justification for the discrimination under s.1 of the **Charter**, by inquiring into the sufficiency of the objectives allegedly served by the impugned classification, and by assessing whether the discriminatory treatment is required to achieve those objectives. Accordingly, so far as distinctions based on enumerated grounds are concerned, individuals who are classified and treated differently based upon such grounds are, by virtue of the language and purpose of s.15(1), per se similarly situated, and any such classifications are inherently discriminatory, subject only to s.15(2) of the **Charter**.

86. To the extent that some courts have relied upon the seminal article by Tussman and tenBroek in support of applying "similarly situated" analysis, even in the context of enumerated classifications, it is to be noted that Tussman and tenBroek utilize the "similarly situated" analysis only in the context of classifications to which minimal scrutiny would apply under the **U.S. Bill of Rights**. Tussman and tenBroek emphasized that, with respect to classifications such as race which, under U.S. equal protection analysis are "suspect" in nature, the "similarly situated" analysis has no role to play. Rather, the concept of a suspect classification involved the recognition that it is per se or inherently discriminatory to treat people as dissimilarly situated on the basis of their membership in a protected group. Similarly, it is submitted that, in terms of s.15, "similarly

situated" analysis has no role to play, at least with respect to enumerated classifications, which are per se or inherently discriminatory.

> Tussman and tenBroek, **"The Equal Protection of the Laws"** (1948), 37 Cal. L. Rev. 342 at pp. 353-356 (discussion of "forbidden" and "suspect" classifications)
>
> **R. v. Century 21 Ramos Realty** (1987), 58 O.R. (2d) 737 at pp. 756-57:
>
> "However, it is not always clear whether persons are or are not similarly situated, and whether, even if they are not, this is relevant to a s.15 inquiry.
>
> It is necessary to be cautious in this classification. It is usually possible to find differences between classes of person and, on the basis of these differences, conclude that the persons are not similarly situated. However, what are perceived to be 'differences' between persons or classes of persons could be the result of sterotypes based on existing inequalities which the equality provisions of the **Charter** are designed to eliminate, not perpetuate."
>
> **Mahe et al v. Alta. (Gov't), supra**, at p. 363
>
> **Cabre Exploration Ltd. v. Arndt et al** [1988] 5 W.W.R. 289 (Alta. C.A.) at p. 297

(d) **Enumerated Grounds and the Unreasonableness or Unfairness Test**

87. As set out above, it is submitted that, where an applicant complains of discrimination on an enumerated ground, s.15(1) does not require that the applicant demonstrate that the adverse treatment complained of is unfair or unreasonable. Such a requirement, which has been asserted by various courts, including the B.C. Court of Appeal in **Andrews v. Law Society of British Columbia**, (1986) 27 D.L.R. (4th) 600 (B.C.C.A.), is inconsistent with the language and purpose of s.15(1), inter alia, for the following reasons:

(a) the interpretation given by the B.C. Court of Appeal to s.15(1) of the **Charter** is narrow and restrictive, whereas constitutionally guaranteed rights and freedoms are to be interpreted in a broad and generous manner;

(b) the interpretation of the B.C. Court of Appeal is inconsistent with the text of s.15(1), the cardinal values which s.15(1) of the **Charter** embodies, its underlying purpose, and the historical origins of the prohibition against discrimination contained in s.15(1);

(c) the requirement that all distinctions, even those based on enumerated grounds, be shown to be unfair or unreasonable fails to give any effect to the fact that s.15(1) specifies and prohibits certain enumerated grounds of discrimination;

(d) the requirement that an individual demonstrate that adverse treatment on the basis of an enumerated ground, such as race, sex or age, is unfair or unreasonable, is inconsistent with the definition of discrimination contained in human rights legislation;

(e) the approach taken by the B.C. Court of Appeal in **Andrews**, which requires even in the case of enumerated grounds that an applicant establish that the treatment complained of is unfair or unreasonable, is inconsistent with that taken in **Oakes** and subsequent cases respecting the proper relationship between those provisions of the

Charter which guarantee rights and freedoms, and s.1, which defines the basis on which guaranteed rights and freedoms can be limited. Indeed, the scrutiny of legislative measures to determine whether they are reasonable or fair, and the weighing of the purpose of legislation against its prejudicial effect, is the central element of the s.1 inquiry under **Oakes**.

Smith, Kline and French Laboratories Ltd. v. A.G. of Canada (1986), 34 D.L.R. (4th) 584 (F.C.A.), per Hugessen J., at p. 593:

"The difficulty I have with those decisions [**Andrews** and other decisions of the B.C. Court of Appeal], as I understand them, is that they conclude that the ultimate test as to whether any given legislative category is in breach of s.15 is whether it meets the twin standards of reasonableness and fairness. With respect, I find this test impossible to reconcile with the teaching of **Oakes, supra**. If a category must be shown to be unreasonable or unfair before it can be said to give rise to a breach of equality rights, it is difficult to see how there can ever be room for application of s.1. In my view, Oakes requires that any test of the content of s.15 must be both logically and analytically distinct form s.1."

R. v. Oakes, supra,, at p. 134

Cabre Explorations Ltd., supra, at p. 295 and p. 297.

Smith, "**A New Paradigm for Equality Rights**", **supra**, at pp. 376-79

Lederman and Ristic, "**The Relationship Between Federal and Provincial Human Rights Legislation and Charter Equality Rights**", in Smith, ed. **Righting the Balance, supra**, at pp. 102-4

Eberts, "**The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions**", in Beckton and MacKay, **The Courts and the Charter** (1985), 133 at pp. 163-65

(ii) **The Inconsistency of Section 9(a) of the Code with Section 15 of the Charter**

(a) **Purpose and Structure of the Human Rights Code**

88. The purpose of the **Human Rights Code**, as reflected in its preamble, is to provide protection for all persons in the Province of Ontario against discrimination, and to recognize the equal worth and dignity of every person. To effect its purpose, the **Code** provides for a right to equal treatment with respect to such matters as services, goods and facilities, accommodation, employment, and membership in vocational associations. The **Code** further provides that a person who believes that a right under the **Code** has been infringed may file a complaint with the Ontario Human Rights Commission. Where it appears to the Commission that the evidence warrants, the Commission may request the Minister to appoint a board of inquiry to determine whether the rights of the complainant had been infringed and if so, the appropriate order or remedy.

O'Malley v. Simpson-Sears Ltd., supra, at pp. 546-47

Robichaud, supra, at pp. 89-90

Ontario Human Rights Code, S.O. 1981, c. 53, as amended

89. Section 4(1) of the **Code** provides as follows:

> "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap".

The right to equal treatment with respect to employment under s.4 of the **Code** is qualified by s.23(b) of the **Code**, which provides as follows:

> The right under s.4 to equal treatment with respect to employment is not infringed where
> . . .
>
> (b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment."

90. However, s.9(a) provides that the definition of "age" for the purpose of employment discrimination under s.4(1) of the **Code** is limited to "an age that is eighteen years or more and less than sixty-five years". As a result, s.9(a) of the **Code** entirely precludes an individual aged 65 or over from complaining about age discrimination in employment, even where age does not constitute a reasonable and bona fide qualification.

(b) The Nature of the Constitutional Violation

91. It is submitted that s.9(a) overtly denies the equal protection and equal benefit of s.4 of the **Code**, and thereby discriminates against individuals, solely on the basis of age -- a ground specifically enumerated in s.15 of the **Charter** -- contrary to s.15(1) of the **Charter**. Section 9(a) constitutes an arbitrary and artificial obstacle which prevents persons aged 65 and over from complaining where their right to equal treatment with respect to employment has been infringed on the ground of age. In this respect, it is submitted that s.9(a) is inconsistent with the fundamental values which s.15(1) of **Charter** embodies, including the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based upon individual ability. Accordingly, it is submitted that s.9(a), by denying the right of persons aged 65 and over to the equal protection and equal benefit of s.4 of the **Code**, constitutes discrimination based on age and a per se violation of s.15(1) of the **Charter**.

> **Re Blainey and Ontario Hockey Association, supra**, at p.741 and p.744:
>
> "Thus, but for s.19(2), Justine Blainey would have been entitled to the protection of the **Human Rights Code** and the benefit of the complete and enforcement procedures therein provided. But s.19(2) denies her that protection and benefit. It permits membership in

athletic organization or participation in an athletic activity to be denied solely on the basis of sex without regard to any other factors. Individuals who may in all respects be equal in terms of qualifications for membership in an athletic organization or participation in an athletic activity can be treated differently for no reason other than their sex. With respect to athletic activity in the Province, the protection of the **Human Rights Code** is still available to all others who complain of discrimination or other grounds, such as race, colour and ethnic origin. Only sexual discrimination is permitted. This renders s.19(2) clearly discriminatory ... In substance, it permits the posting of a 'no females allowed' sign by every athletic organization in this province."

Tetreault-Gadoury v. Canada Employment and Immigration Commission et al, unreported, Sept. 23, 1988, Federal Court of Appeal, per Lacombe J. at pp. 20-23.

Atcheson and Sullivan, **"Passage to Retirement: Age Discrimination and the Charter"**, in Bayefsky and Eberts, **Equality Rights and the Canadian Charter of Rights and Freedoms**, at p. 278:

"In our view, universal restrictions on protection from discrimination based on age cannot be supported under the **Charter**. These restrictions deprive all individuals of fundamental human rights protection in employment. They constitute a nullification of rights."

Petter, **"Amending Human Rights Legislation to Comply With the Charter"** (1984), 5 C.H.R.R., pp. C/84-1 to C/84-5 at C/84-3

92. Indeed, the violation of s.15 which results from s.9(a) of the **Code** is particularly serious, since the removal of protection against age-based employment discrimination deprives an individual of the equal benefit and protection of legislation which is regarded as being of fundamental importance to Canadians.

Insurance Corporation of British Columbia v. Heerspink [1982] 2 S.C.R. 145 at pp. 157-58
O'Ma[illegible] .. Simpsons-Sears Ltd., supra, at p.547
Craton v. Winnipeg School Division [1985] 2 S.C.R. 150 at p. 156
Robichaud, supra, at pp. 89-90
Re Blainey and Ontario Hockey Association, supra, at p. 746:

"Indeed, it is somewhat of an anomaly to find in a statute designed to prohibit discrimination a provision which specifically permits it."

93. Even if s.9(a) of the **Code** were restricted to precluding complaints relating solely to mandatory retirement at age 65 and older, it is submitted that mandatory retirement itself constitutes discrimination on the basis of age contrary to s.15(1) of the **Charter**. In this connection, both courts and commentators have consistently recognized that mandatory retirement provisions constitute age-based discrimination.

O'Malley v. Simpsons-Sears Ltd., supra, at p. 547:

"If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

This court in **Ontario Human Rights Commission et al. v. Borough of Etobicoke** ... found mandatory retirement provisions agreed upon in the collective agreement discriminatory, even though 'there was no evidence to indicate that the motives of the employer were other than honest and in good faith' . . . "

Ontario Human Rights Commission v. Borough of Etobicoke, [1982] 1 S.C.R. 202
Re McIntire and University of Manitoba (1981), 119 D.L.R. (3d) 352 (Man.C.A.)
Craton v. Winnipeg School Division, supra
Re OECTA and Essex County Roman Catholic School Board (1987), 36 D.L.R. (4th) 115 (Ont. Div. Ct.), per Craig J. at p. 121
Sheldrick v. The Queen (1986), 25 D.L.R. (4th) 721 at pp.727-28 (F.C.T.D.)
Walter S. Tarnopolsky, "**Limitations on Equality Rights**", in de Mestral et al. ed., **The Limitation of Human Rights in Comparative Constitutional Law** (1987), pp.325-349 at p.347
Parliamentary Committee on Equality Rights, **Equality for All**, at p. 21
Human Rights and Aging in Canada, Second Report of the Standing Committee on Human Rights to Parliament, at pp. 35-38.

94. It is respectfully submitted that, because section 9(a) overtly denies protection of the **Human Rights Code** on the basis of age, and because age is a prohibited ground of discrimination under s.15(1) of the **Charter**, the "similarly situated" test has no application, for the reasons set out in paragraphs 85-86 above. In any event, it is submitted that, even if the similarly situated test were applicable, persons aged 65 and over are similarly situated to those under that age, having regard to the purpose of human rights legislation, namely, the protection and enhancement of the right of individuals to be treated on the basis of their individual ability or merit, free from discrimination. Further, the evidence demonstrates that age 65 does not accurately divide those individuals who are able to work, and whose economic circumstances dictate a continuing need to work, from those who are not able to work, or do not have to work. As a result, it cannot be said that those aged 65 or over are not similarly situated to those under age 65.

Re OECTA and Essex County Roman Catholic School Board, supra, per Craig J. at pp. 20-21

95. As set out in paragraph 87 above, it is submitted that, once it is established that s.9(a) adversely affects persons aged 65 and over on the basis of the enumerated ground of age, it is not necessary for the applicants to further demonstrate that such treatment is unreasonable and unfair in order to make out a violation of s.15. Rather, the burden of proof shifts to the respondents

to justify the limitation under s.1. In any event, it is respectfully submitted that s.9(a) of the **Code** constitutes unreasonable and unfair discrimination against persons over age 65, for the following reasons, which are more fully discussed in paragraphs 112 to 130 below:

(a) the failure to afford individuals aged 65 or over the protection of the **Code** against employment discrimination is unwarranted in the absence of any evidence that such individuals cannot perform in employment;

(b) section 9(a) of the **Code** prohibits employees from complaining about any form of employment discrimination, including hiring, demotion, transfer or salary reduction, even though its stated objective was solely to permit mandatory retirement;

(c) with respect to mandatory retirement itself, there are severe effects resulting from mandatory retirement which outweigh any alleged benefit which may be associated with its continuation. Mandatory retirement arbitrarily removes an individual from his or her active worklife, and source of revenue, regardless of his or her actual mental and physical capacity, financial wherewithal, years of employment in the workforce, or individual preferences, despite the fact that the continued opportunity to work is for many individuals a symbol of worth and achievement, and a source of social status, prestige, and meaningful social contact.

(d) On the evidence, there is no basis for denying to a segment of the population, i.e., those individuals aged 65 and over, the protection of legislation which is of fundamental importance in the area of employment discrimination, particularly since the objectives allegedly served by s.9(a) of the **Code** could be attained through alternative measures, which do not have such severe effects on individuals.

Thus, whichever test is applied, section 9(a) constitutes discrimination under section 15(1).

(iii) The Interpretation of Section 1 of the Charter

(a) General Considerations

96. As the Supreme Court of Canada has repeatedly emphasized, restrictions or limitations on the exercise of the rights and freedoms guaranteed by the **Charter** should be permitted only where the respondents have met the onus of satisfying the justificatory criteria specified in s.1 of the **Charter**. In determining whether a particular limitation meets the requirements of s.1, a court must be guided by the values and principles essential to a free and democratic society, and must conduct its inquiry in light of a commitment to uphold the rights and freedoms guaranteed by the **Charter**.

R. v. Oakes, supra, at pp. 135-137
R. v. Edwards Books, [1986] 2 S.C.R. 713
Singh v. Minister of Employment and Immigration [1985] 1 S.C.R. 177

97. Accordingly, where a limitation is placed on guaranteed rights and freedoms, the respondents must first establish that the objectives served by the challenged measure relate to concerns which are of pressing and substantial importance, and second, that the means chosen to attain those objectives are proportional or appropriate. As the Supreme Court of Canada has stated in both the **Oakes** and the **Edwards Books** cases, the proportionality requirement has three aspects:

(a) the limiting measure must be carefully designed, or rationally connected, to the objective, and cannot be arbitrary, unfair or based on irrational considerations;

(b) the limiting measure must impair the right in question as little as possible; and

(c) the effects of the limiting measure must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

R. v. Oakes, supra, at pp. 138-140
R. v. Edwards Books, supra, at pp. 768-69

98. In order to justify an infringement of a right or freedom guaranteed by the **Charter**, the evidence adduced by the party relying upon s.1 of the **Charter** must "make clear to the court the consequences of imposing or not imposing the limit". As the Court of Appeal held below, it is not sufficient under the **Charter** "simply to find that there is a rational basis for legislation when a person is seeking to uphold a limitation on a guaranteed right under section 1." Rather, in conducting its inquiry under s.1 of the **Charter**, the court must determine whether the evidence, including social science or economic evidence, demonstrates that the challenged legislation satisfies the requirements of s.1 of the **Charter**, including the three-tiered proportionality test.

Reasons for Judgment, Ontario Court of Appeal, pp. 138-40
R. v. Oakes, supra, at p. 138

99. It is respectfully submitted that, with respect to both aspects of the inquiry under s.1 of the **Charter**, purely utilitarian considerations, such as economic cost and administrative inconvenience or adjustments, cannot give rise to justification under s.1, given the importance of the rights and freedoms guaranteed by the **Charter**. Moreover, the mere fact that transitional adjustments may result from the vindication of constitutionally guaranteed rights and freedoms does not justify the continued deprivation of **Charter** rights and freedoms.

Singh v. Minister of Employment and Immigration, supra, at pp. 218-19
R. v. Oakes, supra

Harrison v. University of British Columbia (1989), 49 D.L.R. (4th) 687 (B.C.C.A.) at p. 705
R. v. Bryant (1985), 48 O.R. (2d) 732 (Ont.C.A.) per Blair J.A. at p. 748

(b) **Is Age Discrimination Subject to a Lesser Standard of Review?**

100. The Court of Appeal rejected the submission that age should be protected by or subject to a lesser standard of scrutiny or review than other enumerated heads under s.15(1). As the Court of Appeal held, there is "nothing in the text of s.15(1) that warrants a difference in the degree of protection accorded to any of the rights guaranteed under that section." As a result, it is submitted that there is no basis in the **Charter** for applying a lower standard of scrutiny to the review of discrimination based on age than to the review of other enumerated grounds of discrimination. Rather, the specification of age as an enumerated ground of discrimination in the **Charter**:

(a) makes Canada unique, in that it is the first jurisdiction to specifically protect individuals against age discrimination in a constitutional document; and

(b) marks a clear departure from the U.S. Bill of Rights, and a rejection of the U.S. Supreme Court's decision in **Murgia** to effectively deny any constitutional protection to age-based discrimination by subjecting it to minimal scrutiny.

Re Blainey and Ontario Hockey Association, supra, at pp.742-746
Attorney-General of Ontario, **Equality Rights Background Paper, supra**, p. 301
Finkelstein, **supra**, at p. 192

101. It is submitted, as the Court of Appeal itself held, that any attempt to incorporate the U.S. Supreme Court's approach to determining which classifications are to be subject to strict scrutiny would fail to have regard to the significant differences between the Fourteenth Amendment of the U.S. Constitution and s.15(1) of the **Charter**, in their language, structure and underlying rationale. Thus, as pointed out in paragraphs 83-84 above, both the open-ended language of the Fourteenth Amendment and its historical underpinnings have dictated the U.S. Supreme Court's approach in determining the level of scrutiny for classifications such as illegitimacy, mental or physical disability, sex or age. In contrast, by specifically enumerating prohibited grounds of discrimination in section 15(1) itself, the **Charter** makes it clear that legislative or governmental classifications based on such grounds are not only per se discriminatory, but must meet the justificatory criteria under s.1. In this respect, the Supreme Court of Canada has cautioned against importing U.S. jurisprudence in interpreting our own **Charter**.

Hunter v. Southam, supra, at p. 161
Re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486, at p. 498

The Right Honourable Brian Dickson, P.C., **"Address to Mid-Winter Meeting of Canadian Bar Association"**, (1986) at p.13:

"... we must be alert, in selecting from [American] jurisprudence to the many fundamental differences between the American Constitution and values and our own Constitution and values."

The Right Honourable Brian Dickson, P.C., **"Address to the Princeton Alumni Association"**, (1985) at pp.19-24

102. It was the position of the respondents below that age-based discrimination should be subject to a minimal or lesser standard of review, on the basis that (i) it is not motivated by feelings of hostility; or (ii) all persons experience the aging process, or (iii) age provides a more accurate measure of ability than some of the other enumerated grounds in s.15(1). In this respect, the submissions of the appellants are as follows:

(a) as the historical record before this Court discloses, there has, in fact, been a history of prejudice against older individuals, of which mandatory retirement is itself a prime illustration. Moreover, whether or not age discrimination is different race discrimination in its degree of hostility, to suggest that it should be subject to a lesser standard of review misconstrues the purpose of the protection afforded by s.15(1), namely, to counteract stereotypical assumptions about the enumerated groups which act as artificial or arbitrary barriers to equal opportunity and individual development. Indeed, in Canada, the definition of discrimination accepted by our courts no longer requires that the hostility or animus be directed against a particular group, but rather recognizes the adverse effect of discriminatory treatment.

(b) the fact that we all experience the aging process is not a safeguard which prevents discriminatory acts by the majority. The prospect that current decision makers may someday be 65 and older is no guarantee against their acting in a discriminatory fashion against older individuals today, or against their acting on the basis of negative stereotypes. In this respect, discrimination against the elderly may appear, from the perspective of those imposing it, to be of more limited duration than from the perspective of those who experience it. Like racial and sexual discrimination, age discrimination segregates on the basis of a characteristic which the individual has neither chosen nor has power to change.

Tribe, **American Constitutional Law**, p.1077, n.3, and p.1081, n.14

(c) with respect to the suggestion that a lesser degree of judicial scrutiny is warranted, because age provides a more accurate measure of ability than some of the other enumerated grounds, it is submitted that this cannot be the case; there are, in fact, statistical generalizations which may be made between particular abilities and certain other enumerated grounds, but no one would suggest that this also calls for a lesser standard of review. For example, although there are generalizations which might be made about physical strength and sex, no one would suggest that sex-based discrimination should be viewed less suspiciously than any other form of discrimination. Indeed, it is precisely because such generalizations have led to stereotypical assumptions

unrelated to any particular individual's ability that these particular grounds, including age and sex, have been specifically enumerated.

Los Angeles Department of Water and Parks v. Manhart, (1978), 436 U.S. 702 at p.708:

"The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a ... sexual class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."

(c) <u>Restricting the Consideration of Section 9(a) to Mandatory Retirement in the University Context</u>

103. It is respectfully submitted that the majority of the Court of Appeal erred by restricting its consideration as to whether s.9(a) of the **Code** could be justified under s.1 of the Charter to (a) mandatory retirement and (b) to persons employed as university faculty or librarians. In this respect, it is submitted that the majority erred in failing to consider whether, according to its terms, s.9(a) of the Ontario **Code** can be justified under s.1.

104. It is submitted that, since the objectives advanced in defence of s.9(a) are related solely to mandatory retirement, the majority erred in failing to consider whether a provision barring access to the **Code** in respect of all forms of age-based employment discrimination could be justified. As set out in paragraphs 117 and 120 below, it is the submission of the appellants that s.9(a) of the **Code** is overbroad in nature and design, and as a result cannot be justified under s.1 of the **Charter**.

105. Further, it is respectfully submitted that, even if s.9(a) related solely to mandatory retirement, the majority of the Court of Appeal erred in restricting its inquiry under s.1 of the **Charter** to whether mandatory retirement of university faculty and librarians could be justified, given that s.9(a) applies to all employees in a variety of industries or occupations, and is not restricted to the university context: see paragraphs 118 and 121 below.

106. It is submitted that, where a particular statutory provision, on its face, violates rights or freedoms guaranteed by the **Charter**, a court is obliged to examine the provision in accordance with its language, purport, and actual scope. Thus, in determining whether or not a particular legislative measure meets the requirements of s.1, a court is required to assess the particular balance struck by the legislature as embodied in the legislative measure before it. The court is

not entitled to assess the constitutional validity of the provision before it by rewriting the legislative measure in question, by filling in legislative lacunae, or by establishing qualifications which the Legislature itself has not included.

Dissenting reasons of Mr. Justice Blair, Case on Appeal, Vol. A, pp. 153-66, at p. 156:

"The conclusions that I have reached make it unnecessary to review the voluminous evidence about the impact of the appellants' claim on universities and the province... [T]he legislature might have included criteria in the **Code** under which the exclusion of university staff from **Charter** might have been justified. Such criteria might be similar to the present sections protecting pension plans referred to above. Weight might also be given to pension plans established pursuant to collective agreements or to distinctive features of employment such as guaranteed tenure and freedom from dismissal or demotion. The legislature has enacted no such provisions. Can this court, nevertheless, repair this deficiency in the **Code** and apply it as if it contained provisions which might justify overriding a **Charter** protection in this case? In my opinion, it cannot.

In this case, the court has only one function. It is to review the Code in order to determine whether it complies with the **Charter**. Having determined that it does not, it is not open to the court to read qualifications or exceptions into the statute which might under s.1 justify a **Charter** infringement. To do so would have the effect of amending the **Code**, which only the legislature can do."

Hunter v. Southam, supra, at p. 154 and pp. 168-69:

"At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed (p. 154).

"In the present case, the overt inconsistency with s.8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even is this were not the case, however, I would be disinclined to give effect to these submissions. While the courts are guardians of the constitution and of individual's rights under it, it is the Legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional (pp. 168-9).

R. v. Oakes, supra
R. v. Smith, [1987] 1045, per Lamer J. at pp. 1080-82
R. v. Morgenthaler, [1988] 1 S.C.R. 30 at p. 74
Rocket v. The Royal College of Dental Surgeons (1988), 49 D.L.R. (4th) 641 at pp. 648-49
R. v. Oakes (1983), 145 D.L.R. (3d) 123 (Ont. C.A.) at pp. 148-49:

"The presumption created by s.8 is in the nature of a mandatory presumption. Its constitutional validity must be determined by an analysis of the presumption divorced from the facts of the particular case."
R. v. Noble (1984), 14 D.L.R. (4th) 216 (Ont. C.A.) at pp. 238-39

107. In this connection, as Mr. Justice Blair held in his dissenting judgment in the Court of Appeal, a distinction may be made between provisions such as 9(a) of the **Code**, which overtly and on their face infringe rights and freedoms guaranteed by the **Charter**, and provisions which confer a discretion on public decision-makers which, while not on their face overtly inconsistent with the requirements of the **Charter**, nevertheless can in certain circumstances give rise to unconstitutional results or conduct. In the latter circumstances, it is not the legislative measure itself which infringes the **Charter**, but rather the conduct of a governmental actor acting pursuant to statutory authority. Whether or not it is possible to read down such a provision so as to authorize only that conduct which is consistent with the requirements of the **Charter**, it is not possible to do so in respect of s.9(a) of the **Code** which, on its face, overtly discriminates against all individuals aged 65 and over contrary to s.15(1) of the **Charter**, and is simply not capable of being read down.

108. As a result, in determining the constitutional validity of a challenged provision, such as s.9(a), and in particular, whether it can be justified under s.1, a court cannot, as the majority of the Court of Appeal did, apply s.1 to s.9(a) **as if** s.9(a) applied only to the facts or applicants before it. Rather, as s.52(1) of the **Constitution Act** makes clear, it is the constitutionality of the law which is in question. Thus, in the context of s.9(a) of the **Code**, the issue under s.1 of the **Charter** is whether s.9(a) as drafted can be justified, i.e. whether it is a justified breach of s.15(1) to prevent individuals aged 65 and over from complaining to the Human Rights Commission about any form of age discrimination in employment. By considering s.9(a) of the **Code** only insofar as it relates to mandatory retirement of university faculty and librarians, the majority of the Court of Appeal effectively rewrote s.9(a), by reading it as if it did not on its face apply to all employees, and to all forms of age discrimination. In so doing, the majority changed the ambit of the provision enacted by the Legislature.

109. It is submitted that, if accepted, the approach adopted by the majority of the Court of Appeal would require the courts to determine, with respect to every statutory provision of general application, whether or not it could be justified under s.1 of the **Charter** on a case-by-case basis. Such an approach could result in a statutory provision, overtly inconsistent with rights and freedoms guaranteed by the **Charter**, being found constitutional in some cases, but unconstitutional in others. In the case of s.9(a), mandatory retirement could be justified for some groups of employees, but not others. However, this is a policy decision to be determined by the Legislature

and not by the courts. Moreover, the determination made by the Legislature was to enact a provision of general application, precluding complaints by all employees aged 65 or over against all forms of age discrimination in employment.

R. v. Oakes, supra, (Ont. C.A.) at pp. 148-49:

> "Parliament has made no distinction based upon the quantity of drugs possesses, and I do not think that we are entitled to re-write the statute ... Since, however, Parliament has not addressed that issue, I do not think the courts should undertake to re-write the statute by applying it on a 'case by case' basis even if we were entitled to do, and I think we are not."

110. In this connection, it is submitted that the approach adopted by the majority of the Court of Appeal in the instant case conflicts with the approach which it followed in **R. v. Oakes, supra,** and in **Re Blainey and The Ontario Hockey Association, supra**. In **Oakes**, the Court of Appeal specifically held that "constitutional validity must be determined by an analysis of the presumption [created by s.8 of the **Narcotics Control Act**] divorced from the facts of the particular case". In **Blainey**, the Court of Appeal inquired into whether the blanket prohibition on complaints about sex discrimination in sport could be justified, not as if it applied only to the applicant Blainey, or to hockey in particular, but rather, to athletic activity, as the statute provided. Further, it is to be noted that the approach taken by the majority of the Court of Appeal in the instant case differs from that taken by the British Columbia Court of Appeal, which considered the provisions of the British Columbia **Human Rights Code** in the context, not merely of universities, but of society generally.

Re Blainey and The Ontario Hockey Association, supra
R. v. Oakes, supra
Harrison v. The University of British Columbia, supra

111. As a result, it is submitted that, in determining whether s.9(a) of the **Code** can be justified under s.1 of the **Charter**, a court cannot apply the justificatory criteria under s.1 to s.9(a) as if s.9(a) applied only to mandatory retirement of university faculty and librarians. Section 1, including the three-tiered proportionality test, must be applied to the law or provision which has been found to be inconsistent with rights and freedoms guaranteed by the **Charter**, and not to the particular facts or applicants before the court, since as noted above, it is the constitutionality of the law, and not the facts, which is in issue. Thus, in the specific context of s.9(a), the issue under s.1 is whether the removal of the rights of all individuals aged 65 and over to complain about age discrimination in employment can be justified.

(iv) Justifications Advanced by the Respondents under Section 1 of the Charter Concerning Section 9(a) of the Human Rights Code

112. The justifications advanced by the respondents in respect of s.9(a) relate solely to mandatory retirement. Below, the appellants set out their submission that the objectives advanced by the respondents do not meet the requirements for establishing justification under s.1 of the **Charter.**

(a) Is There a Pressing and Substantial Objective?

113. It is respectfully submitted that the respondents' objective of avoiding a reduction of employment opportunities for younger workers, at the expense of older workers, is itself inherently discriminatory, and inconsistent with the values and principles essential to a free and democratic society, which, according to Chief Justice Dickson in the **Oakes** case, include "respect for the inherent dignity of the human person" and "commitment to social justice and equality". The objective of forcibly retiring older workers, in order to make way for younger workers, denies the inherent dignity of individuals aged 65 and over, for it assumes that the continued employment of some individuals is less important to those individuals, and of less value to society at large, than is the employment of other individuals, solely on the basis of age. This cannot constitute a pressing and substantial objective under the **Charter.** In any event, the evidence set out in paragraphs 16 to 22 above establishes not only that there would be no substantial or significant increase in unemployment if mandatory retirement were abolished, but also that retention of mandatory retirement does not reduce unemployment; instead, at most it merely redistributes unemployment from younger to older workers.

114. With respect to the pension-related objective, it is submitted that, as noted in paragraphs 23 to 24 above, the evidence simply does not establish any pressing and substantial concern relating to the maintenance or the integrity of pension plans in the event that mandatory retirement at age 65 were abolished. Indeed, the majority of the Court of Appeal accepted that the financial stability and the financial security which pension plans provide would not be affected if mandatory retirement were abolished. The majority found only that there would be some "administrative costs", and the evidence establishes that any required adjustments could easily be made. In any event, as submitted in paragraph 99 above, avoidance of administrative costs or transitional adjustments cannot constitute a pressing and substantial concern under s.1 of the **Charter.**

115. Similarly, with respect to concerns relating to specific personnel policies (e.g., deferred compensation, dismissals for cause, evaluation and planning), it is submitted that such matters relate solely to considerations of administrative convenience, which cannot be regarded as sufficiently pressing or substantial to be relied upon as justification under s.1 of the **Charter**. In any event, the evidence does not establish any pressing and substantial concern relating to personnel policies in the event that mandatory retirement were abolished: see paragraphs 25 to 31 above.

Atcheson and Sullivan, **"Passage to Retirement; Age Discrimination and the Charter", supra,** at p. 278:

"Administrative arguments have also been used to justify upper age limits. It is stated that mandatory retirement facilitates human resource planning on the part of organizations. While this is true, it is also a fact that companies can and do operate very successfully without mandatory retirement."

(b) Is Section 9(a) Carefully Designed to Advance Pressing and Substantial Governmental Objectives?

116. It is submitted that, even if any of the objectives advanced in support of s.9(a) were sufficiently pressing and substantial to warrant overriding constitutionally protected rights and freedoms, s.9(a) of the **Code** is not carefully designed to meet such objectives, nor is it rationally connected to those objectives. Moreover, s.9(a) is by its very terms arbitrary and unfair.

117. As noted in paragraph 104 above, it is the submission of the appellants that s.9(a) is overbroad in its very nature and design, and therefore cannot meet the proportionality requirements of s.1 of the **Charter**. In this regard, it is submitted that, since the only objectives advanced in support of s.9(a) relate to mandatory retirement, there can be no reason whatsoever for denying to individuals aged 65 or over the right to complain about all forms of age-based employment discrimination in employment. Section 9(a) is not restricted to denying to individuals aged 65 and over the right to complain that mandatory retirement amounts to age discrimination in employment; rather, it prevents them from complaining about <u>any</u> employment term or policy which discriminates on the basis of age. Thus, individuals aged 65 and over cannot complain about an age-based reduction in hours of work or wages, age-based denials of performance bonuses, promotions, overtime or vacation opportunities, or age-based demotions, transfers or lay-offs. Indeed, no explanation whatsoever has been offered as to why a provision barring access to the

Code in respect of all forms of age discrimination in employment is required to advance the government's stated objectives, nor has evidence been adduced to justify the overbreadth of s.9(a) of the **Code**.

> **Re Blainey and Ontario Hockey Association, supra**, at pp. 745-746:
>
> "A distinction based on public decency or for the physical protection of participants would, I think, be said to be reasonable. No such legislative purpose is disclosed by the broad language of s.19(2). . .
>
> In the view that I take of s.19(2), it is unnecessary to determine whether a sufficiently significant government interest is disclosed in the section. Assuming a legitimate constitutional purpose is disclosed, in my opinion the means chosen are grossly disproportionate to the end sought to be served. The O.H.A. has failed to show that the means chosen are 'reasonable and demonstrably justified' and 'impair as little as possible the right or freedom in question'.
>
> As I read the record, there was no effort to justify the broad scope of s.19(2) as being a reasonable limit on the right to equality. In my opinion, s.19(2) is an unreasonable limit on the right to the equal benefit and equal protection of the **Human Rights Code**. Indeed, it is somewhat of an anomaly to find in a statute designed to prohibit discrimination a provision which specifically permits it."
>
> **Harrison v. University of British Columbia, supra**, at p. 704
> **Re Southam Inc. and The Queen (No. 1)** (1983), 41 O.R. (2d) 113 (Ont. C.A.) at p. 134
> **Re Information Retailers Association and Metropolitan Toronto** (1985), 22 D.L.R. (4th) 161 (Ont. C.A.), at p. 180-85
> **Re B.C. Motor Vehicles Act, supra**, at p. 521
> **R. v. Oakes, supra**, at pp. 141-42
> **R. v. Smith, supra**, at pp. 1080-81
> **Brossard v. Commission Des Droits De La Personne Du Quebec**, unreported, Supreme Court of Canada, November 10, 1988, pp. 37-40

118. In any event, even assuming that s.9(a) was limited to prohibiting complaints to the Human Rights Commission respecting mandatory retirement, it is submitted that it is not carefully designed or rationally connected to the stated objectives advanced in its support, i.e., mandatory retirement. In this regard, it is submitted that:

(a) s.9(a) does not differentiate between industries, or occupations, in establishing age 65 as an appropriate age for retirement. While there may be certain jobs for which mandatory retirement can be justified, on the ground that it is a reasonable and bona fide occupation qualification, s.9(a) permits mandatory retirement in many industries where age is clearly not a bona fide occupational qualification:

(b) the denial of protection against employment discrimination to employees aged 65 or over applies whether or not there is an adequate pension plan, or indeed any pension plan at the particular workplace, whether or not the integrity of the existing pension plan would be affected if employees did not retire at age 65, and whether or not the employer intends to or does replace retired employees with younger workers. In short, s.9(a) permits discrimination against older workers even where retired employees are not replaced by younger employees, and where the pension plan is not affected in any way.

Re Blainey and Ontario Hockey Association, supra, at pp. 744-745
R. v. Edwards Books, supra, at p. 770:
"The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose".

119. Section 9(a) amounts to discrimination against a group of individuals simply because its members possess a characteristic over which they have no control, and regardless of their individual skill or ability. The respondents do not dispute, nor could they on the basis of the evidence before this Court, that chronological age is an unsatisfactory and inaccurate measure of any one individual sixty-five year old employee's productivity or performance. There is no trait or attribute inherent in reaching age 65 which supports the removal of protection against age-based employment discrimination, or the singling out of individuals for termination of employment at that age, in order to meet the stated objectives of s.9(a). Indeed, by singling out one group for adverse treatment solely on the basis of age, mandatory retirement cannot be said to be fair, because it effectively robs those subject to it of their dignity, undermines the attainment of social justice, and denies older workers the right to participate effectively in society.

Stoffman v. Vancouver General Hospital (1988), 49 D.L.R. (4th) 727 (B.C.C.A.) at p. 735
Harrison v. University of British Columbia, supra, at p. 704
George W. Adams, **"Bell Canada and the Older Worker: Who Will Review the Judges?"** (1974), 12 Osgoode Hall L.J. 389 at p.391-392

(c) <u>Does Section 9(a) Impair the Right to Equality as Little as Possible?</u>

120. It is submitted that the majority of the Court of Appeal erred in failing to consider whether there were reasonable alternative legislative measures, other than a blanket prohibition against complaints by persons aged 65 and over respecting all forms of age discrimination in employment.

In this respect, it is submitted that, even if the objectives advanced by the respondents do constitute pressing and substantial governmental concerns, s.9(a) is not the least restrictive means of accomplishing those objectives, since employees aged 65 and over are denied protection against all forms of age-based employment discrimination, and not just mandatory retirement: see also paragraph 117 above, and cases cited therein.

> **Dissenting Reasons of Mr. Justice Blair, Case on Appeal**, p. 166:
>
> "Section 9(a), in my opinion, does not satisfy the third requirement of the **Oakes** test that the measure adopted "should impair 'as little as possible' the right or freedom in question" as Dickson J. said at p. 227 D.L.R., p. 139 S.C.R. Section 9(a) does not merely limit or restrict the appellants' Charter right under s.15(1). It eliminates it because, under the Code, no protection against age discrimination in employment is provided after the age of 65. The absence of any qualification to the complete denial of the **Charter** right, to which I referred above, results in the failure of s.9(a) to meet the **Oakes** test.

121. Further, even assuming the concerns relied upon by the respondents to justify mandatory retirement were pressing and substantial, there would be no difficulty, as demonstrated by legislation in other jurisdictions, in designing a legislative provision which would permit mandatory retirement only in those workplaces where, for example, it was required to preserve the integrity of existing pension plans, or was implemented in order to hire younger employees, without making s.9(a) applicable in every workplace and to all employees, regardless of the circumstances: see also the submissions contained in paragraph 118 above. In this respect, it should be noted that the effect of finding s.9(a) to be unconstitutional would not be to abolish mandatory retirement, but rather would simply allow individuals aged 65 or over to complain to the Human Rights Commission that their mandatory retirement constituted age discrimination in employment, contrary to s.4 of the **Code**. It would still be open to an employer to establish before the Commission, as it now can do in the case of mandatory retirement under age 65, that age is a "reasonable and bona fide qualification" under s.23(b) of the **Code**.

> **Re Blainey and The Ontario Hockey Association, supra**, at pp. 744-45
> **Canadian Human Rights Act**, S.C. 1986-77, C. 33, as amended, s.10 and s.14(c)
> **Human Rights Act**, R.S.N.B. 1973, C.H-11, as amended, s.3(1) and s.3(6)
> **Individual Rights' Protection Act**, R.S.A. 1980, C.I-2, as amended, s.7(1) and s.11
> **Age Discrimination in Employment Amendments of 1986**, 99th Congress of the United States of America, Second Session

122. In any event, in light of the evidence as summarized in paragraphs 12 to 33 above, the respondents have failed to demonstrate that mandatory retirement is required in order to attain the various objectives which it allegedly serves. In this respect, the evidence discloses that the

assertion by the respondents that, if mandatory retirement were abolished, there would be an increase in unemployment, is not supported by the evidence: see paragraphs 16 to 22 above. Further, in terms of pension matters, the evidence is that pension plans do not require mandatory retirement in order to provide financial stability and security for employees: see paragraphs 23 to 24 above. Moreover, contrary to the position of the respondents, the evidence is that the abolition of mandatory retirement would not have a significant adverse effect in the area of personnel policies, including deferred compensation, dismissals, evaluation and monitoring, or planning considerations, and in any event, these concerns involve matters only of administrative inconvenience or cost: see paragraphs 25 to 31 above.

Harrison v. University of British Columbia, supra, at pp. 700-702

123. This evidence is confirmed by the experience in other jurisdictions and workplaces where there is no mandatory retirement. Further, studies by the Canadian Senate, and the U.S. Congress, have concluded that the objectives which the respondents assert as pressing and substantial can be attained without mandatory retirment. (**Retirement Without Tears**, in Krashinsky Affidavit, **Case on Appeal**, Vol. 6, Tab 3, Exhibit D; and **Mandatory Retirement: The Social and Human Costs of Enforced Idleness**, in Agarwal Cross-Examination, **Case on Appeal**, Vol. 7A, Tab A, Exhibit 1). Given that mandatory retirement has been abolished in other jurisdictions, including jurisdictions in Canada and in the United States, without any evidence of adverse consequences on the employment, pension or personnel policy objectives advanced in these proceedings by the respondents, it is respectfully submitted that any pressing, substantial or legitimate governmental objectives could be served without singling out individuals aged 65 and over for adverse treatment. In short, it is submitted that the respondents have failed to meet the onus of demonstrating that there are no reasonable alternatives to mandatory retirement. Indeed, it is submitted that even if the onus was on the appellants under s.1, that onus has been met on the basis of the evidence before this Court.

124. Further, it is submitted that the majority of the Court of Appeal erred in reaching its conclusion that s.9(a) impairs the right to freedom from discrimination as little as possible for the following reasons:

(a) the majority of the Court of Appeal entirely failed to apply the "minimal impairment" branch of the proportionality test, since it inquired only into whether age 65, as opposed to some later age, was the appropriate age for retirement, rather than asking

itself whether mandatory retirement was required at all in order to obtain the objectives advanced in support of s.9(a) by the respondents;

(b) the majority of the Court of Appeal erred in holding that provisions which have been found to constitute age discrimination contrary to s.15(1) do not have to be tuned with great precision. While in **Edwards** the Supreme Court of Canada held that a Legislature is entitled to some measure of deference in drawing distinctions when regulating business, the Court has been careful to note that such deference is permissible only where the distinction is not in and of itself offensive to constitutional provisions, purposes or values. However, it is submitted that judicial deference to legislative line-drawing on the basis of age is not warranted, since such distinctions are in and of themselves contrary to s.15(1) of the **Charter** and are based upon grounds of discrimination specifically enumerated therein. Just as judicial deference would not be appropriate in cases of race, religion or sex, overtly discriminatory provisions based upon the enumerated ground of age should not be countenanced by the judiciary unless the reasonableness of the distinction can be demonstrably justified;

Edward Books, supra, per Dickson, C.J. at 781, and per La Forest J. at p. 796 and pp. 804-5

(c) in its reasons, the majority of the Court of Appeal held that "it is not unreasonable for the Legislature to proceed slowly in changing the age for mandatory retirement" (p. 152). It is submitted that while, as this Court held in **Edwards**, the Legislature may in regulating industry or business undertake its reforms on a step-by-step basis, this cannot apply where the regulatory classification has itself been found to "impinge on the values and provisions of the **Charter**" because it constitutes discrimination contrary to s.15(1) of the **Charter**. Indeed, in holding that in certain circumstances the Legislature can proceed "one step at a time", the Court in **Edwards** relied upon the principles established by the U.S. Supreme Court in **Williamson v. Lee Optical**, (1955), 348 U.S. 483 which concerned legislative classifications to which the deferential "minimal scrutiny" standard of review is applicable under the Fourteenth Amendment. However, the requirements of s.1 of the **Charter** are more stringent than the deferential "minimal scrutiny" standard of review. It is submitted that, particularly in respect of prohibited grounds of discrimination specifically enumerated in s.15(1), including race, sex, or age, discriminatory provisions cannot be justified on a "step-by-step" basis, and that deference to legislative decision-making is inappropriate. In this respect, the U.S. Supreme Court has never suggested that the Legislature can proceed "one step at a time" in the case of classifications which are subject to "strict" or even "intermediate" scrutiny under the Fourteenth Amendment;

Edward Books, supra, per Dickson C.J. at p. 772

(d) the majority of the Court of Appeal erred in relying upon any general correlation between age and declining ability. Even if there is some general relationship between aging and ability, this "does not mean that most people reaching age 65 ... are unable to perform their duties", as the majority of the Court of Appeal itself found. Moreover, the very purpose of s.15(1) is to guarantee that individuals are treated on the basis of their own abilities and merits, and not on the basis of stereotypical assumptions or generalizations based upon membership in an enumerated or protected group;

The Governors of the University of Alberta v. Dickason et al, unreported, October 13, 1988, Alberta Queen's Bench at p. 48:

"The evidence of Dr. Schaie indicates that there is a decline in the mental abilities of more people the older the age group is after the plateau has been reached in the 50's and early 60's. The University statistics suggest this may start in the 50's. For the most part, it did not seem to me that this is disputed. It is equally true that those who do change do so in different ways, at different rates and at different times, not all related to cognitive functions. The evidence did not satisfy the Board these changes materially affect the ability of the academic staff as a whole to perform their duties as they approach or reach age 65. I agree."

Ontario Human Rights Commission v. Borough of Etobicoke, supra, at p. 209:

"We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employees' capacity is largely economic, that is where the employers' concern is one of productivity, and the circumstances require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the **Code**. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause".

(e) the majority of the Court of Appeal referred to the fact that there are other jurisdictions which have provisions for mandatory retirement. However, the issue under this branch of the proportionality test is whether there are alternatives to mandatory retirement. In this respect, the fact that there are jurisdictions both in Canada and elsewhere where there is no mandatory retirement, and that approximately one-half of the workforce in Canada is not subject to mandatory retirement, with no evidence of adverse consequences, demonstrates that reasonable alternatives to mandatory retirement clearly exist. In this respect, it is to be noted that the onus under s.1 lies upon the respondents, and not the appellants;

(f) the majority of the Court of Appeal erred in relying upon a relationship between continued financing of pension plans, and mandatory retirement at age 65. As noted in paragraphs 23 to 24 above, the evidence demonstrates that pension financing would be unaffected by the abolition of mandatory retirement, as is demonstrated by the experience of other jurisdictions.

Harrison v. University of British Columbia, supra, p. 700 and p. 702

125. Finally, and in the alternative, it is submitted that, even assuming the respondents could establish that there is no reasonable alternative to mandatory retirement at some age, the respondents have entirely failed to demonstrate that the stated objectives of mandatory retirement could not be attained by imposing mandatory retirement at a later age, which would permit older

workers to continue in employment for some time beyond age 65, and thereby impair the rights guaranteed by s.15 less than is now the case under s.9(a) of the Code.

Stoffman v. Vancouver General Hospital, supra, at pp. 735-36

(d) **Are the Objectives Advanced to Support Section 9(a) Proportional to the Adverse Effects on the Individuals Affected?**

126. It is respectfully submitted that the majority of the Court of Appeal erred in failing to consider the evidence respecting the adverse effect of mandatory retirement on all individuals aged 65 and older. In this respect, it is submitted that the majority erred in inquiring into the negative effect of mandatory retirement solely in connection with university faculty, notwithstanding that s.9(a) applies to all employees in Ontario.

127. As set out in paragraph 92 above, the protection afforded by human rights legislation is of fundamental importance in Canadian society. The denial of protection against all forms of age discrimination in employment to individuals aged 65 or over has a particularly severe effect in that it deprives those individuals of a benefit which has been recognized by the courts to be of fundamental importance.

128. Further, the effect of mandatory retirement is to arbitrarily remove an individual from his or her active worklife, regardless of his or her actual mental and physical capacity, and regardless of his or her individual preferences. Mandatory retirement not only causes loss of income, but also deprives individuals of the continued opportunity to work, which for many individuals provides a symbol of worth and achievement, and a source of social status, prestige, and meaningful social contacts. Further, as the evidence set out in paragraph 13 above establishes, mandatory retirement has a disproportionately harsh financial impact on women.

> The Protection of the Aged From Discrimination", in McDougal, Lasswell and Chen, **Human Rights and World Public Order**, Yale University Press, 1980, pp.779-796 at p.781:
>
> "The traumatic impact of the sudden loss of accustomed roles, precipitated by involuntary retirement, is immense and profound. As Rosow has sharply summarized:
>
> > '[T]he loss of roles excludes the aged from significant social participation and devalues them. It deprives them of vital functions that underly their sense of worth, their self-conceptions and self-esteem. In a word, they are depreciated and become marginal, alienated from the larger society. Whatever their ability, they are judged invidiously, as if they have little of value to contribute to the world's work and affairs . . .'
>
> The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression. The ordinary process of aging aside, the psychosomatic

condition of the elderly may be brutally and unduly impaired and exacerbated by the shock of involuntary retirement. Formerly useful skills are consigned to the scrap heap overnight."

Adams, **Bell Canada and the Older Worker, supra**, at pp. 392-93:

"Unfortunately today, as in the past, older workers are stereotyped by the assumptions that they are less productive, they cannot easily be retrained, or that they are inflexible ... Even present day public policy evidences this invidious discrimination . . . These unfounded societal biases place older persons on inadequate fixed incomes . . . [which] in turn forces them to give up many of the comforts of modern day life at a very inopportune time, and to make soul-destroying claims upon relatives. Furthermore, for many older people, the loss of identity associated with compulsory retirement may present a stark social reality. This may be so if one's life revolves about one's job, a revolution that suddenly and unnaturally stops at age 66. [I]t is evident that an enlightened policy objective for a modern industrial society should be the retention of older workers in the work force and not their enforced attrition."

U.S. House Committee on Aging, **Mandatory Retirement: The Social and Human Costs of Enforced Idleness**, 1977, at p.22; (also filed as Exhibit 1 to the Agarwal Cross-Examination, **Case on Appeal**, Vol. 7A)
Attorney-General of Ontario, **Equality Rights Background Paper, supra**, p.305
Agarwal Affidavit, **Case on Appeal**, Vol. 7, Tab 1, Exhibit C, pp. 16-18
Agarwal Cross-Examination, **Case on Appeal**, Vol. 7A, Tab 2, Exhibit 2, pp.68-74

129. As a result of mandatory retirement, individuals are deprived of employment solely by the accident of their date of birth, although age is a characteristic over which individuals have no control, and which bears no necessary relationship to individual ability or merit. Mandatory retirement also reinforces the societal perception that the old are, and should be, less than full and equal participants in society. This perception often rests on negative stereotypes concerning aging, according to which older persons are viewed as playing a decreasingly active role in life, as being resistant to change, and as having failing mental and physical powers, stereotypes which are reinforced by mandatory retirement itself.

130. In short, even if the respondents could establish that the objectives advanced to support s.9(a) were pressing and substantial, and that s.9(a) was carefully designed to advance those objectives in the least restrictive manner, it is submitted that the severity of the economic, psychological and social effects on individuals who are forced to retire, and who are denied the protection of the **Code**, is disproportionate to, and outweighs any benefits to be gained by, the continued imposition of mandatory retirement.

B. THE CONSTITUTIONALITY OF THE MANDATORY RETIREMENT PROVISIONS ENACTED BY THE RESPONDENT UNIVERSITY

(i) The Application of the Charter

131. It is the submission of the appellants that universities are bound by the requirements of the **Charter** for the following reasons:

(a) universities constitute part of the legislature or government of the province within the meaning of s.32 of the **Charter**, insofar as they are creatures of statute which exercise powers pursuant to statute and carry out a public function pursuant to statutory authority;

(b) universities form part of the administrative machinery of government, and as such have been held to be subject to the supervisory authority of the courts through the traditional prerogative writs;

(c) if universities are not bound by the **Charter** as a result of (a) or (b) above, the relationship between universities and government is such that the activities of universities should be viewed as being governmental in nature, and subject to the requirements of the **Charter**.

(a) Exercise of Public Statutory Powers

132. It is respectfully submitted that a body which is a creature of statute exercising statutory authority for a public purpose is bound by the **Charter**, since it falls within the scope of the term "Legislature" or "government" as referred to in s.32 of the **Charter**. As the **Charter** applies to the Legislature of each province, it must also apply to those public bodies which derive their existence, authority and powers from the Legislature. Not only must the statutes creating such bodies not infringe **Charter** rights, but the powers conferred upon such bodies cannot extend to authorize actions which violate the **Charter**, since the Legislature cannot create or sanction such authority.

Hogg, **Constitutional Law of Canada**, 2nd ed., p.671:

"The references in s.32 to the 'Parliament' and a 'legislature' make clear that the **Charter** operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the **Charter** will be outside of the power of (ultra vires) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, **universities**, administrative tribunals and police officers, is also bound by the **Charter**. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the **Charter**, neither body can authorize action which would be in breach of the **Charter**. Thus, the limitations on statutory authority which are imposed by the **Charter** will flow down the chain of statutory authority and apply

to regulations, by-laws, orders, decisions, and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority." [emphasis added]

R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 573 at pp. 598-99 and pp. 603-3
Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441 at pp. 459-60
Re McCutcheon and City of Toronto (1983), 147 D.L.R. (3d) 193 (Ont.H.C.)
Re Klein and the Law Society of Upper Canada (1985), 16 D.L.R. (4th) 489 (Ont.Div.Ct.) per Callaghan J. at 528
Eberts, "**Sex-Based Discrimination and the Charter**", in Bayefsky and Eberts, **Equality Rights and The Canadian Charter of Rights and Freedoms**, pp.183-229 at 213

133. The purpose of the **Charter** includes protection of the individual from legislative or governmental infringements of guaranteed rights or freedoms. This purpose would be undermined if the **Charter** did not apply to the legislature or government in all its manifestations, including those bodies created by, and subordinate to, the Legislature. Further, if bodies established by statute and exercising public functions were not viewed as falling under the **Charter**, the Legislature could effectively circumvent the **Charter** simply by delegating or granting power to subordinate bodies to carry out public functions.

La Forest, "**The Canadian Charter of Rights and Freedoms: An Overview**" in (1983), 61 Can. Bar. Rev. 19, at p.26:

> "The sentiment of Lord Atkin in speaking of a constitutional prohibition addressed solely at the legislative branch is relevant here: 'The Constitution', he stated, 'is not to be mocked by substituting executive for legislative interference with freedom'. The constitutional limits of legislative and governmental power can no more be evaded by authorizing someone else to do the constitutionally forbidden act or by leaving the doing of what is forbidden to someone's discretion."

Re McCutcheon and City of Toronto, supra, per Linden, J. at p. 203

134. Courts have consistently held that Canadian universities are statutory bodies, exercising public functions, including the regulation of the employment relationship with faculty, and are institutions imbued with a public aspect or function, flowing directly from statutory authorization. Moreover the historical record concerning the evolution of universities in Canada, summarized in paragraphs 35 to 44 above, clearly establishes that universities in general, and the particular universities before this Court, are the product of legislative initiative, and governmental policy, and carry out an important public function. As a result, it is submitted that universities are bodies whose actions are subject to the **Charter**.

Paine v. University of Toronto (1982), 34 O.R. (2d) 770 (Ont. C.A.), at pp.773-74; reversing on other grounds **Re Paine and University of Toronto** (1981), 30 O.R. (2d) 69 (Ont.Div.Ct)
Re Bennett and Wilfrid Laurier University (1984), 43 O.R. (2d) 123 at p.126 (Ont.Div.Ct.); affirmed (1984), 48 O.R. (2d) 122 (Ont. C.A.)
Re Ruiperez and Board of Governors of Lakehead University (1983), 41 O.R. (2d) 552 (Ont.C.A.)
Re Giroux and The Queen in Right of Ontario (1984), 46 O.R. (2d) 276 (C.A.)
Riddle v. University of Victoria (1979), 95 D.L.R. (3d) 193 (B.C.C.A.), at pp.227-28
King v. University of Saskatchewan [1969] S.C.R. 678 at p. 683
Kane v. Board of Governors of the University of British Columbia, [1981] 1 S.C.R. 1105
Re Harelkin and University of Regina, [1979] 2 S.C.R. 561

135. Further it is submitted that the **Charter** applies to the retirement provisions enacted by the respondent universities, since the retirement provisions derive from statutory authority, pursuant to which each university's Board of Governors has enacted policies, resolutions or by-laws establishing mandatory retirement. In this respect, at the University of Toronto there is a formal resolution of the Board of Governors; at York University a pension plan established by the Board of Governors; at the University of Guelph a policy and practice established by the Board of Governors; and at Laurentian University general by-laws enacted by the Board of Governors. **Reasons for Judgment, Ontario Court of Appeal**, pp. 97-98

136. It is submitted that the Court of Appeal erred in relying upon the absence of a specific statutory requirement that universities enact mandatory retirement provisions. In this regard, it is submitted that, in order for the **Charter** to be applicable, it is sufficient that the action or activity be undertaken by a statutory authority exercising its statutory powers in carrying out a public function. Otherwise, the government would be able to avoid the **Charter** by a wide grant of discretionary authority to a creature of statute, and the purpose of the **Charter** in restraining unconstitutional governmental activity would be substantially undermined. If the **Charter** were not applicable in such cases, a public or governmental actor could avoid **Charter** scrutiny merely by exercising discretionary powers, although it is precisely in such circumstances that the protection of the **Charter** is most necessary in order to preserve fundamental rights and freedoms.

137. It is submitted that the Court of Appeal erred in relying upon the autonomy granted to universities in the conduct of their internal affairs to support its conclusion that universities are not bound by the **Charter**, for the following reasons:

(a) once it is established that a particular body is exercising statutory powers in order to carry out public functions, the question of the degree of day-to-day supervision exercised by the Legislature over those functions cannot be a relevant consideration. Indeed, it is precisely when the degree of supervision over the actions of a subordinate actor is less fully circumscribed that the possibility of the violation of constitutionally guaranteed rights and freedoms is most pronounced. This is the case since, in the absence of specific legislative or regulatory criteria, or day-to-day supervision, the statutory body is placed in a position where it is least inhibited in its ability to interfere with constitutionally protected rights and freedoms.

(b) while it is in the public interest that universities exercise a degree of autonomy, so as to ensure that they effectively carry out their public functions, this does not derogate from the fact that universities are constituted by statute, derive their power from a legislative grant of authority, and fulfill an important public function; and

(c) the recognition by the courts of the relative autonomy of universities has, in fact, not been regarded as inconsistent with the status of universities as public bodies, subject to supervision by the Courts as part of the machinery of government. In this connection, this Court stated in **Re Harelkin and University of Regina** that "a university incorporated by statute and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of ensuring the higher education of a large number of citizens".

Re Harelkin and University of Regina, supra
Paine v. University of Toronto, supra

(b) Universities as Part of the Administrative Machinery of Government

138. In the **Dolphin Delivery** decision, the Supreme Court of Canada held that the **Charter** "was intended to restrain government action and to protect the individual" and that s.32 of the **Charter** specifies the actors to whom the **Charter** will apply, namely, "the legislative, executive and administrative branches of government". It is respectfully submitted that universities, insofar as they constitute part of the administrative branch of government, are bound by the **Charter.**

R.W.D.S.U. v. Dolphin Delivery, supra

139. In Canada, where unlike the U.S. there is no clear demarcation between the legislative, executive, and administrative branches of government, it has been left to the courts to determine the boundaries of administrative action through the exercise of their supervisory powers. As Chief Justice Dickson stated in **Martineau v. Matsqui Institution**, where an administrative entity forms part of the "machinery of government", its decisions and activities will be subject to judicial review.

Martineau v. Matsqui Institution Disciplinary Board (No.2) [1980] 1 S.C.R. 602 at pp. 616-17, and pp. 628:

"Certiorari is available as a general remedy for supervision of the machinery of Government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers."

140. In the specific context of university decision-making, the courts have held that decisions made by university authorities are amenable to judicial review on the basis that they constitute administrative action. Judicial review procedures, designed to control the machinery of government, have been utilized in order to ensure that universities comply with the requirements of procedural fairness.

See cases referred to in paragraph 134 above.

141. The application of administrative law principles to restrain the exercise of decision-making powers by public bodies proceeds from a recognition that, when public institutions, which form part of the machinery of government, make decisions which affect the rights of individuals, the courts should intervene to ensure that such decisions are made in accordance with fundamental principles of fairness. It is submitted that the same considerations which determine whether judicial review is available apply with equal force in constitutional law, since the **Charter** is designed to protect individuals from governmental action which violates fundamental principles reflected in constitutionally guaranteed rights and freedoms. This is not to say that it is necessary, in order to be bound by the **Charter**, that a governmental actor must be subject to judicial review; rather, it is submitted that, at a minimum, those bodies subject to judicial review are also subject to the **Charter**, since they form part of the machinery of government.

Martineau v. Matsqui Institution Disciplinary Board (No. 2), **supra**
Eberts, "**The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions**", **supra**, at p.147 and p.178
Re Chyz and Appraisal Institute of Canada (1985), 13 C.R.R. 3 (Sask.Q.B.); rev'd on non-**Charter** grounds, 20 C.R.R. 272 (Sask. C.A.)

142. It is respectfully submitted that the Court of Appeal erred in holding that, since the courts interfere with the internal affairs of wholly private organizations where members complain of a breach of internal rules or denial of natural justice, the availability of judicial review involves merely a matter of choice of remedies, and as a result is not determinative of whether a particular body is an emanation of government under s. 32 of the **Charter**. It is submitted that, where the

courts intervene with respect to the internal decisions of private bodies, they do so only as a matter of contract. The traditional prerogative remedies do not lie against private bodies. Rather, the traditional prerogative remedies are available only against bodies, such as the respondent universities, which form part of the machinery of government. It is submitted, therefore, that the same considerations which result in a finding that universities form part of the machinery of government for administrative law purposes are applicable in determining whether universities are part of government for the purposes of s. 32 of the Charter.

Reasons for Judgment, Ontario Court of Appeal, p. 114
Martineau v. Matsqui Institution Disciplinary Board, (No. 2), supra

(c) **The Relationship of Universities to the Legislative and Executive Branches of Government**

143. In the alternative to (a) or (b) above, it is respectfully submitted that the respondent universities constitute part of government under s.32 of the **Charter** in light of the nature of the relationship between universities and the elected or executive branches of government.

Re Blainey and Ontario Hockey Association, supra, at p.738
R.W.D.S.U. v. Dolphin Delivery, supra

144. It is submitted that universities must be regarded as governmental in character, having regard to the entire context in which universities operate, including:

(a) their statutory framework, in that they are established by statute; their powers, objects and governing structure are determined by statute; they are afforded such special powers as expropriating property and regulating the internal affairs of the university community; and are given the exclusive statutory authority to grant degrees;

(b) their historical origins and development as part of a public system of post-secondary education;

(c) their dependence upon public funding, to the extent that they could not survive without vast infusions of public monies; and

(d) the extent to which government structures, co-ordinates and regulates their activities, e.g. through operating grants, capital grants, special funds, control over tuition fees, and approval of new programs.

In this respect, the appellants rely upon paragraphs 34 to 56, which detail the nature of the relationship between the provincial government and the Ontario university system.

145. Having regard to the relationship between the provincial government and the Ontario university system, universities and government are intricately and inextricably interconnected. However much authority universities may retain over their internal affairs, which on the evidence set out in paragraph 45 to 55 is anything but absolute and complete, the historical record reveals that universities are statutory institutions, and were created by the Legislature to provide substantial opportunities for post-secondary education, a responsibility which Canadians expect their legislatures and executives to meet. In this sense, universities have been delegated a fundamental public responsibility. Notwithstanding the measure of independence granted to the Ontario university system in the daily supervision of its affairs, the authority and fiscal capacity of Ontario universities depend upon legislative and governmental action, without which universities would be unable to discharge the public duties delegated to them.

146. As a result, it is submitted that, given the nature and importance of the function undertaken by universities in Canadian society, their historical development and the present way in which the Ontario university system is operated, universities are public actors, and as such are obliged to comply with the constitutionally guaranteed rights and freedoms enshrined in the **Charter**. By creating, structuring, funding and supervising the Ontario university system, the provincial government discharges its duty and performs its function of providing higher education to the population of Ontario. It is submitted that universities, as public bodies designated by the Legislature to carry out this significant and vital public function, are obligated in all of their activities to respect those rights and freedoms considered fundamental to Canadian society, which rights and freedoms form part of the supreme law of Canada.

147. In its decision, the Ontario Court of Appeal held that the nature and degree of control or encouragement by the Legislature or government of a body created by the Legislature is not relevant in determining whether or not that body is subject to the **Charter**. In this regard, it is submitted that to disregard the relationship or connection between the Legislature and a particular statutory body it has created is to allow form to prevail over substance, to unduly restrict the scope and application of the Charter, and to fail to protect the individual against governmental action in its various manifestations.

Reasons for Judgment, Ontario Court of Appeal, p. '10
R.W.D.S.U. v. Dolphin Delivery, supra

148. In this connection, the status of the respondent universities is to be distinguished from that of the Ontario Hockey Association in the **Blainey** case, in which the Ontario Court of Appeal held that the mere funding of an otherwise private hockey association was insufficient to support the conclusion that such an association constituted a governmental agency exercising a governmental function. As the Court of Appeal emphasized in **Blainey**, there was in that case no delegation of power by the Legislature, and no grant of any powers by government. In this respect, the following factors, inter alia, distinguish the position of hockey associations from universities:

(a) universities are creatures of statute, and carry out a public function in the exercise of their statutory powers;

(b) universities are granted unique powers and responsibilities pursuant to statute, and their activities are circumscribed by statute;

(c) as set out in paragraphs 45 to 55 above, government exerts a large measure of control, both direct and indirect, over the activities of the universities;

(d) universities are subject to the supervisory power of the courts through the exercise of prerogative writs precisely because of the uniquely public aspect of their functions; and

(e) universities have been designated as the exclusive vehicle in Ontario to provide post-secondary education resulting in a university degree, pursuant to the **Degree Granting Act.**

Re Blainey and Ontario Hockey Association, supra

(d) **Additional Submissions Respecting the Court of Appeal's Decision**

149. According to the Court of Appeal, an entity is bound by the **Charter** only where that entity is "performing a government function in the place and stead of the government", and where the entity was "incorporated by government to perform a governmental function; a function that the Provincial government could and often does perform itself." (p. 103 and p. 113). However, it is submitted that the test adopted by the Court of Appeal (i) begs the question as to whether the entity under consideration is itself government; (ii) ignores the fact that government "could" perform virtually any function; (iii) restricts the application of the **Charter** to functions which the government has performed in the past; and (iv) permits the Legislature to avoid the requirements of the **Charter** by creating subordinate bodies which exercise statutory powers on its behalf for a public purpose.

150. In its reasons (pp. 115-116), the Court of Appeal suggested that the **Charter** may not apply to a governmental actor, where the impugned action is essentially of a private, commercial, contractual or non-public nature. It is submitted, that to the extent that the Court of Appeal held that certain acts of government are exempt from **Charter** scrutiny, this holding constitutes a significant narrowing of the protection which the **Charter** affords against government. If accepted, the government could circumvent the **Charter** by using its contractual power rather than by enacting legislative measures. Thus, for example, the government would be immune from scrutiny under the **Charter** if, as a matter of contract, it required its employees to campaign on its behalf during an election, or if government advised businesses that it would not contract with them unless they subscribed to a particular political persuasion.

151. It is submitted that just as a statutory authority cannot do by way of contract that which is prohibited by statute, so a body bound by the **Charter** has no greater authority to achieve by way of contract that which is otherwise constitutionally forbidden. Moreover, if contractual provisions cannot override the right to be free from discrimination as guaranteed by human rights legislation, a fortiorari contractual provisions cannot override, or detract from, constitutionally guaranteed rights and freedoms set out in the **Charter**, given that the **Constitution of Canada** constitutes Canada's supreme law. In any event, in the instant case, the mandatory retirement provisions are imposed on all faculty and librarians as a result of policies promulgated by each of the respondent universities. The fact that these provisions may subsequently be reflected in collective agreement does not detract from the reality that mandatory retirement is imposed on all individual faculty and librarians who wish to hold an appointment with the respondent universities.

> **Ontario Human Rights Commission v. Borough of Etobicoke, supra**, at pp. 213-14
> **Winnipeg School Division, No. 1 v. Craton, supra**, at p. 154
> **Insurance Corporation of B.C. v. Heerspink, supra**, at pp. 158-9

152. To suggest that there are spheres of governmental conduct which are immune or exempt from constraints imposed by the **Constitution**, including the **Charter**, is not supported by the text of s.32 of the **Charter** itself, and is inconsistent with the purpose of the **Charter**, which is to constrain governmental action inconsistent with the rights and freedoms guaranteed by the **Charter**. Further, it is submitted that the rule of law itself, which is one of the principles upon which the **Charter** is predicated, as reflected in the **Charter's** preamble, dictates that all activity undertaken by government be subject to and circumscribed by fundamental constitutional requirements. In

this regard, in **Dolphin Delivery**, the Supreme Court of Canada has held that the conduct of government is subject to the **Charter** whether challenged in public or private litigation.

> **R.W.D.S.U. v. Dolphin Delivery, supra**, at pp. 558-99
> **Roy v. Hackett** (1987), 62 O.R.(2d) 365 (C.A.), at p. 371
> **Air Canada v. British Columbia** [1986] 2 S.C.R. 539 at p. 545:
>
> "In my view, if even a statute cannot permit the retention of monies obtained under an unconstitutional statute, that result cannot be achieved under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supported discretion. "All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with the constitutional imperatives."
>
> **Moore v. British Columbia** (1988), 50 D.L.R. (4th) 29 (B.C.C.A.) at p. 36:
> "What is involved in this case is an administrative act of government, an order given by an administrator in the course of carrying out a government function [an order to an employee by her supervisor in the course of employment]. In short, the order to the appellant to approve abortion expenses was part and parcel of the exercise of governmental power, and ought not to be characterized as private action, in the sense that phase is discussed in [**Dolphin Delivery**]. In my opinion, the **Charter** applies.
>
> **Fraser v. Public Service Staff Relations Board** [1985] 2 S.C.R. 455 at p. 462

153. Further, it is to be noted that the U.S. Supreme Court has consistently held that the **Bill of Rights** applies to <u>all</u> actions of a governmental body, including, for example, actions taken by public or state universities.

> **Bakke v. Regents of the University of California** (1978), 438 U.S. 269
>
> **Roth v. United States** (1972), 354 U.S. 476
>
> **Pickering v. Board of Education** (1968), 391 U.S. 563

154. In any event, even if the actions of governmental actors were, for the purpose of **Charter** review, to be compartmentalized, as "governmental" or so-called "private" conduct, the courts have recognized the public nature of university functions and decision making in general, and of university employment contracts with tenured faculty in particular. As a result, it is submitted that actions or decisions of the respondent universities, including those relating to employment or continued employment of tenured faculty or librarians, are public or governmental in nature, and cannot be viewed as purely private acts exempt from **Charter** review.

See cases referred to in paragraph 134 above.

(ii) <u>Do the Mandatory Retirement Provisions Enacted by the Respondent Universities Violate Section 15 of the Charter?</u>

(a) <u>Nature of the Violation</u>

155. Having regard to the principles pertaining to the interpretation of s.15 of the **Charter** set out above in paragraphs 77 to 87, it is submitted that mandatory retirement provisions enacted by the respondent universities, which require university faculty and librarians to retire regardless of their individual performance or abilities, solely because they have attained the age of 65, infringe and deny, and are inconsistent with, s.15(1) of the **Charter**.

156. For the reasons set out in paragraphs 85 to 86, the test as to whether or not faculty aged 65 or over are similarly situated to those under age 65 is not relevant where a protected group is adversely affected by a classification based upon an enumerated ground. In any event, even if such a consideration were applicable, it is submitted that the similarly situated requirement has been met, since the attribute or characteristic of being aged 65 or over does not distinguish, in any material respect, faculty or librarians aged 65 or over from those under age 65. Further, there is no evidence, and the respondents have not asserted, that faculty performance is a function of age, and as a result there can be no principled reason to deny employment to faculty aged 65 or over when they are fully able to carry out their duties and responsibilities.

157. Further, for the reasons set out in paragraph 87 above, having demonstrated that they are adversely affected by an age-based classification, the appellants should not be required in addition to establish that their mandatory retirement is unreasonable or unfair. Rather, the burden of justifying such discrimination lies entirely on the respondent universities under s.1 of the **Charter**. In any event, for the reasons set out below in paragraphs 165 to 184 below, the appellants submit that mandatory retirement is unreasonable and unfair.

(b) Is Mandatory Retirement "Law" For the Purpose of Section 15(1)?

158. It is respectfully submitted that the guarantee of equality contained in s.15 is a comprehensive one, intended to apply to all forms of discrimination resulting from unequal treatment imposed by those bodies bound by s.32(1) of the **Charter**. As a result, it is submitted that the appellants are denied the equal protection and equal benefit of the law, whether or not they are discriminated against by conduct or by legislation.

> Tarnopolsky, "**The Equality Rights in the Canadian Charter of Rights and Freedoms**", **supra**, at p.255:
>
> "It will be argued here that discrimination by legislative action will be determined under the **Charter**, discrimination by private action will continue to be dealt with under the

anti-discrimination laws, and that discrimination by executive or government action may be challenged under either."

Eberts, **"The Equality Provisions of the Canadian Charter of Rights and Freedoms"**, Cambridge Lectures. 1983, pp. 25-38, at p. 36

159. In this respect, no court in the United States, where the Fourteenth Amendment guarantees the "equal protection of the law", and "due process of law", has ever suggested that this protection is restricted to legislative activity. Rather, all bodies subject to the Fourteenth Amendment must not deprive individuals of equality, discriminate against them or deny them due process of law, whether by way of legislation or conduct. Courts in the United States have consistently held that discriminatory actions violate the Fourteenth Amendment. Indeed, were it otherwise, segregation of blacks by administrative action would have escaped constitutional review. Moreover, the actions and conduct of universities have been subjected to the requirements of the Fourteenth Amendment.

Bakke v. Regents of the University of California, supra
Roth v. United States, supra

160. Limiting the application of s.15 of the **Charter** to formal legislative enactments would serve only to encourage the Legislature to delegate authority to statutory bodies in broad terms, so that the actions of such bodies would not be subject to the requirements of the **Charter**, and in particular s.15(1). Such a restrictive interpretation of s.15 would mean that activity in the exercise of discretionary powers would not be subject to s.15(1) of the **Charter**, as it would not constitute "law" within the meaning of s.15(1). Yet, it is precisely where a large measure of discretion is entrusted to statutory bodies that the need for judicial scrutiny is most important, given that the usual safeguards provided by the legislative process are not present. It is submitted that it would be inconsistent with the very purpose of the **Charter** in constraining governmental action if the requirement to act in accordance with section 15(1) turned on whether the discrimination was specifically imposed by a statute, or by a decision of a statutory body exercising public powers granted to it by statute.

St. Lawrence College v. OPSEU, unreported arbitration award, April 25, 1986 (Teplitsky), at p. 13; quashed by Ont. Div. Ct., unreported, April 13, 1988; leave to appeal granted, by Ont. C.A., June 27, 1988 (unreported)

161. It is submitted that the appellants' position in this regard is supported by reference to s.15(2), which provides that s.15(1) does not preclude any law, program or activity which constitutes

an affirmative action program. There would be no need for s.15(2) to refer to programs or activities, unless programs or activities, as well as legislation, could otherwise contravene s.15(1) of the **Charter.**

162. It is submitted that the mandatory retirement provisions enacted by the respondent universities constitute a binding legal norm, applicable to those individuals subject to the authority of the respondent universities. As such, the mandatory retirement provisions constitute "law" within the meaning of s.15(1) of the **Charter.** Moreover, the inclusion of mandatory retirement provisions in contracts of employment or collective agreements does not make such provisions any less binding on the employees affected by them. As is the case under human rights legislation, a body bound by the **Charter** cannot contract out of its requirements: see paragraph 151 above. Further it is submitted that the actions and rules of the respondent universities, including the imposition of mandatory retirement, stem from a legal grant of statutory authority, as implemented by the Board of Governors of each of the respondent universities. Otherwise, the mandatory retirement of the appellants would be ultra vires the authority of the respondent universities.

Re McCutcheon and City of Toronto, supra, at pp.202-3
St. Lawrence College v. OPSEU, supra, at pp. 12-13

163. Alternatively, it is submitted that the mandatory retirement of the appellants by the respondent universities was effected pursuant to s.9(a) of the Ontario **Human Rights Code,** which permits the respondent universities to discriminate by mandatorily retiring the appellants. Accordingly, the action complained of was authorized by and taken pursuant to law.

[illegible]in Delivery, supra, at pp. 603-4

(iii) Can the Mandatory Retirement Policies Enacted by the Respondent Universities Be Justified Under Section 1 of the Charter?

164. As set out in paragraphs 96 to 102, and paragraph 124(a).(b) and (c) above, if the respondent universities are to meet the burden imposed upon them under s.1, they must establish by a high degree of probability that there are pressing and substantial objectives served by the mandatory retirement of university faculty and librarians, and that the infringement of the appellants' rights actually advances those objectives in a manner which (1) is carefully designed, rational, and not arbitrary or unfair; (2) impairs the right in question as little as possible; and (3) is proportional to the adverse effect on the appellants of mandatory retirement.

(a) Is There a Pressing and Substantial University Objective?

165. It is respectfully submitted that the majority of the Court of Appeals erred, to the extent that it held that faculty renewal constitutes a pressing and substantial objective under s.1 of the **Charter**. In this connection, it is submitted that, as set out in paragraph 113 above, the respondent universities cannot rely upon a preference to replace older faculty with younger faculty, since to do so would permit the respondent universities to advance an inherently discriminatory objective, inconsistent with the norms and principles of a free and democratic society, and repugnant to the underlying purpose of s.15 of the **Charter** itself.

166. In any event, insofar as the term "faculty renewal" assumes that an injection of "new blood" is necessary to revitalize a declining faculty, the evidence before the Court, as referred to, for example, in paragraphs 65 and 70 above, establishes that the quality of university education is not a function of the age of the persons providing it. Indeed, justifications based upon faculty renewal have been specifically repudiated as reflecting the very prejudice that anti-discrimination legislation was designed to correct:

> **Leftwich v. Harris-Stowe State College** (1983), 702 F. 2d 686 at p.692:
>
> "The defendants failed to demonstrate that reserving nontenured slots was necessary to bring new ideas to the college. Instead, their assertion that younger nontenured faculty would have new ideas apparently assumes that older tenured faculty members would cause the college to 'stagnate'. Such assumptions are precisely the kind of stereotypical thinking about older workers that the ADEA was designed to eliminate. Indeed, the record in this case reveals that the defendants' plan may have frustrated the development of new ideas within the college because it succeeded in eliminating the plaintiff who was actively involved in research and had published several articles, while retaining a nontenured faculty member whose contribution to new research in the profession was concededly less than that of Leftwich."

167. In this respect, it is submitted that U.S. decisions under the **Bill of Rights** are of little, if any, assistance in determining whether the objective of faculty renewal is sufficiently pressing and substantial to meet the requirements of s.1 of the **Charter**, since cases under the U.S. **Bill of Rights** involve "minimal scrutiny" of age-based discrimination. Cases under the U.S. **Age Discrimination in Employment Act**, such as **Leftwich, supra**, and the cases referred to in paragraph 169 below are of greater assistance to Canadian courts in that they involve a degree of judicial scrutiny which is more consistent with the requirements of s.1.

168. In any event, as the evidence set out above in paragraphs 58 to 63 demonstrates, the abolition of mandatory retirement would result at most in only a temporary delay in the hiring of a limited number of new faculty, and as such cannot constitute a pressing and substantial concern under s.1. Indeed, this concern has already been specifically addressed by the provincial government through its University Excellence Fund and University Faculty Renewal Program, described in paragraph 52 above.

169. Further, it is submitted that, to the extent that the majority of the Court of Appeal held that flexibility of resource allocation, including salary costs, constitutes a pressing and substantial objective, such an objective is based solely upon cost considerations or economic savings, which cannot constitute a pressing and substantial concern under s.1 of the **Charter**, where the constitutional rights of individuals are at stake.

> **Re Singh v. Minister of Employment and Immigration, supra**
> **R. v. Oakes, supra**
> **Ontario Human Rights Commission v. Borough of Etobicoke, supra**, at p. 209
> **Harrison v. University of British Columbia, supra**, at p.705
> **Leftwich v. Harris-Stowe State College, supra**, at p.691:
>
> "Nonetheless, because of the close relationship between tenure status and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated. . .
>
> Similarly, federal courts have held that economic savings derived from discharging older employees cannot serve as a legitimate justification under the ADEA for an employment selection criterion."
>
> **Marshall v. Arlene Knitwear, Inc.** (1978), 454 F. Supp. 715, at pp. 728-730
> **Geller v. Markham** (1980), 635 F. 2d 1027
> **Popko v. City of Clairton** (1983) 570 F. Supp. 446
> **E.E.O.C. v. City of Newcastle** (1983), 32 F.E.P. 1409
> **E.E.O.C. v. Chrysler Corp.** (1982), 546 F. Supp. 54

170. With respect to tenure, the respondent universities contend that there would be increased evaluation of faculty, if mandatory retirement were abolished and that such increased evaluation would pose a threat to tenure. It is submitted that this contention is inconsistent with the fact that there is already extensive evaluation of faculty in universities without any adverse consequence for tenure, as well as with the fact that university administrators have themselves proposed increased evaluation of tenured faculty independently of the abolition of mandatory retirement, without any

apparent concern as to a possible adverse effect on academic freedom. Far from viewing increased evaluation as a pressing and substantial concern, universities have themselves advocated the need for such increased evaluation: see the evidence referred to in paragraphs 69 to 70 above.

171. Finally, with respect to pension plans, the evidence does not establish that a pressing and substantial concern relating to pension plans would arise if mandatory retirement of university faculty or librarians were found to be unconstitutional: see paragraph 114 above.

(b) Is Mandatory Retirement of University Faculty Carefully Designed to Advance Pressing and Substantial University Objectives?

172. Even if the objectives advanced by the respondent universities in support of mandatory retirement were sufficiently pressing and substantial, it is respectfully submitted that mandatory retirement has not been carefully designed to meet such objectives. Mandatory retirement of university faculty and librarians is by its very nature arbitrary, unfair, and not rationally related to such objectives; see paragraph 119 above. Moreover, the respondents have not even demonstrated that mandatory retirement was conceived or designed to attain those objectives now advanced in its justification, namely, faculty renewal, the avoidance of performance evaluations, and the preservation of pension plans.

173. Insofar as mandatory retirement is designed to attain faculty renewal through injection of "new blood", there is no evidence to establish a relationship between the age of a particular faculty member and that individual's productivity, performance, adaptability or innovativeness. Accordingly, there is no rational basis to conclude that there would be a decline in the quality of faculty performance in the Ontario university system, were mandatory retirement to be abolished as a result of the Charter. Moreover, as set out in paragraph 66 above, the forced retirement of a professor at age 65 does not automatically result in the hiring of a younger professor.

174. The respondent universities have suggested that, in the absence of mandatory retirement, there would be increased evaluation of tenured faculty which would threaten the tenure system. However, as noted above, there is no evidence, nor is there any assertion, that faculty performance is a function of age, and thus no reason to foresee a need for increased evaluation. Indeed, it is simply not fair to terminate all faculty, regardless of their ability, at an arbitrary age, in order to avoid evaluating, and possibly discharging for cause, faculty who may not be competent, whatever their age. In this respect, evaluation procedures for tenured faculty and dismissal

procedures in the event of incompetence are presently in effect in all Ontario universities, and as noted in paragraph 68, universities themselves recognize that tenure does not protect incompetence, or prevent dismissal for cause. Further, the evidence available from those universities in Canada and the United States where mandatory retirement has been abolished, is that the tenure system, and academic freedom, remain firmly in place, notwithstanding the abolition of mandatory retirement: see paragraphs 72 to 74 above. Indeed, it is submitted that mandatory retirement itself constitutes a threat to academic freedom, insofar as it permits universities to exercise an unfettered discretion to determine which faculty members will be continued in employment after attaining the age of 65. (Malloch Affidavit, **Case on Appeal**, Vol. 11, Tab 1, para. 31)

175. Finally, with respect to pension plans, it is submitted that there is no rational connection between the operation and maintenance of pension plans, and the continued imposition of mandatory retirement: see paragraphs 23 to 24 above.

(c) Do the Mandatory Retirement Policies Enacted by the Respondent Universities Impair Section 15(1) as Little as Possible?

176. It is respectfully submitted that, by inquiring into whether or not mandatory retirement in universities impairs the constitutional right to freedom from discrimination as little as possible, the majority of the Court of Appeal erred in restricting its consideration solely to whether the age of retirement should be 65 rather than a later age. It is submitted that, had the Ontario Court of Appeal considered whether the objectives allegedly served by mandatory retirement of university faculty and librarians could be attained by alternative means, the evidence would have disclosed that mandatory retirement cannot be justified. Further, as submitted in paragraph 124 above, it is respectfully submitted that the Court of Appeal erred in holding that it is appropriate under s.1 of the **Charter** to defer to provisions which have been found to constitute age discrimination contrary to s.15 (1), and in holding that such discriminatory provisions do not have to be tuned with great precision in order to be justified under s.1.

177. The majority of the Court of Appeal's only finding with respect to faculty renewal is that it is "more readily accomplished" by mandatory retirement, not that faculty renewal cannot be accomplished without mandatory retirement. In this regard, it is the submission of the appellants that, as the COU (of which all the respondents universities are members) itself has acknowledged, the abolition of mandatory retirement would, at most, have only a short-term, temporary and

limited effect on the hiring of new faculty: see paragraphs 58 to 63 and 168 above. Indeed, as the Bovey Commission recognized, the hiring of new faculty can be accomplished without mandatorily retiring older faculty. Moreover, any difficulties universities are presently experiencing in hiring new faculty result from the short-term phenomenon of a bulge in faculty age profile as the result of the rapid expansion of the university system in the 1960's, and this phenomenon would exist with or without mandatory retirement. Indeed, as a result of this age profile, a bulge of accelerated faculty retirements is predicted in the 1990's, irrespective of whether or not mandatory retirement continues to be imposed by the respondent universities.

178. There are many non-discriminatory measures available to advance the objectives of ensuring that there are new faculty in the university system, such as retirement incentives and flexible work arrangements, which do not require the arbitrary termination of faculty solely because they have reached age 65: see paragraphs 64 to 65 above. Arrangements can be and have been designed and implemented which would, if necessary, assist faculty of all ages in adapting to changes within their disciplines. Further, given that the ability of universities to hire new faculty is determined largely by funding decisions of the provincial government, and that the hiring of additional new faculty can be and has been achieved through an increase in such funding, as set out in paragraphs 58 to 63 above, it is submitted that mandatory retirement cannot be regarded as the only reasonable alternative available to meet the objective of hiring new faculty.

> **The Governors of the University of Alberta v. Dickason et al, supra**, at p. 61 and 67:
>
> "In the result, I am satisfied that the most one can say is that if mandatory retirement were eliminated there may be a short-term reduction in the number of openings available for young academics at the University of Alberta. This, however, would not involve significant numbers. The major problem today seems to be the demographic bulge which is working its way through the academic community and the cutbacks in government funding.
>
> The evidence did not establish that a policy of mandatory retirement achieves the goal of academic renewal or youth employment. At most, we are concerned with the delay of possibly five years at which time matters will be back to normal. The real villain in this regard seem to be the demographic bulge which has been described earlier. If there is increased attention paid to the performance of the members of the various faculties, this concern may be alleviated to some extent."

179. With respect to the objective of preserving tenure, it is respectfully submitted that, as noted above, mechanisms are already in place to ensure adequate review of the performance of faculty without endangering tenure, academic freedom or collegiality. Further, tenure itself does not prevent dismissal for cause, and, in fact, each of the respondent universities is now entitled to

dismiss tenured faculty for cause. Moreover, as submitted in paragraph 166 above, there is no direct relationship between age and productivity, and therefore no reason to suppose increased evaluation or dismissals would necessarily result if mandatory retirement were abolished.

180. To the extent that the majority of the Court of Appeal accepted the contention of the respondent universities that mandatory retirement should not be eliminated, because this might pose a threat to tenure through increased evaluation, it is submitted that this is inconsistent with the fact that university administrators themselves have proposed increased evaluation of tenured faculty, independently of the abolition of mandatory retirement, without any apparent concern as to a possible effect on tenure, academic freedom or collegiality. As a result, the evidence does not support the claim now made in these proceedings that mandatory retirement is required in order to preserve tenure.

> **The Governors of the University of Alberta v. Dickason, supra,** at pp. 66-68:
>
> "The weight of evidence falls on the side of establishing that a policy of mandatory retirement is not necessary to ensure that tenure is preserved. There is a fear of this happening but it is speculative. There are equally well qualified people who hold the opposite opinion. The empirical evidence which is available to this time does not support this fear . . .
>
> The argument that retirement with dignity is essential and that it would be eroded by the abolition of mandatory retirement, to my mind is not an objective by itself which would satisfy the initial test. Even if it were, the evidence before the Board does not establish that there will be the institution of a "humiliating dismissal process" which concern Dr. Meekison. The evidence as to the numbers of staff who elect to stay beyond 65 years in the final analysis simply may not warrant any change in policy. One must remember that any performance evaluation mechanism will initially be the subject of negotiations between the university administration and faculty associations. Given the sentiment of the administration on this subject, it is difficult to imagine the implementation of a system which would be callous and not have regard to the dignity of the faculty members."

181. Finally, with respect to pension plans, it is submitted that the majority of the Court of Appeal itself recognized that no alternative mechanism was required to ensure the financial integrity and security of pension plans; it was concerned only with administrative adjustments which might be required, which adjustments the record discloses could be made and indeed have been made without difficulty in other jurisdictions where there is no mandatory retirement.

182. It is respectfully submitted that, having regard to the above considerations, and to the fact that mandatory retirement in universities in other jurisdictions, both in Canada and the U.S., has been eliminated without resulting harm to the quality of teaching and research, to the institution

of tenure, or to pension plans, the respondent universities have failed to establish that mandatory retirement of university faculty and librarians is the least restrictive or only reasonable alternative method of attaining the objectives which they assert are pressing and substantial.

183. Finally, and in the alternative, it is submitted that even if the respondents had established that there was no reasonable alternative to mandatory retirement of university faculty or librarians at some age, the respondents have entirely failed to establish that their objectives could not equally be attained through mandatory retirement at an age later than 65.

(d) **Are the Objectives Allegedly Advanced by Mandatory Retirement Proportional to the Adverse Effects on University Faculty and Librarians?**

184. It is submitted that the severity of the effects of retirement on individual faculty and librarians is not proportional to the benefit which the respondent universities may gain through forcing individuals to retire at an arbitrary age. In addition to the general effects of mandatory retirement as set out in paragraphs 128 to 129 above, the forced retirement of the appellants in these proceedings severely affects their professional careers and working lives.

185. In this respect, it is respectfully submitted that the Court of Appeal erred in relying on the fact that "it is also still possible for the universities to make special arrangements to retain faculty members after the age of 65" as a balancing factor which makes the adverse effects of mandatory retirement proportional to any benefits resulting from its continued imposition. The appellants are deprived not only of their major source of income, but also of the financial and technical support necessary to carry out academic research, the collegial contact and support that is needed to sustain an active teaching and research program, opportunities for involvement with the larger academic community, eligibility for a number of internally administered research grants, competitive standing with respect to externally administered grants, the right to participate in future decision-making with respect to decisions affecting their department, and the stature which is associated with employment as a faculty member of a university. This severe impact on the appellants is especially pronounced to the extent that, as the Court of Appeal found, at the time of their forced retirement, the appellants were active researchers and contributors to academic life within the university, and within the larger academic community. The fact is that mandatory retirement deprives individual faculty and librarians of their dignity, their self respect, their livelihood and their professional responsibility, solely because they have attained the age of 65.

Affidavits of each Appellant, **Appeal Book**, Vol. 1, tabs 10-18

PART IV - ORDER REQUESTED

186. It is respectfully requested that the appeals be allowed, and an order be granted in the terms set out in the appellants' Notices of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Jeffrey Sack, Q.C.

James K. McDonald

Steven M. Barrett

of Sack, Charney, Goldblatt & Mitchell
20 Dundas Street West
Suite 1130
Toronto, Ontario
M5G 2G8

(416) 977-6070

F. A. Schroeder

of Schroeder & Company
Box 12142
Nelson Square
Vancouver, B.C.
V6Z 2H2

(604) 688-6737

PART V

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