No. 20747

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

BETWEEN:

DAVID WALTER McKINNEY, JR. et al.

Appellants

- and -

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

Respondents

SUPPLEMENTARY FACTUM SUBMITTED ON BEHALF OF THE APPELLANTS

SACK GOLDBLATT MITCHELL

Barristers & Solicitors
Suite 1130
P.O. Box [illegible]
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
Scotia Plaza
40 King Street West, Suite 2200
Toronto, Ontario
M5H 1B5

Attn: S. John Page

Solicitors for the Respondent University of Toronto

AND TO: CAMPBELL, GODFREY & LEWTAS
Suite 3600, Bank Tower
Box 36
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, IBM Tower
Box 270
Toronto-Dominion Centre
Toronto, Ontario
M5K 1N2

Attn: Mary Eberts

Solicitors for the Respondent Laurentian University

AND TO: HICKS MORLEY HAMILTON STEWART STORIE
Box 371
Bank Tower, 30th Floor
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
720 Bay Street
8th Floor
Toronto, Ontario
M5G 2Y1

Attn: Janet E. Minor

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SUPPLEMENTARY FACTUM SUBMITTED ON BEHALF OF THE APPELLANTS

A. INTRODUCTION

1. This supplementary factum is submitted in response to

   (a) the supplementary factum filed by the respondent universities relating to the decision of this Honourable Court in **Law Society of British Columbia v. Andrews**; and

   (b) the supplementary factum filed by the respondent University of Toronto respecting appropriate remedial relief as it relates to the Appellants Bregzis and Zacour, should the **Charter** apply directly to the respondent university, and should the mandatory provisions enacted by the respondent university violate s.15(1), and not be justified under s.1.

B. THE ANDREWS DECISION AND SECTION 15(1) OF THE CHARTER

2. In their supplementary factum respecting the **Andrews** decision, the respondent universities submit that:

   (a) even where an impugned provision based upon an enumerated ground has the effect of imposing burdens, obligations or disadvantages on individuals or groups not imposed upon others, or of withholding or limiting access to opportunities, benefits, and

advantages available to other members of society, such provision will not be discriminatory within s.15(1) of the **Charter** unless an applicant also establishes or proves "irrationality, stereotypical assumptions and prejudice"; and

(b) the "similarly situated" test continues to be applicable under s.15(1) of the **Charter**.

(i) **Discrimination**

3. In **Andrews**, this Court held that the "enumerated and analogous grounds" approach most closely accords with the purpose of and underlying values protected by s.15(1). In **Reference Re Newfoundland Workers' Compensation Act**, this Court confirmed that only those distinctions based upon the grounds specifically enumerated in s.15(1), and analogous human characteristics, can give rise to discrimination within the meaning of s.15(1) of the **Charter**.

> **Law Society of British Columbia v. Andrews**, unreported, February 2, 1989, Supreme Court of Canada
> **Reference Re Newfoundland Workers' Compensation Act**, unreported, Supreme Court of Canada, April 24, 1989

4. The grounds specifically enumerated in s.15(1) of the **Charter** are intended to identify in advance certain groups whose members have been the victims of prejudice or stereotyping, and have generally suffered a history of social, political and legal disadvantage in our society. As Madame Justice Wilson specifically recognized, "in enumerating the specific grounds in s.15, the framers of the **Charter** . . . addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability". For his part, Mr. Justice LaForest stated that the enumerated grounds are intended to identify those "irrelevant personal differences", the use of which is subject to constitutional scrutiny under s.15(1). As Mr. Justice McIntyre stated, "the enumerated grounds . . . reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s.15(1), receive particular attention".

> **Law Society of British Columbia v. Andrew**, **supra**, per Wilson, J. at p. 4; per La Forest, J. at pp. 2-3; and per McIntyre, J. at p. 19
> **Appellants' Main Factum**, paragraphs 80-81.

5. Having determined that s.15(1) of the **Charter** requires the courts to scrutinize those distinctions which are based upon enumerated (and analogous) personal characteristics, this Court held in **Andrews** that discrimination within the meaning of s.15(1) "may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on

such individuals or groups not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society". In this regard, the Court concluded, that "while discrimination under s.15(1) will be of the same nature and in descriptive terms will fit the concepts of discrimination developed under the Human Rights Acts, a further step will be required in order to decide whether discriminatory laws can be justified under s.1". Of course, "the onus will be on the state to establish this."

Law Society of British Columbia v. Andrews, supra, per McIntyre, J. at pp. 19-21

6. Contrary to the submissions of the respondent universities in paragraph 9 of their supplementary factum, no member of this Court in **Andrews** held that proof of an adverse or disadvantageous distinction based upon an enumerated ground was insufficient to establish a violation of s.15(1). Rather, this Court unanimously held that a distinction based upon an enumerated ground, which adversely affects individuals in the sense of imposing a disadvantage or burden, or denying or withholding access to opportunities or benefits, constitutes discrimination within the meaning of s.15(1) of the **Charter**. It is in this context that Mr. Justice McIntyre stated that the words "without discrimination" require more than "a mere finding of distinction".

Law Society of British Columbia v. Andrews, supra, per McIntyre, J. at pp. 25-26

7. While the respondent universities continue to argue in paragraphs 10 and 12 of their supplementary factum that, in addition to discrimination as defined by this Court in **Andrews**, consideration of prejudice, stereotyping and irrationality are relevant in determining whether a distinction based upon an enumerated ground is discriminatory, such an approach is entirely inconsistent with the judgment of this Court in **Andrews**, for the following reasons:

(a) it is clear from the definition of discrimination adopted by this Court in **Andrews**, and in other cases involving human rights legislation, that motive or intention is not required as an element of discrimination; rather, "it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint." In any event, it is submitted that the record discloses that the adverse treatment of individuals aged 65 or over as a result of the impugned provisions is animated in large measure by considerations of prejudice and stereotyping;

Law Society of British Columbia v. Andrews, supra, per McIntyre, J. at p.17

(b) this Court has categorically stated in **Andrews** that the "rationality" of distinctions based upon an enumerated or analogous ground is germane only in determining whether the government has met its onus under s.1 of the **Charter**. As Mr. Justice McIntyre held:

"Where discrimination is found, a breach of s.15(1) has occurred and - where s.15(2) is not applicable - any justification, any consideration of the

> reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s.1. This approach would conform with the direction of this Court in earlier decisions concerning the application of s.1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim."

Law Society of British Columbia v. Andrews, supra, per McIntyre, J. at p. 27

8. Accordingly, it is submitted that, based upon this Court's decision in **Andrews**, there can be no doubt that both s.9(a) of the **Human Rights Code**, and the mandatory retirement provisions of the respondent universities (to the extent the **Charter** applies to the universities), are discriminatory within the meaning of s.15(1). For its part, s.9(a) of the **Code** involves a distinction based upon an enumerated ground which disadvantages individuals aged 65 and over by withholding or limiting access to opportunities and advantages available to individuals under age 65, and in particular, the benefit of the protection of human rights legislation, which this Court has constantly recognized to be of fundamental importance to Canadians: see paragraph 92 of **Appellants' Main Factum**. With respect to the mandatory retirement provisions enacted by the respondent universities, it is submitted that they involve a distinction based upon an enumerated ground which has the effect of imposing burdens, obligations or disadvantages on individuals over age 65 which are not imposed upon those under age 65, and which withholds or limits access to opportunities, benefits and advantages available to those under 65, in respect of the ability to pursue a livelihood, which this Court has recognized to be of fundamental importance (see, for example, **Law Society of British Columbia v. Andrews, supra**, per La Forest, J., at p.12).

9. In **Andrews**, this Court held that denial of admission to the practice of law based upon non-citizenship was discriminatory, since it resulted from a blanket rule "which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status [on analogous ground] and without consideration of educational and professional qualifications or the other attributes and merits of individuals in the group". It is submitted that this rationale applies even more forcefully to s.9(a) of the **Code**, and to the mandatory retirement provisions enacted by the respondent universities, particularly since, unlike the situation in **Andrews**, the deprivation in the instant case is of a permanent and not merely a temporary nature. Section 9(a) of the **Code** and mandatory retirement itself constitute classic examples of blanket rules based upon attributed characteristics, rather than an individual's own merits and capacities. As Mr. Justice McIntyre stated in **Andrews**, "distinctions based on personal characteristics attributed to an

individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based upon an individual's merits and capacities will rarely be so classed."

> **Law Society of British Columbia v. Andrews, supra**, per McIntyre, J., at p. 19 and p. 28, and per Wilson, J., at p. 2

10. It is to be noted that in paragraph 196 of their main factum, the respondent universities state that it is "obvious" that "there may be some adverse effect upon the appellants" as the result of the imposition of mandatory retirement. It is the submission of the appellants that, in light of this concession, the respondents can only save the impugned provisions if they can satisfy the onus resting upon them under s.1 of the **Charter.**

(ii) <u>The "Similarly Situated" Test</u>

11. It is respectfully submitted that in **Andrews** this Court recognized that the "similarly situated" test has no application with respect to distinctions based upon enumerated or analogous grounds. Indeed, contrary to the submissions of the respondent universities in paragraph 4 of their factum, the "similarly situated" test was rejected precisely because it fails to have regard to the content of the law, its purpose, and its impact. Moreover, this Court's rejection of the "similarly situated" test has recently been confirmed in **Brooks v. Canada Safeway Ltd.**

> **Law Society of British Columbia v. Andrews, supra**, per McIntyre, J., at pp. 9-12
> **Brooks v. Canada Safeway Ltd.**, unreported, May 4, 1989
> **Appellant's Main Factum**, paragraphs 85-86 (discussion of inappropriateness of "similarly situated" analysis)

12. Indeed, contrary to the submissions of the respondent universities in paragraph 11 of their factum, the mechanical nature of the "similarly situated" test is evident from their own application of the test in paragraphs 190-193 and paragraph 250 of their main factum. The attempt by the respondent universities to distinguish between individuals aged 65 and over and individuals under age 65, on the basis that the "purpose" of mandatory retirement has been achieved for the former but not for the latter, clearly demonstrates the inappropriateness of the "similarly situated" analysis, having regard to the underlying purpose of, and values protected by, s.15(1) of the **Charter.**

C. THE ANDREWS DECISION AND SECTION 1 OF THE CHARTER

13. In their supplementary factum, the respondent universities submit that

(a) something less than a pressing and substantial objective is sufficient to justify a

provision which has been found to be discriminatory under s.15(1) of the **Charter**, where that provision relates to administrative or regulatory matters;

(b) it is not necessary for the respondents in the instant appeal to meet the elements of the "proportionality" requirements, followed by this Court since its decision in **Oakes**; and

(c) the requirements of s.1 have been met, in the instant case, both in terms of s.9(a) of the **Code**, and the enactment of the mandatory retirement provisions by the respondent universities, since in both cases, the provisions have been enacted in order to achieve "desirable social objectives", and the limitations in questions are "clearly conducive to the desired result", having regard to the "administrative/regulatory" nature of the objectives, the nature of the alleged infringement, and the **Charter** right involved.

14. Contrary to the assertion contained in paragraphs 13-15 of the supplementary factum filed by the respondent universities, it is respectfully submitted that in **Andrews** only two of the six members of this Court suggested that a standard less then "pressing and substantial" might be appropriate. Moreover, in large measure, the rationale advanced by the minority of the Court in **Andrews** was based upon a concern that the standard of "pressing and substantial" might be too stringent, because of the "innumerable legislative distinctions and categorizations" made by the Legislature in enacting legislation covering "various aspects of the civil law dealing largely with administrative and regulatory matters".

Law Society of British Columbia v. Andrews, supra, per McIntyre, J., at pp. 28-30

15. However, as Madame Justice Wilson held in **Andrews**, this is not a concern once it is recognized that the only distinctions capable of giving rise to discrimination under s.15(1) are those based on enumerated or analogous personal characteristics, as this Court has subsequently affirmed in the **Newfoundland Workers' Compensation Reference**. As a result, it is submitted that the only objectives which are sufficiently important to justify provisions found to be discriminatory under s.15(1) are those which relate to pressing and substantial concerns. In this regard, as Madame Justice Wilson concluded, "given that s.15 is designed to protect those groups that suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one". Moreover, subsequent to the **Andrews** decision, this Court has continued to apply the "pressing and substantial concern" requirement in determining whether infringement of constitutionally protected rights and freedoms can be justified.

Law Society of British Columbia v. Andrews, supra, per Wilson, J., at p. 5
Law Society of Alberta v. Black, unreported, Supreme Court of Canada, April 20, 1989

Attorney General of Quebec v. Irwin Toy Ltd., unreported, Supreme Court of Canada, April 27, 1989
Reference re Newfoundland Workers' Compensation Reference, supra

16. Furthermore, with respect to s.9(a) of the **Code**, it is submitted that, contrary to the assertion in paragraph 15 of the respondent universities' supplementary factum, human rights legislation cannot be characterized as merely administrative or regulatory in nature. Rather, as this Court has consistently held, human rights legislation is of fundamental importance to Canadians, being quasi-constitutional in nature.

17. With respect to the proportionality requirement under s.1, contrary to the submissions of the respondent universities in paragraphs 16-19 of their supplementary factum, it is clear that all members of the Court in **Andrews** recognized that the second step in a s.1 inquiry involves the proportionality test. Moreover, all members of the Court recognized that, in determining the issue of proportionality, the Court must realistically balance a number of factors, including the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the legislative objectives. Further, it is clear from the reasons of Madame Justice Wilson and Mr. Justice LaForest that, in determining whether the proportionality requirement has been met, it is necessary to balance the objectives sought to be accomplished against the means sought to achieve those objectives, including an inquiry into whether the respondents have established that there is no reasonable alternative to achieving those objectives other than infringing rights and freedoms guaranteed by the **Charter**.

Law Society of British Columbia v. Andrews, supra:

"I would respectfully concur in the view expressed by McLachlin J., at p. 617, that the citizenship requirement does not appear to relate closely to those ends, much less to have been carefully designed to achieve them with minimum impairment of individual rights." (Wilson, J., at p. 9)

"At all events, the simple fact, in my view, is that far less intrusive means exist to ensure such knowledge, if this is indeed the goal. . .

It is to my mind clear that were these the sole objectives, the means chosen, namely, the restriction of access to the profession to citizens, would quite simply be unnecessary, and so impermissibly, over-inclusive . . .

That less drastic methods for achieving these objectives are available is evident from the fact that some provincial law societies simply require a declaration of an intention to become a citizen . . .

It seems to me that the preceding objectives are, in this case, legitimate, but could easily be accomplished by means that would not impair a person's ability to practice law in the province to as great an extent." (LaForest, J., at pp. 10-12)

18. Further, it is submitted that, having regard to the various factors which must be weighed and considered in determining whether the impugned provisions meet the requirements of proportionality, the respondents have failed to meet their onus under s.1 of the **Charter**. In this regard, it is submitted that when one weighs and balances the objectives underlying the provisions of s.9(a) of the **Code** and the university mandatory retirement provisions, objectives which the respondent universities now concede in paragraph 21 of their supplementary factum to be "administrative/regulatory" in nature, **against**:

(i) the extent to which the impugned provisions trench upon values and principles essential to a free and democratic society, and in particular, respect for human dignity, social justice and equality, and full participation of individuals and groups in society;

(ii) the importance of the protection of human rights legislation, which this Court has recognized as being quasi-constitutional in nature, and of which individuals aged 65 and over are deprived as a result of s.9(a) of the **Code**;

(iii) the severe and detrimental effect on individuals aged 65 and over in general, and on the appellants in particular, of depriving them of the protection of human rights legislation, and of imposing mandatory retirement upon them;

(iv) the fact that age is specifically enumerated as a prohibited ground of discrimination in s.15(1) of the **Charter**, and that the impugned provision constitutes direct and deliberate discrimination based upon age;

(v) the blanket nature of the denial of s.15(1) rights, both in terms of s.9(a) of the **Human Rights Code**, and mandatory retirement provisions, which apply to all individuals based solely upon their age, and regardless of their individual capacities, merit or needs;

(vi) the evidence respecting the limited extent, if any, to which the objectives of the impugned provisions are actually advanced by and reasonably require continued imposition of s.9(a) of the **Code** and of mandatory retirement of university faculty and librarians; and

(vii) the evidence concerning the extent to which the objectives allegedly served by the impugned provisions can be achieved through less drastic and intrusive means than a blanket rule or prohibition which discriminates against individuals aged 65 and over.

the respondents have failed to discharge the onus which rests upon them of establishing that the limitations in question meet the proportionality test, and are demonstrably justified as a reasonable limit under s.1 of the **Charter**.

> See also **Appellants' Main Factum**, paragraphs 113-130 (s.9(a) of the **Code**), and paragraphs 165-185 (the university mandatory retirement provisions)
> **Sniders v. A.G. Nova Scotia**, unreported, Nova Scotia Court of Appeals, December 16, 1988

D. REPLY OF APPELLANTS' BREGZIS AND ZACOUR TO SUPPLEMENTARY FACTUM OF THE RESPONDENT UNIVERSITY OF TORONTO RESPECTING APPROPRIATE REMEDIAL RELIEF

19. In its supplementary factum, the respondent University of Toronto takes issue with the declaratory relief sought by the appellants Bregzis and Zacour, should this Court find that the **Charter** applies directly to the respondent universities and that the mandatory retirement provisions enacted by them are unconstitutional. In this regard, it should be noted that the University of Toronto stands alone in advancing this position.

20. Under s.52 of the **Constitution Act**, the Constitution is the supreme law of Canada, and any law which is inconsistent with the provisions of the Constitution is to the extent of the inconsistency of no force and effect. As a result, it is submitted that the mandatory retirement provisions enacted by the Governing Council of the University of Toronto are of no force and effect only to the extent that they conflict with the rights guaranteed by the **Charter**. Since it is only the provisions respecting retirement which conflict with such guarantees, all remaining elements of the University policy respecting appointments continue in full force and effect.

> **Constitution Act, 1982**, s.52
> **Re Blainey and Ontario Hockey Association** (1986), 26 D.L.R. (4th) 728 (Ont. C.A.)

21. Moreover, pursuant to s.24 of the **Charter**, where the rights and freedoms guaranteed by the **Charter** have been infringed or denied, the **Charter** requires the Court to grant a remedy which is both appropriate and just. It is submitted that it would not be appropriate or just, in circumstances where the **Charter** is held to apply to the respondent University of Toronto, and where the mandatory retirement provisions enacted by the University of Toronto are held unconstitutional, to void the entirety of the employment relationship between the parties, since to do so would fail to guarantee the appellants' right to be treated equally with other members of

faculty without regard to age, and would fail to grant a remedy to redress the violation of their constitutional rights.

Constitution Act, 1982, s.24

22. In this connection, it is to be noted that the remedy which has been granted by courts and by Human Rights Commissions, where contractual provisions respecting retirement have been found to violate human rights legislation, is to reinstate employees to their former positions, with all their former rights and privileges, or to declare that only the provisions respecting retirement are void.

McIntyre v. The University of Manitoba (1981), 118 D.L.R. (3d) 352 (Man. C.A.)
Ontario Human Rights Commission v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (S.C.C.).

23. Further, it is respectfully submitted that the provisions governing the appointments which the appellants possess are not solely a matter of contract between the appellants and the respondent University of Toronto. Rather, such rules have been enacted by the Governing Council of the University of Toronto pursuant to its statutory powers under the **University of Toronto Act**. As a result, the doctrines relating to the severance of contractual terms can have no application in the circumstance of this case.

The University of Toronto Act
Paine v. The University of Toronto (1981), 34 O.R. (2d) 770 (Ont. C.A.)

24. In any event, to the extent that the doctrine of severability applies to the terms of appointment of the appellants, it is submitted that the mandatory retirement provisions are severable from the other terms of appointment, in accordance with the following fundamental principles of contract law:

(a) Whether the promises contained in a contractual document may be severed depends upon the intention of the parties. In the instant case, the University of Toronto has specifically acknowledged that, should any provisions respecting the policies and procedures of appointment be rendered invalid by judicial act, the remainder shall remain in force, and as a result have evidenced a clear intention to create severable promises.

Cook Affidavit, Exhibit "B", **Appeal Book**, Vol. 2
Fridman, **The Law of Contract**, p. 401
Amoco Australia Party Ltd. v. Rocca Bros. [1975] A.C. 561 at 578 (P.C.)

(b) A contract will be voided only where the invalid promise was the whole or main consideration for the agreement. Where, however, there is ample consideration to

support the agreement apart from the void covenant, other covenants in the agreement can be enforced.

Alex Lobb Limited v. Total Oil G.R. Ltd. [1985] 1 ALL E.R. 303 (Eng. C.A.)

25. Moreover, where mandatory retirement of university faculty has been abolished, as in, for example, Manitoba, Quebec, and a substantial number of universities in the United States, the contractual relationship has been unaffected, and continued in full force and effect. Indeed, where alteration was made to the mandatory provisions enacted by the respondent University of Toronto itself, in substituting age sixty-five for age sixty-eight, no contractual alterations were sought or made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Jeffrey Sack, Q.C.

James K. McDonald

Steven M. Barrett

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

(416) 977-6070

Solicitors for the Appellants

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