

No. 20747

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal
for the Province of Ontario)

BETWEEN:

MCKINNEY ET AL.

Appellants

AND:

BOARD OF GOVERNORS OF THE UNIVERSITY OF GUELPH ET AL.
and ATTORNEY GENERAL OF ONTARIO

Respondents

FACTUM OF THE ATTORNEY GENERAL OF CANADA
INTERVENER

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PART I

STATEMENT OF FACTS

1. That portion of the Statement of Facts relating to Application of the Charter to the Respondent Universities as set out in Part I of the Factum submitted on behalf of the Appellants is adopted by the Attorney General of Canada for purposes of this appeal.

2.

PART II
POINTS IN ISSUE

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

- 10 1. Does s. 9(a) of the Ontario Human Rights Code, 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, 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?
- 20 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?
- 30 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?

3.

3. The Attorney General of Canada makes submissions as to the tests to be applied in answering Question 3, but takes no position on the other questions.

PART III
ARGUMENT

Application of the Charter

4. The Ontario Court of Appeal held in this case, (1988), 63 O.R. (2d) 1 at pp. 24-5, that the Charter does not apply to universities or other bodies simply because they may be "creatures of the legislature". Rather, that Court held
10 that it is important to consider whether a body is created to perform a governmental function and whether the action complained of is a governmental function. In all of the circumstances, the Court concluded, at p. 28, that the Charter "has no direction application to the respondent universities or to their contracts of employment with the appellants".

5. The Attorney General of Canada agrees that it was appropriate for the Court of Appeal to apply the tests on
20 which it relied in making its decision, and that the Court may have been right in holding that the Charter does not apply to the respondent universities or their contracts of employment with the Appellants. But, a conclusion in that regard must be reached upon a proper weighing of all relevant circumstances in light of all the tests and factors referred to in paragraphs 3-11 and 13-16 of the Factum of the Attorney General of Canada in The University of British Columbia v. Connell. The Attorney General of Canada makes no submission as to what is the correct conclusion in that regard.

5.

PART IV

ORDER SOUGHT

6. The Attorney General of Canada takes no position on the disposition of the constitutional questions as stated in this appeal.

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All of which is respectfully submitted.


