IN THE SUPREME COURT OF CANADA

No. 20747

(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

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INDEX

			Page
PART I	-	STATEMENT OF FACTS	1
PART II	-	ISSUES	2
PART III	-	ARGUMENT	4
PART IV	-	RELIEF SOUGHT	25
PART V	-	LIST OF AUTHORITIES	26

PART I

STATEMENT OF FACTS

1. The Attorney General of Nova Scotia makes no submission with respect to the facts of this case.

PART II

POINTS IN ISSUE

2. By Order of the Court dated August 30, 1988, the following constitutional questions were stated in this appeal:

1. Does s.9(a) of the Ontario Human Rights Code, 1981, S.O. 981, c.53 violate the right 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. 981, 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?

3. The Intervenor, the Attorney General of Nova Scotia, confines his submissions to question 2 and takes

the position that if s.9(a) of the Human Rights Code, S.O. 1981, c.53 gives rise to a violation of s.15(1) of the Charter, such a limitation of s.15(1) is a reasonable limit justified in a free and democratic society, within the meaning of s.1 of the Charter.

PART III

ARGUMENT

1. Is s.9(a) of the 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?

Section 1 of the Charter

4. Section 1 of the Charter provides:

> The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

5. The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

> R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295;
>
> R. v. Edwards Books and Art et al., [1986] 2 S.C.R. 713;
>
> Retail, Wholesale and Department Store Union v. Dolphin Delivery, [1986] 2 S.C.R. 573, at p.590.

The Oakes Test

6. To establish a limit on a Charter right as reasonable and demonstrably justified in a free and democratic society, two separate criteria must be met. First the objective of the measure responsible for limiting the Charter right or freedom must be of "sufficient importance to warrant overriding a constitutionally protected right or freedom". Second, the means chosen to achieve the objective must be reasonable and demonstrably justified when considered under a "form of proportionality test" which requires the court to balance the interests of society and those of the individuals and groups whose rights have been violated.

> R. v. Oakes, [1986] 1 S.C.R. 103;
> Edwards Books, supra, at p.758.

(I) Matter of Pressing and Substantial Concern

7. It is submitted that the primary objective of s.9(a) is the creation of a prohibition against age-based discrimination to benefit those between ages 19 and 65. Other interests that may be weighed in the balance in the legislative decision to enact s.9(a) are the interference with freedom of contract and the economic impact in the private sector if government were to prohibit freedom of contract relating to termination of employment of employees

over age 65. (Peter Hirst, Costing the Elimination of Mandatory Retirement: The Bottom Line, infra.)

8. It is submitted that the objective of the legislation is a matter of pressing and substantive concern.

> Re McKinney v. University of Guelph (1988), 46 D.L.R. (4th) 193 (Ont. C.A.), at p.232;
>
> (Contra: Sniders v. Attorney General of Nova Scotia et al. (1988), 88 N.S.R. (2d) 91 (N.S.C.A.))

(II) The Proportionality Test

9. Before applying the proportionality test, it is appropriate to consider the standard of review relevant in this case.

(A) Standard of Review under the Proportionality Test:

10. In stating the proportionality test in Oakes, Dickson, C.J.C. noted:

> Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit, trench upon the integral principles of a free and democratic society." (per Dickson, C.J. in Oakes, supra, at pp.138-139.)

11. Chief Justice Dickson later in Edwards Books held that the Oakes test must be applied in the manner responsive to the interests affected:

> The court stated (in Oakes) that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement, the court has been careful to avoid rigid and inflexible standards. (emphasis added) (at pp.768-769.)

12. La Forest, J. in Edwards Books explained the reason there is a need for flexibility in the standard of review under the Oakes test as follows:

> Let me first underline what is mentioned in the Chief Justice's judgment, that in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in McGowan, supra, at p.524 calls "the practical living facts" to which a legislature must respond. That is especially so in a field of so many

> competing pressures as the one here in question.
>
> ... having accepted the importance of the legislative objective, *one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected*.
>
> *In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures*. Of course, what is reasonable will vary with the context. Regard must be had to the nature of the interest infringed and to the legislative scheme sought to be implemented. (emphasis added) (pp.794-796).

13. The operation of the flexible standard of review resulting in a less strict application of the *Oakes* test is demonstrated in *R.* v. *Jones*, [1986] 2 S.C.R. 284, a decision rendered six months after *Oakes*. Justice La Forest, Chief Justice Dickson concurring, determined that compulsory certification of school curriculum violated s.2(a) freedom of religion but held that the denial was reasonable. Justice La Forest described the infringement of certification as a "minimal intrusion" and stated that to permit anyone to ignore the requirement for certification on the basis of religious conviction would create an "unwarranted burden on

the operation of a legitimate legislative scheme to ensure a reasonable standard of education".

14. The seriousness of a Charter violation is determined, according to Chief Justice Dickson, by the "extent and degree to which" a limiting measure trenches upon "integral principles of a free and democratic society" (Oakes, supra). It is submitted that a violation of a Charter right may be seen as trenching upon integral principles of a free and democratic society in at least two respects: first the degree or extent the violation offends the basic purposes of the Charter; secondly, to the extent or degree to which the violation offends the purpose of the Charter right infringed.

15. The general purpose of the Charter may be described as follows:

> ... the Charter, like most written constitutions, was set up to regulate the relationship between the individual and Government. It was intended to restrain government action and to protect the individual.
>
> Per McIntyre, J. speaking for the majority in Retail, Wholesale, Department Store Union, Local 500, et al., supra, at p.593.

16. Dickson, C.J. in Hunter v. Southam, [1984] 2 S.C.R. 145, at p.156, stated that the Charter "... is intended to constrain governmental action inconsistent with those rights and freedoms [it enshrines]", and later at p.160 described the purpose as "to protect individuals from unjustified state intrusion upon their privacy".

17. In light of the purpose of the Charter, it is submitted that infringements, which are the result of government action concerned with the state's relationship to the individual, ought to be regarded as the most serious of violations. Such violations are exactly what the Charter was intended to prohibit (McIntyre, J., supra), and it is appropriate that they be subject to the most stringent of reviews under the s.1 proportionality test.

18. Conversely, it is submitted that where a violation of the Charter occurs as the result of a law that is consistent with the broader purposes of the Charter in regulation of private transactions, the violation must be characterized as the least serious. In such cases, the Charter objective of restraining government in its dealings with individuals is not be impinged at all. The impugned law regulates individuals' relations with each other, not

individuals dealing with government. Such a law promotes values enshrined by the Charter in a manner that could not be accomplished as the Charter has no application to private transactions such as an employment contract (Dolphin Delivery, supra).

19. As s.9(a) of the Human Rights Code has a purpose consistent with the purpose of the Charter, i.e. promotion of basic human rights, does not result in restricting individuals' dealings with government, and in effect actually promotes Charter values in respect of the relationships between individuals in private transactions in a manner the Charter could never accomplish, on these bases alone, it is submitted s.9(a) ought to be subject to the least rigid and most flexible standard of review under s.1 of the Charter.

20. In any event, having regard to the purpose of s.15(1) of the Charter, it is submitted that if s.9(a) of the Human Rights Code violates the right to equality, it is not a serious infringement. The purpose of s.15(1) was described by Justice McIntyre in Law Society of British Columbia v. Andrews et al. (1989), 91 N.R. 255, at p.297:

> It is clear that the purpose of s.15 is to ensure equality in the formulation and application of the law. The promotion of

> equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.

21. Madame Justice Wilson identified the purpose of s.15(1) in the following manner:

> Given that s.15 is designed to protect these groups who suffer social, political and legal disadvantage in our society ... (p.262).

22. Obviously, the impugned provisions are consistent with the objective of "promoting equality" and are "remedial" within the context discussed by Justice McIntyre.

23. As the purpose of s.15(1) is to protect the socially, politically or legally disadvantaged, it is relevant in determining the seriousness of a violation to consider whether the group whose rights have been trenched upon by s.9(a) are a "group lacking in political power, vulnerable to having their rights overlooked and their right to equal concern and respect violated".

> Ely, Democracy and Distrust (1980), at p.151 (Cited with approval by Wilson, J. in Andrews, supra, at p.262.)

24. Infringements of equality rights of groups not socially, politically or legally disadvantaged are, it is submitted, less serious than violations as the purpose of s.15(1) is not jeopardized in such cases.

25. It is submitted that groups defined by age are not "groups in society whose needs and wishes elected officials have no apparent interest in attending". As has been observed, "... the fact that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws ... that comparatively advantage those between, say, 21 and 65 vis-a-vis those who are younger or older."

> Ely, Democracy and Distrust (1980), pp.151 and 160.

26. In the United States, the Supreme Court has consistently refused to extend the equal protection provisions of that country's constitution to those treated differently on the basis of age.

> Massachusetts Board of Retirement v. Murgia, (1976) 427 U.S. 307, 96 S.Ct. 2562;
>
> Vance v. Bradley, (1979) 440 U.S. 93, 99 S.Ct. 939.

27. As the impugned provisions have as their objective the promotion of values consistent with those of s.15(1) and because the law gives rise to distinctions based on age, not in relation to a politically, socially or legally disadvantaged group, the extent or degree to which s.15(1) has been infringed must be characterized as a less serious violation of s.15(1).

28. In addition, in the case of age based discrimination in employment, there is at least one additional reason for flexibility in application of the proportionality test under s.1. Under our own Constitution, age is accepted as a legitimate proxy for ability in determining when senators and judges of the superior courts in this country are no longer eligible to hold office. Similarly, the U.S. Constitution accepts age as a valid proxy for ability with regard to eligibility for the office of President and the right to vote.

> Constitution Act, 1867, ss.23(1), 29(2), 99(2);
>
> United States Constitution, Article 2, s.1, clause 5, 26th amendment.

29. Given that in regulating private transactions, s.9(a) does not generally impinge on Charter objectives of

restraining government in its dealing with individuals, the intention of the Ontario Legislature to confer a positive benefit upon individuals that would not otherwise be available, and the fact that any infringement of s.15(1) must be characterized as minimal having regard to the purpose of s.15(1), it is submitted that the extent and degree of the violation in this case must be characterized as the least serious of possible violations. The court ought therefore allow the Legislature "room to manoeuver" to balance the interest of government in creating prohibition against age based discrimination and the competing interest of the private sector in freedom of contract, (i.e. freedom to agree upon terms regulating the termination of the employment relationship), by bringing to bear the most deferential of reviews for proportionality under s.1.

(B) Application of the Proportionality Test

30. As the proportionality test involves an analysis of the means chosen to achieve a legislative objective in light of the benefit to society and the adverse impact upon the individual or group whose rights have been infringed, proper characterization of the effects of the impugned legislation must be established.

(i) Identification of the Effect of s.9(a): Benefits and Adverse Impact

31. In this case, the Respondents assert that they have been subject to age-based discrimination in employment. The nature of an employment relationship is of course one of contract. Obviously without a contract of employment, an employee has no right to work for any particular employer under any circumstances.

32. It is self-evident that every contract of employment will terminate at some point in time. Termination may occur for just cause or by agreement of the parties. The factors agreed upon by the parties which may trigger termination of the agreement are unregulated by the common law and may range from selected arbitrary events (i.e. fixed date) to fulfillment of the purpose of the contract (i.e. completion of a specific project irrespective of the date).

33. A provision governing the termination of the employment relationship, and thus "mandatory retirement" is simply a term of the contract of employment.

Brown v. Coles (1985), 5 B.C.L.R. (2d) 143 (B.C.C.A.)

34. As a matter of contract, if an employee is dismissed without cause where the contract did not specify any termination date, an action would lie for unjust or wrongful dismissal. (Brown v. Coles, supra, at p.144.) However, there is no common law tort arising from an act of discrimination per se, based on age or otherwise. (Seneca College v. Bhadauria, [1981] 2 S.C.R. 181.)

35. Viewed in this context, certain observations may be made as to the effect of the impugned provision in the Human Rights Code.

36. First, and most importantly, s.9(a) of the Ontario Human Rights Code does not establish mandatory retirement as a rule of law in the Province of Ontario. It does create a prohibition against age-based discrimination, albeit a limited one.

37. Second, s.9(a) regulates the contractual relations between individual employers and employees by prohibiting the parties from agreeing to terminate an employment contract on the basis of the age of the employee where the employee is between ages 19 and 65. However, the parties remain free to

choose any other method of determining termination of the employment contract.

38. Third, as a corollary to the second point, employers and employees are free to agree to terminate employment on the basis of the employee's age after the employee's 65th birthday. If no such agreement exists and the employee is nonetheless dismissed, an action for wrongful dismissal will lie.

39. Of employees who "retire" after age 65, the only ones that are without a remedy at law if they decide that they do not wish to terminate the employment relationship are those who are party to a contract under which there was agreement to terminate the employment relationship at a fixed date determined by age.

40. The effect of the impugned legislation in the employment context is twofold; it creates a benefit, a prohi ition against age-based discrimination, albeit a limited one and second; it establishes freedom of contract in respect of termination of employees over age 65.

(ii) Balancing of Interests under the Proportionality Test

41. For the purpose of the proportionality test, evaluation of the effects or benefits and adverse impact of the Legislature's decision to permit freedom of contract with respect to employees over age 65 ought to be made, it is submitted, having regard to the actual context in which the rule operates and having regard to the proper standard of review.

42. It is relevant to this evaluation of the unfairness or invidiousness of the effect of the law whether or not the law was passed with a view to creation of a benefit.

> R. v. Turpin et al. (1987), 36 C.C.C. (3d) 289 (Ont. C.A.), at p.300, applied in Medwid v. Ontario (1988), 48 D.L.R. (4th) 272 (O.H.C.);
>
> See also: Bernard v. Dartmouth Housing Authority (1988), 88 N.S.R. (2d) 190 (N.S.C.A.) and Re Attorney General of Newfoundland & Labrador Housing Corp. et al. (1987), 38 D.L.R. (4th) 355 (Nfld. C.A.).

43. The impugned provision does create a benefit by prohibiting discrimination on the basis of age as defined.

This benefit would not otherwise be available as the common law does not recognize the tort of discrimination. (Seneca College, supra.) Neither would the Charter create such a benefit as it has no application to private transactions (Dolphin Delivery, supra).

44. The benefit of s.9(a) is enjoyed by every resident of the Province of Ontario who becomes eligible as a result of attaining the age of 19 until the benefit, by operation of law, expires after the individual's 65th birthday. In other words, there is equal benefit of the law by all citizens when eligible; equal application of the law and all individuals can reasonably expect to participate in the benefit at some point in their lives.

45. After expiration of the benefit created by s.9(a), individuals are free to negotiate whatever arrangements they desire and those that have agreed to retire will have no recourse to the law as a result of consensual retirement.

46. In considering whether the Legislature has struck an appropriate balance, in enacting the impugned provision of the Human Rights Code, and having regard to the proper standard of review in this case, it is submitted that the

justifications for mandatory retirement are of marginal significance. Section 9(a) does not establish mandatory retirement but does re-establish freedom of contract.

47. In its most unfavourable light, all that can be said of s.9(a) is that it does not prohibit individuals from negotiating agreements as to termination of an employment contract upon the basis of criteria that may or may not be relevant to the job.

48. However, the validity of the arguments for or against termination of employment contracts at age 65 of employees by mutual agreement of the parties, do not relate to the objective of the law to create prohibition against age-based discrimination. Nor are agreements to terminate employment after age 65 the result of compulsion by the impugned law. The relative desirability of the contracts that might be made as a result of the exercise of freedom of contract and the validity of the rationale behind such contracts do not bear on either the purpose or the effect of the law. Consequently, the argument pro and con is of little value when considering whether the Legislature has struck an appropriate balance of interests in passing s.9(a).

49. In any event, it is submitted that the nomenclature "mandatory retirement" is misleading. Where there is termination of employment on an employee's 65th birthday, it is the product of the agreement, otherwise an action for wrongful dismissal will lie. There is no unilateral termination of employment without corresponding liability. Thus, the term "mandatory" is inappropriate.

50. In this case, retirement arrangements were agreed to as conditions of employment by the parties. The justifications or rationales for mandatory retirement may reflect the various reasons, valid or not, as to why the employer or employee wanted mandatory retirement in the contract. However, the validity of those justifications are not related to the fairness of the operation of the impugned law. The significant consideration is that, having exercised the freedom of contract that the Legislature permits, and accepted the benefits of that arrangement, the employees now seek to be relieved of the part of the bargain which they now find unacceptable.

51. Further, it is inappropriate to describe an agreement to terminate employment on the basis of age where the age of an individual is over 65, as contracting out of

human rights. To be "contracted out of" the right or obligation must first have existed between the parties. The common law does not, in its regulation of private parties, guarantee life-time employment for employees nor does it prohibit arbitrary reasons for actions and thus does not prohibit discrimination per se between individuals (Seneca College, supra.). If statute law similarly does not confer a benefit by prohibiting certain actions, there is no right or obligation between the parties which may be "contracted out of".

52. In addition, in balancing interests it is relevant to consider that there would be a significant impact at a micro level upon employers if consensual retirement were rendered unlawful in Human Rights legislation by an unrestricted prohibition against age-based discrimination.

> ... at the micro level individual companies will have to face ... significant costs ... in terms of pension and benefit programs and human resources management.
>
> Peter Hirst, Costing the Elimination of Mandatory Retirement: The Bottom Line, CCH, Canadian Industrial Relations and Personnel Development, at p.1029.

53. Although of the view that abolition of consensual retirement would not affect pension funding, Mr. Hirst, a

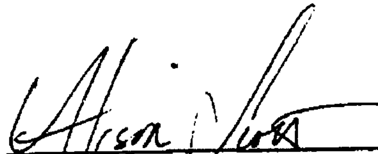
proponent for abolition of consensual retirement, and a witness on behalf of the Applicants in in the case on appeal, does concede that there will be an economic impact at the micro level as described.

54. Bearing in mind the proper standard of review that ought to be brought to bear in this case, it is submitted that the nature of the adverse impact, the economic reality of the large number of social welfare programs available to those over age 65 is offset in the balance by the benefit created by s.9(a) of the Ontario Human Rights Code, which establishes a limited prohibition against age-based discrimination proportional constitution. If s.9(a) does infringe s.15(1) of the Charter, it is therefore a reasonable limit within the meaning of s.1 of the Charter.

PART IV

RELIEF SOUGHT

55. The Intervenor respectfully requests that the appeal be dismissed.



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HALIFAX, NOVA SCOTIA
May 3, 1989

PART V

LIST OF AUTHORITIES

		Pages
1.	R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295	4
2.	R. v. Edwards Books and Art et al., [1986] 2 S.C.R. 713	4, 5, 7
3.	Retail, Wholesale and Department Store Union v. Dolphin Delivery, [1986] 2 S.C.R. 573	4, 9, 11 19
4.	R. v. Oakes, [1986] 1 S.C.R. 103	4, 6, 7, 8
5.	Re McKinney v. University of Guelph (1988) 46 D.L.R. (4th) 193 (Ont.C.A.)	6, 23
6.	Sniders et al. v. Attorney General of Nova Scotia et al. (1988), 88 N.S.R. (2d) 91 (N.S.C.A.)	6
7.	R. v. Jones, [1986] 2 S.C.R. 284	8
8.	Hunter v. Southam Inc., [1984] 2 S.C.R. 145	9
9.	Law Society of British Columbia v. Andrews et al. (1989), 91 N.R. 255 (S.C.C.)	11
10.	Ely, Democracy and Distrust (1980)	12, 13
11.	Massachusetts Board of Retirement v. Murgia, (1976) 427 U.S. 307, 96 S.Ct. 2562	13
12.	Vance v. Bradley, (1979) 440 U.S. 93, 99 S.Ct. 939	13
13.	Brown v. Coles (1985), 5 B.C.L.R. (2d) 143 (B.C.C.A.)	16
14.	Seneca College v. Bhadauria, [1981] 2 S.C.R. 181	16, 19 22

		Authorities
15.	<u>R.</u> v. <u>Turpin et al.</u> (1987), 36 C.C.C. (3d) 289 (Ont. C.A.)	19
16.	<u>Bernard</u> v. <u>Dartmouth Housing Authority</u>, (1988), 88 N.S.R. (2d) 190 (N.S.C.A.)	19
17.	<u>Re Attorney General of Newfoundland and Newfoundland and Labrador Housing Corp. et al.</u> (1987) 38 D.L.R. (4th) 355 (Nfld. C.A.)	19
18.	Peter Hirst, <u>Costing the Elimination of Mandatory Retirement: The Bottom Line</u>, CCH, Canadian Industrial Relations and Personnel Developments	23