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

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PART I

STATEMENT OF FACTS

1. The facts are set out in the Factums of the Appellant and the Respondents.

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PART II

POINTS IN ISSUE

2. The Constitutional Questions in this appeal are as follows:

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(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?

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(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?

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(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?

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3. The Attorney General of Saskatchewan submits that the Questions should be answered as follows:

(1) No.

(2) Yes.

(3) No.

(4) No.

(5) Yes.

10 The Attorney General of Saskatchewan limits the substance of his submissions to Questions 1, 2 and 3.

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PART III

ARGUMENT

A. INTRODUCTION

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4. The position of the Attorney General of Saskatchewan is that section 9(a) of the Ontario Human Rights Code does not violate section 15(1) of the Charter. In the alternative, it is submitted that it is clearly justifiable pursuant to section 1 of the Charter.

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The Attorney General also submits that the Charter does not apply to the mandatory retirement policies of the Respondent universities. These three propositions are discussed in the following paragraphs.

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B. DOES SECTION 9(a) VIOLATE SECTION 15(1)?

(1) Section 15 Considered Generally

5. The basic principles that govern the operation of

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section 15(1) of the Charter must be established before the specific issues raised by section 9(a) of the Ontario Human Rights Code can be considered. Section 15(1) reads as follows:

> 15. (1) 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.

10 6. The purpose and scope of section 15 of the Charter were set out in Law Society of British Columbia v. Andrews. Each of the three judgments in that case confirmed the same approach. McIntyre J. (Lamer J. concurring) said that the section is concerned with
20 distinctions based on "grounds relating to personal characteristics" of individuals or groups and that it is "designed to prevent discrimination based on [the enumerated grounds] and analogous grounds". Wilson J. (Dickson C.J.C. and L'Heureux-Dube J. concurring) agreed
30 completely with McIntyre J.'s approach and employed the concept of "discrete and insular minorities" to explain the ambit of section 15. La Forest J. confirmed that the section is aimed at discrimination on the basis of irrelevant personal differences "such as those listed in
40 section 15 and, traditionally, in human rights legislation".

Law Society of British Columbia v. Andrews, S.C.C., Feb. 2, 1989 (unreported).

- per McIntyre J. at pp. 19, 24.
- per Wilson J., at pp. 3-4.
- per LaForest J., at p. 3.

7. More recently, in the Workers' Compensation Act Reference, the Court applied the Andrews approach in rejecting a section 15 challenge to the provisions of the Reference Re The Workers' Compensation Act, 1983, S.C.C., April 24, 1989 (unreported), that granted compensation

10 under the Act in lieu of the right to sue on death or injury. La Forest J. said that the distinction between workers covered by the Act and other persons did not "constitute discrimination". He confirmed that section 15 of the Charter is not applicable unless the impugned

20 classification is based on grounds enumerated in section 15 or grounds analogous to them. La Forest J. said:

> The situation of the workers and dependents here is in no way analogous to those listed in section 15(1), as a majority in Andrews stated was required to permit recourse to section 15(1). The appeal is accordingly dismissed.

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8. The Court in Andrews expressly recognized that section 15 of the Charter reflects the same values that underpin human rights legislation. Section 15 represents the constitutional entrenchment of those values. There is

40 a clear and strong identity between both the purpose and effect of the discrimination provisions in human rights legislation and section 15 of the Charter.

> Law Society of British Columbia v. Andrews, per McIntyre J. at pp. 16-17.

9. Andrews also confirmed that discrimination is the key concept in section 15. McIntyre J. noted that "discrimination" acted as a qualifier on the language in the section that refers to equality and that, without discrimination, there will be no violation of section 15.
10 He indicated that enumerated grounds, and grounds analogous to them, serve to reflect and explain the meaning of "discrimination". McIntyre J. defined discrimination in the following way at p. 19:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds
> 20 relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.
>
> Law Society of British Columbia v.
> 30 Andrews, per McIntyre J., at pp. 16, 26, 27.

10. Finally, Andrews established that, even when considering enumerated grounds, it was not sufficient to focus on the ground of differential treatment alone. The
40 classification in question must be "discriminatory" before section 15 will be engaged. Presumably, distinctions based on enumerated or analogous ground will normally be

discriminatory. However, discrimination does not necessarily or inevitably flow from the simple fact that a classification is based on such grounds.

> Law Society of British Columbia v. Andrews, per McIntyre J., at pp. 26-27.
>
> R. v. Swain (1986) 53 O.R. (2d) 609 (C.A.) at pp. 646-647.
>
> R. v. Johnstone (1986), 26 C.C.C. (3d) 401 (N.S.C.A.) at pp. 409-410.
>
> R. v. Le Gallant, [1986] 6 W.W.R. 372 (B.C.C.A.) at pp. 379-380.
>
> Century 21 Ramos Realty Inc. et al. v. The Queen (1987), 58 O.R. (2d) 737 (C.A.) at pp. 35-36.
>
> Smith, Kline and French Laboratories Limited et al. v. The Attorney General of Canada (1986), 34 D.L.R. (4th) 584 at 591.

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(2) Section 15(1) Applied

11. The application of the foregoing principles suggests that section 9(a) of the Ontario Human Rights Code does not offend section 15(1) of the Charter. The relevant provisions read as follows:

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> 4.(1) 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, age, record of offences, marital status, family status or handicap.

9. In Part I and in this Part,

(a) 'age' means an age that is eighteen years or more, except in subsection 4(1) where 'age' means an age that is eighteen years or more and less than sixty-five years;

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12. These sections do draw a distinction on the basis of age. "Age" is an enumerated ground. However, they do not appear to "discriminate" in the sense contemplated by section 15(1). Their purpose and effect is entirely consistent with the Charter. The Human Rights Act

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advances the very same interests as the equality guarantee in section 15(1). The only basis on which the Act can be attacked is that it should operate more generally and protect not just those workers who are between the ages of 18 and 65 but also those who are over 65 and, presumably,

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all those who are under 18 as well. That line of criticism reflects a fundamental misunderstanding of the basic role of the Charter in the legal system.

13. The Charter, by virtue of section 32 thereof,

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applies only to government. It does not apply to private persons or private action. As stated by McIntyre J. in R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 598:

> It is my view that section 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government.

That analysis, of course, is consistent with the basic notion that the role of the *Charter* is to regulate the relationship between the state and the citizen. Relationships between or among individual citizens are outside its scope.

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14. Legislatures have no obligation to enact human rights statutes. There is no legal or constitutional imperative to regulate discrimination in any or all private conduct. In the absence of human rights legislation, private discrimination would not be subject to review.

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15. Human rights legislation thus occupies an exceptional place in the legal world. First, it straddles the public and private realms in the sense that it represents a legislature's only effective vehicle for regulating discriminatory conduct in the private arena. Second, human rights legislation is self-evidently and exclusively concerned with the very same principles that animate the *Charter*. In that respect it is unique.

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Ontario Human Rights Commission v. Simpsons Sears, [1985] 2 S.C.R. 536 at p. 547.

16. In view of that situation, it would be anomalous to hold that section 9(a) of the Ontario Code, which is part of a bona fide legislative initiative to impose Charter-type values concerning age discrimination on private relationships, should itself conflict with the Charter. As noted in paragraph 10, above, this Court has held that not every distinction on the basis of an enumerated ground constitutes a violation of section 15(1) of the Charter. It would seem that a statute which expressly and directly advances the same interests that animate section 15(1) is an obvious example of a law that differentiates on the basis of an enumerated ground but is nonetheless not "discriminatory".

C. IS SECTION 9(a) JUSTIFIABLE UNDER SECTION 1?

17. It is submitted that, if section 9(a) of the Human Rights Code is held to violate section 15(1) of the Charter, it should be sustained pursuant to section 1 of the Charter.

18. This Court has recognized that the standard of justification under section 1 of the Charter must be flexible and pragmatic. It must accommodate the obvious reality that laws are enacted for different purposes and to mediate or advance different kinds of interests. Not all laws will be made subject to the same standard of scrutiny. For example, criminal law will have to clear a higher justificatory hurdle than laws concerned with economic or social regulation. In A.G. Quebec v. Irwin Toy Limited, S.C.C., April 27, 1989 (unreported), the majority noted as follows at pp. 67-68:

> Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. This would only be to substitute one estimate for another.

19. Similar views have been expressed in several contexts. For example, La Forest J. wrote as follows in R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 795:

> 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.
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> See also: Law Society of British Columbia v. Andrews, per McIntyre J., at p. 27.

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20. The questions raised by this appeal are relatively unique and the approach taken to section 1 must reflect that situation. The test formulated in R. v. Oakes, [1986] 1 S.C.R. 103 does not fit comfortably with a provision such as section 9(a) of the Human Rights Code. That test presumes that the law in question reflects a decision to limit rights in order advance some other governmental interest. It assumes that the limitation of rights is instrumental in the achievement of that legislative objective. The Human Rights Code, on the other hand, reflects (on any practical analysis) a decision to expand rights.

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21. The Human Rights Code does not create mandatory retirement or any other kind of age distinction in the private sphere. They would exist in the absence of the legislative provisions in question. Mandatory retirement is not the "objective" at which sections 4 and 9(a) are

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aimed. The "objective" or "purpose" of sections 4 and 9(a) is the prevention of discrimination. Similarly, its true effect is the prevention of discrimination in employment. Arguments as to justification are misplaced to the extent that they seek to weigh the importance of mandatory retirement or other workplace age distinctions against the limitation of section 15(1) rights.

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22. It is submitted that the proper approach to section 1 in this appeal must reflect the unique character of human rights legislation i.e. the fact that it is the only kind of statute which is exclusively concerned, in both purpose and effect, with the advancement of Charter-type values. The Courts should show considerable deference to the legislative assessments of the extent to which such values should be imposed on private conduct. In the absence of some demonstration that a legislature has acted in bad faith or entirely capriciously, courts should be loathe to reject legislative judgment as to how far human rights values should be extended.

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D. DOES THE CHARTER APPLY TO THE RESPONDENTS?

23. It is submitted that the Charter is not applicable to the mandatory retirement policies of the Respondent

universities. The Respondents can neither be considered "government" as that term is used in section 32 of the Charter, nor can their retirement policies be considered the actions of government.

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24. The key provision in the resolution of this issue is obviously section 32(1) of the Charter. It reads as follows:

> 32. (1) This Charter applies
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

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25. In R.W.D.S.U. v. Dolphin Delivery Ltd., supra, McIntyre J. significantly clarified the meaning of section 32. He concluded that the Charter applied only to "government" in the sense of the executive or administrative branch of government. He also indicated that, at some point, governmental intervention could make the Charter applicable to otherwise private action. As stated by the British Columbia Court of Appeal in Harrison v. University of British Columbia, [1988] 2 W.W.R. 688 at 692-3:

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The Supreme Court's analysis in Dolphin Delivery suggests the following:

(1) The institutions whose conduct is governed by the Charter are legislative, executive and administrative branches of government.

(2) Legislative and executive acts such as cabinet decisions are clearly covered by the Charter since they are necessarily acts of government.

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(3) The acts of persons other than parliament, the legislatures and their respective executives may also be governed by the Charter if a direct and precisely defined connection is found between an act of parliament, the legislatures or their executives in an alleged infringement of the Charter.

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26. The issue in this appeal is whether there is a sufficiently "direct and precisely defined connection", as between government and the Respondent universities or their retirement policies so as to engage the Charter. It is submitted that there is not sufficient connection in this case:

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(a) The Respondents are not subject to the Charter simply because they are "creatures of statute". The Respondents' submissions at paragraphs 110 to 120 of their Factum are adopted on this point.

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(b) The Respondents are not subject to the Charter on the basis that they exercise a "public function". The application of the public function test should be used to determine the application of section 32 only, if at all, in the most clear-cut cases. The situation of municipal governments may be an example. The public function test, in most of its applications, is extremely subjective and presupposes an appropriate or necessary role for government that is simply too elusive to be helpful.

(c) The Respondents are not subject to the Charter on the basis that their operations are so intimately connected with government as to be part of it. (See Appellant's Factum at para. 144). They enjoy a large measure of autonomy and there is no real "control" over their operations. The Respondents' submissions at paras. 140-148 are adopted in this regard.