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 RESPONDENT, THE ATTORNEY GENERAL OF ONTARIO

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TABLE OF CONTENTS

FACTUM OF THE ATTORNEY GENERAL OF ONTARIO

PART I - THE FACTS

a) Position of the Attorney General of Ontario with respect to the facts set out in the Appellants' Factum

1. The Attorney General of Ontario accepts as correct the statements of facts set out in paragraphs 1, 2 and 7 of the Appellants' Factum.

2. The Attorney General of Ontario takes no position with respect to the facts in paragraphs 4, 5 and 34 to 75 of the Appellants' Factum relating to the issues of the applicability of the Charter to universities and to the constitutional validity of the mandatory retirement of university faculty and librarians.

3. The Attorney General of Ontario does not accept the facts set out in the balance of the paragraphs in the Appellants' Factum as these paragraphs are incomplete, argumentative, inaccurate or conclusions of law. The Attorney General of Ontario intends to rely on the additional facts set out below.

b) Additional Facts Relied on by the Attorney General of Ontario

4. The Attorney General of Ontario has provided the court with extensive expert affidavit evidence to justify the validity of section 9(a) of the Code, not only as it applies in the University context, but as it applies generally. The Attorney General relied on the Affidavit of Professor David Foot, a Professor in the Department of Economics at the University of Toronto with expertise in macroeconomics, econometrics and the economics of demographic change. His recently published books include Public Policy and Future Population in Ontario (Ontario Economic Council, 1979), and Canada's Population Outlook: Demographic Futures and Economic Challenges (1982). The Attorney General also relied upon the Affidavit of Professors Gunderson and Pesando. Professor Gunderson is the Director of the Centre for Industrial Relations and a Professor in the Department of Economics at the University of Toronto, with expertise in the economic and industrial relations implications of mandatory retirement. Professor Pesando is the Director of the Institute for Policy Analysis and a Professor in the Department of Economics at the

University of Toronto, with expertise in financial economics (including pension issues) and macroeconomics. In addition, the Attorney General relied upon the Affidavit of Professor Daniel Ondrack, a Professor of Organizational Behaviour at the Faculty of Management Studies and the Centre for Industrial Relations at the University of Toronto, with expertise in personnel and human resource management.

Case on Appeal, Volume 13, Affidavit of Foot, paragraph 1

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 1.1 and 1.2

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraph 1

EMPLOYMENT RELATIONSHIP AND WORK ENVIRONMENT

5. Approximately two-thirds of major collective agreements in Canada contain mandatory retirement provisions, indicating that mandatory retirement is not simply a policy imposed upon employees by their employers, but is often the result of mutually agreed upon collective agreements between employers and unions.

Leopold Morin v. Canadian Auto Workers National Union, [1988] O.L.R. B. Rep., May, 506

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 7 and 8

Case on Appeal, Volume 12A, Cross-Examination of Pesando, Questions 155, 156 and 476

Case on Appeal, Volume 7B, Cross-Examination of Hirst, Questions 11 - 18

Reasons for Judgment, Ontario Court of Appeal, Case on Appeal, Volume A, p.145 (p.61 O.R.)

Reasons for Judgment, Ontario High Court, Case on Appeal, Volume A, p.77 (p.41 O.R.)

6. Not permitting mandatory retirement in those organisations which currently employ this personnel management tool will cause a fundamental shift in the employee/employer relationship to the detriment of both employees and employers. Consequently, the removal of mandatory retirement from the organisational environment will have a profound impact on a wide range of personnel functions and policies: hiring, training, dismissals, monitoring and evaluation, and compensation.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 2, 3, 51,

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 24.

Reasons for Judgment, Ontario Court of Appeal, p.141 (p.57 O.R.)

7. Mandatory retirement exists as a part of an intricate lifetime compensation system, in which employers and their employees benefit from a deferred wage system. In this deferred compensation system, workers' compensation is less than their productivity when they are young, and more when they are older. This does not imply that a worker's productivity declines with age. It implies only that compensation increases more than does productivity as a worker's length of service with the company increases.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 17, 19 - 23, and Exhibits "I" and "J"

Case on Appeal, Volume 12A, Cross-Examination of Pesando, Question 445

8. Mandatory retirement provides the necessary termination date for this contractual arrangement. Without a fixed termination date, such a deferred compensation system would be more difficult to establish because the employer could be forced to pay compensation in excess of the worker's productivity for an indefinite period of time. With mandatory retirement, the expected life of the contractual arrangement is known by both parties. [illegible] worker's compensation need not equal the worker's productivity at every point in time (a condition economists term the "spot" or "auction" labour market). Instead, the worker's expected lifetime compensation equals the value of the worker's expected lifetime productivity (a condition economists term the "contract" labour market).

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 18, 26

Case on Appeal, Volume 6A, Cross-Examination of Krashinsky, Question 479 - 483

9. When employees are in early stages of employment, employers tend to be more careful in the performance appraisal process in order to assess whether the employee has the capability to be a satisfactory performer. Once

it has been established that the employee is a capable performer, the performance review process tends to become less close and the established employee is subject to less careful scrutiny. Only when performance is seen to deteriorate to some marginal level, is the employer obliged to reinstitute a careful scrutiny of performance. The employee will either improve his performance level or be subject to dismissal for cause. Workers nearing mandatory retirement age are generally permitted to continue their employment without careful scrutiny even if their performance deteriorates to the marginal level at which other employees are subject to careful performance scrutiny. This is because employers can tolerate the substandard level of performance when there is a predictable and close termination date. This relaxed and less careful scrutiny of performance is a benefit which accrues to workers nearing mandatory retirement age.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 6, 14

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 15

Case on Appeal, Volume 7, Affidavit of Agarwal, Exhibit "H", pp.92, 117

10. The consequence of an indefinite work term is that a substandard level of performance which may have been tolerated prior to retirement, will no longer be tolerated. Employers will be obliged to use more careful and .anding performance appraisal for older employees who had previously benefited from the relaxed scrutiny. Having to work under these new work conditions would cause unusual emotional pressure on older workers substantially different from those conditions now enjoyed.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 7, 15

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 12, 28

Case on Appeal, Volume 7, Affidavit of Agarwal, Exhibit "B", pp.81, 89

11. If mandatory retirement is not permitted, some alternative to voluntary retirement will be necessary to terminate the employment relationship. Without this alternative, employers would be required to continue the employment of someone until that person decided to retire.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 5, 19

12. Further, not permitting mandatory retirement as a personnel policy would necessitate changes in other personnel policies. Employers would be faced with a choice of at least five major alternatives, which might be applied separately or in combination.

13. In order to adjust to an indefinite employment term, employers would adopt a wage structure based on current productivity and develop new productivity evaluation tools which would have to be constantly administered.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 13, 17, 20

Case on Appeal, Volume 13a, tab 1, Cross-Examination of Ondrack, Questions 218, 252

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 22

14. In order to adjust to an indefinite employment term, employers would increasingly have to terminate older workers for cause. Dismissal of employees for cause is a complex process with economic and social costs for both employee and employer; an increase in dismissals for cause due to the elimination of mandatory retirement would increase these costs to employees and employers.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 21 - 25, and Exhibits "B" and "F"

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 27

15. In order to adjust to an indefinite employment term and to avoid the dismissal for cause process, employers could terminate certain older workers by giving them "adequate" notice or money in lieu of notice.

Case on Appeal, Volume 13a, tab 1, Cross-Examination of Ondrack, Questions 218, 252

16. In order to adjust to an indefinite employment term and to avoid the dismissal for cause process, employers might redesign jobs and work schedule arrangements to accommodate possible changes in ability associated with

workers who are past the present mandatory retirement age.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 26 - 28

17. In order to adjust to an indefinite employment term, employers would likely reduce the uncertainty of employing workers for an indefinite period of time by offering only limited term contract appointments to workers rather than ongoing/indefinite appointments.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 29 - 30

18. The effect of each of these alternatives is to make the work relationship more demanding upon older workers so that the years approaching retirement become less satisfying or subject to greater uncertainty. Instead of being able to work at the end of a career in conditions of relative stability, security and dignity, older workers may find themselves under careful scrutiny having to continually prove themselves as capable performers and having to adapt to re-structured working conditions and compensation levels.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraph 31

19. Not permitting mandatory retirement would result in organisational uncertainty for succession planning/career pathing. Succession planning is a common personnel practice that has as its objectives:

(i) effective staffing of key positions by qualified personnel; and

(ii) the orderly progression of personnel through job assignments.

An indefinite work term would mean that succession planning would become more complicated because of the removal of the fixed retirement date and a loss in predictability of turnover. Career pathing would also become more complicated because of the succession planning uncertainties.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 8, 33, 34, and Exhibits "C" and "H"

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 13

Case on Appeal, Volume 7, Affidavit of Agarwal, Exhibit "B", pp.83, 84, Exhibit "H", pp.47 and 48

20. If mandatory retirement were not permitted, seniority rights would have to be modified or adjusted for the actual skill, knowledge or performance levels of older workers. Rather than being accumulated automatically in an undifferentiated manner as is presently the case, seniority would become a conditional benefit dependent upon a more careful examination of actual capabilities or performance of older workers. The use of "performance-modified" seniority will result in a reduction of job security for older workers as well as a more generally demanding work environment.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 36 - 41, and Exhibit "G"

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 30

21. Mandatory retirement, as part of a collective agreement or a company personnel policy, is highly correlated with the existence of occupational pension plans: approximately 95 per cent of pension plans contain mandatory retirement provisions. If mandatory retirement were not permitted, then the design of occupational pension plans would have to be reviewed, and adjustments in pay policy and/or the pension plan may be necessary.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 7, 33 - 36, and Exhibits "K" and "L"

POPULATION TRENDS

22. The Respondent's evidence relating to the impacts of eliminating mandatory retirement on the future work force and unemployment rates in Ontario was introduced primarily through the Affidavit of Professor David Foot, a Professor of Economics at the University of Toronto who specializes in the economics of demographic change. Mr. Justice Gray of the Ontario High Court found that his projections were "cogent and persuasive so as to meet the section 1 standard of proof as set out in R. v. Oakes...".

Reasons for Judgment, Ontario High Court, pp.72-73 (pp.36-37 O.R.)

23. The populations of Canada and Ontario are getting older, and by the year 2001 the median age of the Ontario population is projected to be around 37.5 years. One of the major determinants of this process was the volatility

of fertility rates in the Post-War period. A rapid rise in fertility rates over the 1950's was followed by an even more dramatic decline over the 1960's, which has continued through the 1970's and into the 1980's. This created the so-called Baby Boom generation, a twenty year group or cohort of persons whose birthdates approximately range between 1947 and 1967. By 1986, therefore, these people are aged 19 to 39 years inclusive. Their distribution over these ages is, however, quite skewed since the maximum number occurs at age 23 years.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 3 and 4

24. Each of these single year age groups in Ontario contain over 140,000 persons. In total they number almost 3 1/4 million in a provincial population of 9 million; that is, about 36 per cent of the total. The aging of this cohort has had a major impact on labour force growth and, hence, unemployment rates in Ontario over the 1960's and 1970's.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 5

25. The proportion of the population in Ontario aged 65 years and over has risen from 8.4 per cent in 1971 to 11.0 per cent by 1986. There are now slightly over 1 million persons in this age category. Recent projections indicate that this group will number between 1.406 and 1.493 million persons by 2001. This represents between 13.5 and 15.2 per cent of the total provincial population. The age group 65 years and over can, therefore, be expected to grow substantially from its current level of approximately 1 million persons.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 6 and 8

26. Influenced in part by mandatory retirement provisions, the vast majority of persons in this older age group do not participate in the labour market; that is, they are retired from work on a permanent or full-time basis. Labour force survey data for 1985 indicate that 13.1 per cent of males and 4.5 per cent of females aged 65 years and over currently participate in the Ontario labour force. These represent declines from 20.3 and 5.3 per cent respectively over the past decade.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 9

27. The labour market implications of mandatory retirement provisions

can be viewed, in part, in terms of employment opportunities for younger workers. The retirement of an older worker can be viewed as an opportunity for promotion of younger workers up the hierarchical ladder which can lead ultimately to a vacancy to be filled from outside the organisation, perhaps at an entry level position. If the job is not part of a hierarchy and has the appropriate characteristics, a younger worker may be able to substitute directly for an older worker who retires. In this way the retirement of older workers provides both promotion and employment opportunities for younger workers.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 10

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraph 9, and Exhibit "D"

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 12 and 25

28. There are, of course, cases where this does not result in net new employment opportunities. In difficult times the position created by a retirement may remain unfilled; in times of retrenchment it may even be eliminated, but it is not necessary to have a direct linkage for there to be impacts on younger workers since the salary saved can be used, in whole or in part, to employ some existing workers for more hours (including, perhaps, turning a part-time position into a full-time position, etc.).

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 11

29. These issues take on greater importance in a labour market environment characterised by relatively high youth and young adult unemployment rates and an aging population placing increasing numbers in the post-mandatory retirement age groups. In 1985 the youth (15 to 24 years) unemployment rate in Ontario stood at 13.2 per cent (15.8 for 15 to 19 years and 11.6 for 20 to 24 years respectively) while the young adult (25 to 34 years) unemployment rate stood at 8.2 per cent, still above the provincial average of 8.0 per cent. Unemployment rates for all other reported groups were lower.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 12

30. These relative unemployment rates reflect not only the relatively shorter labour market experience of younger workers, but also the fact that the past two decades have witnessed the absorption of the entire Baby Boom

generation into the labour force. This absorption is now largely complete.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 13

PARTICIPATION RATE TRENDS

31. Participation in the labour force is defined as the proportion of the non-institutionalised population in a specified group that is seeking employment. The trend towards declining labour force participation in the older age groups in Ontario and elsewhere has ameliorated the above-noted "problem". Besides the declining rates in the 65 years and over age groups labour force participation rates of those aged 55 to 64 years of age declined from 83.0 per cent to 74.0 per cent for males over the last decade (1975-1985). This was somewhat offset, however, by an increase in the participation rates of females aged 55 to 64 years of age from 36.1 per cent to 39.2 per cent over the same period.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 16

32. The aggregate data on labour force participation rates for older workers in Ontario for each year over the 1975-85 period show:

- that female participation rates are lower than comparable age male participation rates;
- that participation rates of older male workers have generally been declining throughout the period, a trend which is not reflected in the other age male categories; and
- that participation rates of older female workers have generally not been declining over the period, in accordance with the trends for other female workers.

Analysis with comparable individual age data suggests that these trends cannot be attributed to population aging per se, but rather likely reflect a multitude of determinants including a trend to early retirement, especially among males and mandatory (or normal age) retirement provisions.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 17 - 26

MANDATORY RETIREMENT

33. Evidence from surveys in Canada indicate that although approximately one-half of the work force are in jobs subject to mandatory

retirement provisions, over 70 per cent of the employees currently entering the "retirement years" and working for an employer with a mandatory retirement age have left the organisation before the normal retirement age of 65 and are therefore not subject to mandatory retirement policy. Of all employees currently aged 55 and working for an employer with a pension plan, the following will probably occur:

- 15 per cent will die before age 65;
- 6 per cent will be laid off and will not find another job;
- 50 per cent will retire before age 65, some because of the early retirement provisions of their pensions and others because of poor health;
- 25 per cent will retire at age 65; and
- 4 per cent will work beyond their 65th birthday.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 27 and 28

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 2 and 3

34. Exactly how many workers would elect to defer retirement if mandatory retirement provisions were eliminated is unkown. Estimates of the exact number of workers in Canada who would voluntarily elect to work past the mandatory retirement age in any one given year vary from 0.1 per cent of the labour force to 0.4 per cent.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 29 and 30

Case on Appeal, Volume 6, Affidavit of Reid, paragraphs 4 - 6

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 3, 5 and 6

35. It is submitted that the data offered in support of the contention that the abolition of mandatory retirement would not lead to significant delays in retirement is unreliable. First, where mandatory retirement has been abolished it has only been prohibited for a few years. Accordingly, the data from these jurisdictions are premature. Reliable analysis would require a ten or fifteen year period of observation. Second, employees are more likely to retire at or near the 65 year mark in the years immediately following the abolition of the mandatory retirement in that for many years their plans and expectations would have been based on retirement at age 65. Third, the American data are unreliable because of the "tax-back" feature in American

social security legislation which discourages workers from continuing to work beyond the normal retirement age. No such feature is found in the Canada and Quebec Pension Plans, the earnings based component of Canada's social security system, nor are there any known plans to introduce a "tax-back" feature in Canada. Finally, when work satisfaction is high and working conditions very pleasant, employees can be expected to retire at a later date. Thus, white collar employees such as university professors are more likely to retire later than blue collar workers.

Case on Appeal, Volume 12A, Cross-Examination of Pesando, Question 688

Case on Appeal, Volume 6B, Cross-Examination of Rosenbluth, Questions 57 and 68

Case on Appeal, Volume 6A, tab C, Cross-Examination of Krashinsky, Question 393

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 4, and 5

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 35 and 36

Case on Appeal, Volume 13.2A, Cross-Examination of Foot, Questions 64 - 68

THE FUTURE

36. There will be approximately 1 million persons aged 55 to 64 years and approximately 1.4 million persons aged 65 years and over in the source population of the labour force of the province by the year 2000. Older persons will, therefore, number approximately 2.4 million in a total labour force source population of 8.15 million (that is, 29.3 per cent). Comparable figures for 1985 are 1.8 million in a source population of 7 million (or 25.3 per cent). There will, therefore, be an increasing number and proportion of potential older workers in the province over the next 15 years (1985-2000).

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 37 - 40

37. Of particular note is the aging of the Baby Boom generation, who will be aged 33 to 53 years in the year 2000, with the bulk being in the 35 to 44 age group. In addition, there will likely be fewer potential youth and young adult workers in the province by 2000. Source populations for these age groups

(15 to 24 and 25 to 34 years, respectively) number approximately 1.25 and 1.4 million respectively compared to 1.53 million for each group in 1985. This reflects the reduced numbers following the Baby Boom generation.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 41

38. At current (1985) participation rates, these source population projections would result in a provincial labour force of 5.347 million persons in 2000, a growth of 11.7 per cent over the current (1985) labour force of 4.787 million. This represents 560,000 new labour force entrants over a 5 year period for an average annual growth of 0.74 per cent.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 42

39. Estimates of the effects of eliminating mandatory retirement have ranged from a 0.1 per cent to a 0.4 per cent (or even higher) impact on the labour force. Since these have usually been calculated on a ceteris paribus basis, that is holding all other determinants constant, it is appropriate to examine their effects within these labour force scenarios which hold group participation rates constant. With a 1985 labour force of 4.787 million, a 0.1 per cent impact represents 4,787 persons annually while an impact of 0.4 per cent would represent 19,148 persons annually. With a labour force of 5.347 million in the year 2000, a 0.1 per cent impact would represent 5,347 persons annually, while an impact of 0.4 per cent would represent 21,388 persons anually.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 43 - 45

40. The impact of these additional persons in the labour force on the job opportunities of younger workers is difficult to ascertain. If the impact of 5,347 additional persons results in an equivalent increase in the number of unemployed, the unemployment rate of the 15 to 54 year olds would have increased from 8.4 to 8.5 per cent. If all the resulting unemployed were aged 25 to 34 years the unemployment rate for this group would have increased from 8.2 to 8.6 per cent, while if they were all aged 35 to 44 years the unemployment rate for this group would have increased from 5.8 to 6.3 per cent. Similar calculations can be made for the other age groups with similar results.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 46

41. By the year 2000 these impacts are likely to be slightly larger for

the declining younger age groups and slightly smaller for the increasing older age groups, but the results are very similar to those reported above. In the case of an impact of 21,388 additional persons, this would increase the unemployment rate for all younger workers by 0.4 percentage points and those for selected age groups by around 1 1/2 percentage points. For example, the unemployment rate of the relatively large 35 to 44 years age group would increase from 5.8 to 7.2 per cent if all displaced persons were unemployed and in this age group. Similarly the 25 to 34 year unemployment rate would rise from 8.2 to 9.8 per cent.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 47

42. Which of the impacts of eliminating mandatory retirement on the future work force and unemployment rates of the province is likely remains uncertain. However, it is likely that the lower effects more closely correspond to the initial effects while the larger effects more closely respond to the longer run effects.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 48

43. These calculations of the impacts of removing mandatory retirement on unemployment rates may be upper estimates or they may be lower estimates. They will be upper estimates if there is not a one-to-one correspondence between a person staying in the labour force and the loss of a potential job elsewhere. If these jobs would not have been filled anyway as would occur, for example, if machines were substituted for people in the workplace, or if by staying on older workers generate additional work for younger colleagues, the impacts outlined above would be proportionately smaller.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraph 49

44. Contrary to the contention in paragraph 20 of the Appellants' Factum, the calculations of Professor Foot are not based upon the "lump of labour" fallacy. His calculations took into account several variables, including the functioning of labour markets and other economic adjustment mechanisims. As such, he provides both upper and lower estimates of the impact of removing mandatory retirement on the unemployment rate.

Case on Appeal, Volume 13.2A, Affidavit of Foot, paragraphs 45 49

Case on Appeal, Volume 13.2A, Cross-Examination of Foot, Questions 153 - 156, 193 - 207, 228 - 235

Case on Appeal, Volume 6A, Cross-Examination of Reid, Questions 205 - 207

45. Those economists who are of the view that a substantial increase in labour supply will eventually be absorbed by the labour market generally acknowledge that the labour market does not adjust immediately to equate the demand for jobs with available supply and that if mandatory retirement is abolished, there will be unemployment, the extent and duration of which is difficult to predict with accuracy. Thus, the dispute between the economists relied upon by the Appellants and Professor Foot, is not whether there will be an increase in the unemployment rate if mandatory retirement is abolished, but rather, the extent and duration of the increase in unemployment that will result.

Case on Appeal, Volume 6, Affidavit of Riddell, paragraphs 11 and 13

Case on Appeal, Volume 6A, Cross-Examination of Riddell, Questions 7, 73 - 76

Case on Appeal, Volume 6A, Cross-Examination of Reid, Questions 123, 168, 203 - 207

Case on Appeal, Volume 7A, Cross-Examination of Swartz, Questions 171 - 194

Case on Appeal, Volume 7, Affidavit of Agarwal, Exhibit "D", p.100

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 12

Case on Appeal, Volume 12A, Cross-Examination of Pesando, Questions 175 - 177 and 706

Case on Appeal, Volume 13.2A, Cross-Examination of Foot, Questions 235, 236

46. Moreover, regardless of the effect of banning mandatory retirement on employment in the general economy, its prohibition would almost certainly affect specific sectors of the economy significantly. In the university sector, for example, where positions and revenues are limited, the Ontario Court of Appeal and the High Court of Justice accepted the evidence that the abolition of mandatory retirement will likely create significant unemployment, and

threatens to worsen the demographic malaise of the universities relating to the age (and sex) distribution of present faculty.

Case on Appeal, Volume 6B, Cross-Examination of Rosenbluth, Questions 85 - 89 and 238 - 239

Case on Appeal, Volume 6A, tab A, Cross-Examination of Reid, Questions 118 and 119

Case on Appeal, Volume 6A, tab B, Cross-Examination of Riddell, Question 12

Case on Appeal, Volume 12A, Cross-Examination of Pesando, Question 214

Reasons for Judgment, Ontario Court of Appeal, pp.138-142, 146 (pp.54-58, 62 O.R.)

Reasons for Judgment, Ontario High Court, pp.68-70 (pp.32-34 O.R.)

PART II - POSITION OF THE ATTORNEY GENERAL WITH RESPECT TO THE ISSUES

SECTION 9(a) OF THE HUMAN RIGHT CODE 1981

47. It is the position of the Attorney General of Ontario that section 9(a) of the Ontario Human Rights Code, 1981, is valid legislation, consistent with the Canadian Charter of Rights and Freedoms.

MANDATORY RETIREMENT OF UNIVERSITY FACULTY AND LIBRARIANS

48. The Attorney General of Ontario takes no position with regard to the applicability of the Charter to universities or to the constitutional validity of the mandatory retirement of university faculty and librarians.

PART III - THE LAW

49. Section 4(1) of the Ontario Human Rights Code, 1981, S.O. 1981, c.53 (the "Code") provides that:

> Every person has a right to equal treatment with respect to employment without discrimination because of...age...

50. Section 9(a) of the Code provides that "age in subsection 4(1) means an age that is eighteen years or more and less than 65 years".

51. Section 23(b) of the Code provides:

> The right under section 4 to equal treatment is not infringed where, the discrimination in employment is for reasons of age,...if the age...of the applicant is a reasonable and bona fide qualification because of the nature of the employment.

52. Section 31(1) of the Code provides:

> Where a person believes that a right of his under this Act has been infringed, the person may file with the Commission on a complaint in a form approved the Commission.

53. Section 32 of the Code empowers the Commission to investigate a complaint and endeavour to effect a settlement. Where the Commission fails to effect a settlement of the complaint, section 35 of the Code authorizes the Commission to request the Minister to appoint a Board of Inquiry and refer the subject-matter of the complaint to the Board.

54. Section 38 of the Code provides that the Board of Inquiry shall hold a hearing:

(a) to determine whether a right of the complainant under this Act has been infringed;

(b) to determine who infringed the right; and

(c) to decide upon an appropriate order under section 40.

55. Section 40 of the Code provides:

> Where the Board of Inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceedings, the Board may, by order:
>
> (a) direct the party to do anything that, in the opinion of the Board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in

respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000.00 for mental anguish.

56. The Ontario Human Rights Code does not impose mandatory retirement at any age. The combined effect of sections 4(1), 9(a) and 23(b) of the Code is that an employment contract may not provide for mandatory retirement at a fixed age of less than 65 unless the employer is able to adduce evidence to establish upon a balance of probabilities that age is a reasonable and bona fide qualification because of the nature of employment. This Court has held that in order to qualify as a reasonable and bona fide qualification, the retirement age must be objectively related "to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public". Employment contracts may provide for mandatory retirement at a fixed age of 65 or more without demonstrating that age is a reasonable and bona fide employment qualification.

Ontario Human Rights Commission v. Borough of Etobicoke, [1982] 1 S.C.R. 202

Brown v. Coles (1986), 5 B.C.L.R. (2d) 143 (B.C.C.A.)

CHARTER SECTION 15

57. In the case of The Law Society of British Columbia v. Andrews, the Attorney General of Ontario took the position that the interpretation that will best achieve the purpose of the equality rights guaranteed by section 15 of the Charter is that section 15 applies to legislation and other government action which discriminates against individuals where such discrimination is based either on one of the nine enumerated grounds, or on an unenumerated ground which is akin to the enumerated grounds. A law or government action which treats an individual adversely on those recognized grounds would be inconsistent with section 15(1).

58. If this Honourable Court accepts the submissions made by the Attorney General of Ontario in the Andrews case, then it is conceded that section 9(a) of the Code is prima facie inconsistent with section 15(1) of the Charter. Individuals aged 65 years or more do not have the equal protection from aged based employment discrimination that persons under 65 years of age have. This disadvantage is sufficient to constitute a limitation on the right to the equal protection and equal benefit of the law without discrimination. Accordingly, the onus falls upon the government to justify this limitation.

59. In the alternative, if this court does not accept the Attorney General's submissions in the Andrews case, then it is submitted that section 9(a) of the Code is not inconsistent with section 15(1) of the Charter of Rights and Freedoms. The Ontario Court of Appeal, the Federal Court of Appeal and the British Columbia Court of Appeal have all rejected the contention that any legislative classification based on age is a prima facie limitation on an individual's right to the equal protection and equal benefit of the law, as guaranteed by section 15(1) of the Charter. These courts have held that an age-based legislative classification will not be "discrimination" within the meaning of section 15 unless such classification distinguishes between "similarly situated" individuals and is found to be "discrimination" in the pejorative sense of that word.

Smith Kline & French Laboratories Ltd. v. A. G. Canada (1986), 12 C.P.R. (3d) 385 at 391 (F.C.A.)

R. v. R. L. (1986), 26 C.C.C. (3d) 417 (Ont. C.A.)

Andrews v. Law Society of British Columbia, [1986] 4 W.W.R. 242 at 250 (B.C.C.A.)

R. v. LeGallant (1987), 54 C.R. (3d) 46 (B.C.C.A.)

60. If section 9(a) of the Code is a limitation on an individual's right to the equal protection and equal benefit of the law without discrimination based on age, it is submitted that the Ontario Court of Appeal and the Ontario High Court correctly held that this limitation is reasonable and demonstrably justified pursuant to section 1 of the Charter.

Reasons for Judgment, Ontario Court of Appeal, p.148 (p.64 O.R.)

Reasons for Judgment, Ontario High Court, p.77 (p.41 O.R.)

Re Ontario English Catholic Teachers Association and Essex County Roman Catholic Separate School Board (1987), 58 O.R. (2d) 545, (Div. Ct.) per Craig J.

CHARTER SECTION 1

61. 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. The standard of proof under section 1 is the civil standard, namely, proof by a preponderance of probability.

R. v. Oakes (1986), 26 D.L.R. (4th) 200 at 226 (S.C.C.)

Edwards Books and Art v. The Queen, [1986] 2 S.C.R. 713 at 768

Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 590

62. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". The objective must relate to concerns which are pressing and substantial in a free and democratic society. Second, the means chosen to achieve that objective must be reasonable and demonstrably justified. This involves "a form of proportionality test" which requires the courts to balance the interests of society with those of individuals and groups.

Oakes, supra, at 227

Edwards Books and Art v. The Queen, supra,

63. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature 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. The nature of the proportionality test will therefore vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the court must be careful to avoid rigid and inflexible standards.

Oakes, supra, at 228

Edwards Books and Art v. The Queen, supra, at 768-9

64. In regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. Legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the Charter of Rights, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny. Simplicity and administrative convenience are legitimate concerns for the drafters of such legislation.

Edwards Books and Art v. The Queen, supra, at 772

R.W.D.S.U. v. Dolphin Delivery, supra, at 590

65. In determining whether the means chosen to achieve a government objective are reasonable, it is not the role of the court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable.

Edwards Books and Art v. The Queen, supra, at 783

66. The factual disputes in this case involve socio-economic issues on which there is disagreement among professionals in those fields. These disagreements are related to the economic theories to which these professionals subscribe. Economic theories are not susceptible to proof of correctness. The most that the court can ask in respect of such a dispute is whether there is, or is not, a rational basis for a particular position on the disputed issue. The courts are in no better position than the legislature to choose between competing economic theories.

P. W. Hogg, "Proof of Facts in Constitutional Cases", (1976), U. of T. Law J. 386 at 396-7

NATURE OF THE RIGHT

67. It is submitted that limiting protection from age-based employment discrimination to persons under 65 years of age is a minimal limitation on the right to equality guaranteed by section 15(1).

Reasons for Judgment, Ontario High Court, pp.74-77 (pp.38-41 O.R.)

68. Section 15 of the Charter specifically enumerates nine grounds

of prohibited discrimination: race, national or ethnic origin, colour, religion, sex, age and mental or physical disability. These enumerated grounds of discrimination are distinguishable in two respects:

(i) animus; and

(ii) accuracy of generalizations.

69. Age discrimination is distinguishable from racial and religious discrimination in that it is generally motivated by a different animus. Racial and religious discrimination are often based on feelings of hostility and intolerance. In contrast, discrimination on the basis of age is more often based on inaccurate assumptions about the effects of age on ability.

Note: **The Age Discrimination in Employment Act of 1967** (1976), 90 Harv. L.R. 380, 383-4

70. This distinction is of constitutional significance in the United States, where the effect of racial hostility has been to exclude certain racial and ethnic minorities from participation in the political process. As a result, the American Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment as a mandate to provide these "discrete and insular minorities" with extraordinary protection from the majoritarian political process.

United States v. Carolene Products Co., 304 U.S.144, 152-153, fn.4, 58 S. Ct. 778, (1938)

71. The American courts have refused to extend this extraordinary protection to persons discriminated against on the basis of age because although ...e treatment of the aged...has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment'".

Massachusets Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562 (1976)

Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939 (1979)

72. Discrimination on the basis of race, colour, national or ethnic origin, or sex, is directed against persons of a different and discrete race, colour, etc. For example, white people can pass laws discriminating against blacks, and men can pass laws disadvantaging women, without fear of ever being disadvantaged themselves by those laws. But, "the facts 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) p.160

73. It is submitted that the hostility which often motivates discrimination based on race, national or ethnic origin, colour and religion should compel the courts to be especially suspicious when reviewing legislation which discriminates on those grounds. Discrimination on the basis of age, even when inconsistent with section 15 of the Charter, is not as serious a limitation on the right to equality because it is not motivated by hostility or intolerance toward a discrete group. This is one factor which the courts should consider when examining the extent of the violation and the degree to which the measures adopted trench upon the integral principles of a free and democratic society.

74. A further distinction is that there is nothing inherent in race, colour, religion or national or ethnic origin that supports any correlation between those characteristics and ability. In contrast, there is a general relationship between advancing age and declining ability.

Note, Age Discrimination in Employment Act, supra, p.384

Murgia, supra, at p.2565

Appeal Book, Volume 10, Affidavit of Schaie, paragraphs 6 and 9

Appeal Book, Volume 10A, Cross-Examination of Schaie, Questions 742 - 753

Reasons for Judgment, Ontario Court of Appeal, pp.145-146 (pp.61-62 O.R.)

Reasons for Judgment, Ontario High Court, pp.76-77 (pp.40-41 O.R.)

75. In fact, the Constitution Act, 1867 accepts age as a legitimate proxy in determining the eligibility and compulsory retirement of Senators (subs. 23.1 and 29(2)) and the compulsory retirement of Judges of the Superior Court (subs. 99(2)). Similarly, the United States Constitution accepts age

as a valid proxy in determining eligibility for the Office of the President and eligibility to vote.

Constitution Act, 1867, subs. 23.1, 29(2), 99(2)

United States Constitution, Article II, section 1, clause 5; 26th Amendment

76. It is submitted that the absence of any correlation between race, colour, religion, national or ethnic origin, or sex and ability should compel the courts to be especially suspicious when reviewing legislation which discriminates on these grounds. Discrimination on the basis of age, even when inconsistent with section 15 of the Charter, is not as serious a limitation on the right to equality because of the general relationship between advancing age and declining ability. This is another factor which the courts should consider when undertaking a section 1 analysis.

W. S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar Rev. 242 at 255

Reasons for Judgment, Ontario High Court, p.76 (p.40 O.R.)

EXTENT OF THE LIMITATION

77. It is submitted that the Charter is intended to constrain government action and does not apply to the conduct of private persons. The Charter imposes no affirmative obligation on the legislature to prevent or prohibit any private conduct. As such, the legislature was not required to protect any persons from employment discrimination in the private sector. In the absence of section 4(1) of the Code, the private sector would be free from both legislative and constitutional constraints with respect to such conduct.

Charter of Rights and Freedoms, section 32

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

78. Ironically, it is Ontario's willingness to go further than it has to in protecting people from private discrimination that provides the Appellants with a basis for arguing that the Human Rights Code operates in a discriminatory fashion to deny them the equal protection of the law.

79. It is submitted that the history of the Human Rights Code discloses a consistent and laudable government policy of expanding the age groups protected by the legislation. The legislature has moved to protect persons

from private discrimination, but has chosen to intervene cautiously and experimentally, taking reform one step at a time.

The Age Discrimination Act, S.O. 1966, Chap. 7

An Act to Amend the Ontario Human Rights Code, S.O. 1972, Chap. 119, sections 5, 14

Human Rights Code, 1981, S.O. 1981, Chap. 53, section 9(a)

Edwards Books and Art v. The Queen, supra, at 772

Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, per McIntyre J.

80. The general purpose of the Ontario Human Rights Code, consistent with that of section 15 of the Charter, is to protect individuals from various forms of invidious discrimination. The net effect of the Code is to provide all individuals with more protection than they would have had in the absence of the Code. It is, therefore, submitted that this limit on the right to equality is minimal because the protection established by the Code is consistent with and furthers the integral principles of a free and democratic society.

81. Section 9(a) of the Code was the product of reasoned analysis rather than the result of prejudicial or stereotypical assumptions about the elderly. As the legislative history demonstrates, the legislature considered carefully and at length both the justifications for permitting the continuation of this practice and the arguments for prohibiting it.

Hansard, May 15, 1981, pp.741, 743, per Honourable Mr. Elgie

Hansard, December 1, 1981, p.4097, per Honourable Mr. Elgie

Hansard, May 25, 1981, p.959, per Honourable Mr. Elgie

Hansard, December 1, 1981, p.4096, per Mr. Renwick

SECTION 1 - JUSTIFICATIONS

82. It is submitted that section 9(a) of the Human Rights Code is the product of multiple, somewhat competing objectives, that led to certain compromises. One purpose of the Code was to protect individuals from age-based employment discrimination. The purpose that competed with this broad objective was the purpose of permitting employers and employees the

freedom to agree on a termination date for the employment relationship. Both of these purposes represent important legislative objectives.

Hansard, May 15, 1981, p.743, per Honourable Mr. Elgie

Hansard, May 25, 1981, p.959, per Honourable Mr. Elgie

Hansard, December 1, 1981, p.4096, per Mr. Renwick

Hansard, December 1, 1981, p.4097, per Honourable Mr. Elgie

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

Reasons for Judgment, Ontario High Court, pp.66-68 (pp.30-32 O.R.)

83. Rather than sacrificing either the objective of protecting individuals from age-based employment discrimination, or the objective of permitting employers and employees the freedom to agree on a termination date for the employment relationship, the legislature has chosen a compromise which will further both of these objectives to a certain point. In order to protect individuals from age-based employment discrimination, any discrimination in employment for reasons of an age less than 65 years must be a reasonable and bona fide qualification because of the nature of employment. If such protection were provided indefinitely, however, employers and employees would have no freedom to agree on a termination date for the employment relationship. Thus, the age 65 demarcation represents a compromise between two important legislative objectives.

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

84. It is submitted that permitting employers and employees the freedom to agree on a termination date for the employment relationship is of sufficient importance to warrant overriding the right to the equal protection of the law without discrimination based on age. Both employers and employees may prefer a contractual arrangement which includes a definite termination date for the employment relationship rather than an indefinite work term, because such a contractual arrangement may provide a number of benefits to both parties. The Ontario Court of Appeal found that "freedom to agree on a termination date is of considerable benefit to both employers and employees".

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 6, 8, 9, 31, 32, 44, 45

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 2, 3, 51

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

Reasons for Judgment, Ontario High Court, p.68 (p.32 O.R.)

O.E.C.T.A. v. Essex County Roman Catholic Separate School Board, supra, per Craig J.

Leopold Morin v. Canadian Auto Workers National Union, supra, at paragraphs 14, 17 (per Rosalie S. Abella, Chair)

85. Employees may want to agree on a termination date for the employment relationship because it permits them to benefit from the deferred compensation system rather than a wage structure based on current productivity. Employees may prefer this system for a number of reasons. Deferred compensation may be a form of forced saving which many workers may prefer. A worker's compensation need not decline over time if the worker's productivity does decline with his or her age. Employees may prefer the periodic monitoring that can accompany the deferred compensation scheme to the continuous monitoring that must prevail if the employee's compensation is tied to his or her productivity at every point in time. The worker's productivity is likely to be higher under the deferred compensation scheme. A deferred compensation system is likely to be accompanied by a degree of "due process" to ensure that workers receive their deferred compensation. Such due process may be achieved through seniority rules, well-established evaluation and promotion procedures, or through the protection of a collective agreement. All may be characteristic of a lifetime contractual arrangement in which mandatory retirement is an integral part.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 17 - 23, 26

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 20, 25, 31

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

86. Employees may want to agree on a termination date for the employment relationship because it enables the employee to benefit from a period of relaxed and less careful performance scrutiny toward the end of the employment relationship. A substandard level of performance which an

employer may tolerate under the expectation of a close retirement date may not be tolerated with the uncertainty of an indefinite work term. In order to adjust to an indefinite work term, employers will be obliged to use more careful and demanding performance appraisal for older employees who had previously benefited from the relaxed scrutiny. This may increase the pressure and emotional stress on these older employees.

Appeal Book, Volume 13.1, Affidavit of Ondrack, paragraphs 6, 7, 13, 14, 15, 16, 24, 31, 51

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

87. Employees may want to agree on a termination date for the employment relationship because it enables them to retire with dignity by avoiding the humiliation of individual determinations of incompetence or inability associated with dismissal for cause. The employee, his or her peers, and the community know that the employee retired because he or she reached the fixed retirement age, not because of declining abilities or productivit .

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 16 and 28

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 6, 22, 23, 31

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

88. Employees may want to agree on a termination date for the employment relationship because it enables them to know with certainty when they are likely to retire. This forces them to confront the reality of retirement and to plan and prepare for the event.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 14

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 48, 49, 50

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

89. Employees may want to agree on a termination date for the employment relationship because it enables them to benefit from a seniority system. The use of seniority assumes a finite term to the work relationship. In the absence of such a finite term, seniority rights would have to be modified

or adjusted. Rather than being accumulated automatically in an undifferentiated manner, seniority would become a conditional benefit dependent upon a more careful examination of the actual capabilities of older workers.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 30

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 37, 38, 39, 40, 41

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

90. Employees may want to agree on a termination date for the employment relationship because such a date assists in the administration and financing of pension plans. Without a definite termination date for the employment relationship, there would likely be a reduction in the willingness of employees to defer compensation and this may require adjustments in pay policy and/or the pension plan.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 33 - 42

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 18, 32

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

Reasons for Judgment, Ontario High Court, pp.68, 70, 72 (pp.32, 34, 36 O.R.)

91. If employers are not permitted mandatory retirement as a personnel management tool, they are likely to reduce the uncertainty of employing workers for an indefinite period of time by offering only limited term contract appointments to workers rather than ongoing/indefinite appointments. Employees may prefer a fixed retirement date rather than a limited term contract appointment.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 29, 30, 31

92. Employers may want to agree on a termination date for the employment relationship because it permits them to establish a deferred compensation system. Such a system serves to enhance work effort and to reduce unwanted turnover. The reduction in unwanted turnover enables the employer to amortize its fixed hiring and training costs over a long period, and this encourages the firm to invest in such training. Deferred wages also

reduce the need for the employer to monitor constantly and to evaluate its workers productivity, as would be required if workers' compensation were tied to workers' productivity at every point in time.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 17 - 20, 26, 29

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 17 and 20

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

93. Employers may want to agree on a termination date for the employment relationship because it enables them to plan their recruiting and training decisions, to forecast their payroll, and to determine their financial obligations in such areas as pension commitments and disability and medical insurance. A predictable termination date provides employers with more flexibility in employment decisions without laying off workers.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 13

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 8, 33 and 34

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

94. Employers may want to agree on a termination date for the employment relationship because it reduces the need for individual monitoring and evaluation.

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraphs 5 and 28

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 21, 22

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

95. Employers may want to agree on a termination date for the employment relationship because it may stimulate high performance in the ranks of the employed by assuring that opportunities for promotion will be available at a predictable time; those in the ranks know that it will not be an intolerable time before they will have the opportunity to compete for maximum responsibility.

Vance v. Bradley, supra, at pp.943 - 945

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 9 and 35

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 10 and 14

Case on Appeal, Volume 7, Affidavit of Agarwal, Exhibit "B", pp.83-4, Exhibit "H", pp.47-8

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

96. Employers may want to agree on a termination date for the employment relationship because it decreases their need to terminate or dismiss employees for cause. Dismissal for cause is a complex, time-consuming process with economic and social costs for both the employer and the employee. This process causes stress for both the employer and the employee and may result in a work climate characterized by considerable tension as employees age.

Case on Appeal, Volume 13.1, Affidavit of Ondrack, paragraphs 5, 21 and 22

Case on Appeal, Volume 12, Affidavit of Gunderson and Pesando, paragraph 27

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

97. It is submitted that, given the competing legislative objectives of protecting individuals from age-based employment discrimination and permitting employers and employees the freedom to agree on a termination date for the employment relationship, the means chosen to achieve these objectives are reasonable and demonstrably justified.

98. It is submitted that the Supreme Court of Canada's analysis relating to "administrative convenience" found in the case of Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177, is not applicable to the case at hand. Unlike the administrative procedures considered in Re Singh and Minister of Employment and Immigration, section 9(a) of the Code was not enacted for the administrative convenience of the government. To the extent that section 9(a) of the Code relates to "administrative convenience", it affects the administration of personnel management functions in the private sector, and provides adminstrative convenience for business, industry and labour. The standard applied to the administration of justice by the government is not an appropriate standard to be applied to the administration of personnel

management functions by the private sector. In the latter case, this Court has found that simplicity, administrative convenience and economic harm are legitimate concerns.

Reasons for Decision, p.35

Edwards Books and Art v. The Queen, supra, at 772

R.W.D.S.U. v. Dolphin Delivery, supra, at 590

Reference Re Public Service Employee Regulations Act, supra, per MacIntyre J.

99. It is submitted that the age 65 demarcation contained in section 9(a) of the Code is carefully designed to achieve a compromise between the two objectives in question, and is rationally connected to the legislative objectives. The age 65 demarcation was chosen for the following reasons:

(a) Age 65 is the age by which the vast majority of people have voluntarily left the labour force, so that only a relatively small fraction of the labour force is affected by this limitation.

Case on Appeal, Volume 6, Affidavit of Reid, paragraphs 4, 5 and 6

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 17, 28, 29, 30

Reasons for Judgment, Ontario Court of Appeal, p.145 (p.61 O.R.)

(b) Age 65 is the age at which individuals become eligible for a variety of government pensions and other social and economic benefits.

Canada Pension Plan, R.S.C. 1970, Chapter C-5, section 44(1)(a), as amended, S.C. 1974-75, Chapter 4, section 25(2)

Old Age Security Act, R.S.C. 1970, Chapter O-6, section 30, as amened, S.C. 1976-77, Chapter 9, section 1(1)

Ontario Guaranteed Annual Income Act, R.S.O. 1980, Chapter 336 as amended, S.O. 1981, Chapter 44, section 2

Ontario Pensioners Property Tax Assistance Act, R.S.O. 1980, Chapter 352, section 1(c), section 7

Municipal Elderly Resident's Assistance Act, R.S.O. 1980, Chapter 307, section 2(1)(b)

Family Benefits Act, R.S.O. 1980, Chapter 151, section 7(1)(a)

Family Benefits Act, Regulations, R.R.O. 1980, Reg. 318, section 25

Health Insurance Act, R.S.O. 1980, Chapter 197, section 14

General Welfare Assistance Act Regulations, R.R.O. 1980, Reg. 441, section 12(2).12

Reasons for Judgment, Ontario Court of Appeal, p.145 (p.61 O.R.)

(c) Age 65 is the age at which an increasing number of persons begin to show some reliable decline in ability associated with advancing age.

Case on Appeal, Volume 10, Affidavit of Schaie, paragraphs 6 and 9

Case on Appeal, Volume 10A, Cross-Examination of Schaie, Questions 753, 765 - 771, 780 - 785, 790 - 795

Reasons for Judgment, Ontario High Court, pp.76-77 (pp.40-41 O.R.)

100. It is submitted that the age demarcation cannot be moved substantially in either direction without sacrificing one of the two competing objectives which the legislature wanted to achieve. Given these competing objectives, the age 65 demarcation impairs as little as possible the right in question. The courts should not substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

Edwards Books and Art v. The Queen, supra, at 781-2

Reasons for Judgment, Ontario Court of Appeal, p.142 (p.58 O.R.)

101. Contrary to paragraphs 117 and 120 of the Appellants' Factum, section 9(a) of the Code is not "overbroad" because it is not restricted to mandatory retirement per se. The purpose of permitting employers and employees the freedom to agree on a termination date for the employment relationship implies that employers and employees maintain the flexibility to agree to some arrangement other than termination. For example, rather than agreeing to retirement at a fixed age of 65 or more, the employer and employee may prefer to agree to reduced hours of work or reduced responsibilities at a fixed age of 65 or more. Section 9(a) of the Code permits such flexible arrangements. The alternative proposed by the Appellants would preclude such contractual arrangements unless age "is a reasonable and bona fide qualification because

of the nature of the employment".

Case on Appeal, Vol. 12, Affidavit of Gunderson and Pesando, paragraphs 9, 32

102. Further, section 4(2) of the Code protects every employer from "harassment in the workplace" because of age, and this protection is provided without any upper age limit. Section 4(2) of the Code has no upper age limit because the particular protection granted therein is unrelated to the terms and conditions of employment with which the limitation in section 9(a) is concerned. The fact that the age limit in section 9(a) applies only to subsection 4(1) of the Code indicates that it is carefully designed to achieve the government objective.

103. Section 9(a) of the Code is not limited to particular industries or occupations because the question of whether employers and employees in any particular industry or occupation prefer a contractual arrangement which includes a definite termination date for the employment relationship is left to free negotiation between the contracting parties. Contrary to paragraphs 118 anbd 121 of the Appellants' Factum, this is not a question which is amenable to review by an administrative tribunal such as a Human Rights Commission.

104. It is submitted that another objective of section 9(a) of the Code is to permit employers to retire older workers in order to open up the labour market for younger unemployed workers. Statistics indicate that unemployment amongst youth and young adults is and will continue to be disproportionately high, and such unemployment is a significant problem that is both pressing and substantial in our society.

Hansard, May 15, 1981, p.743, per Honourable Mr. Elgie

Hansard, May 25, 1981, p.959, per Honourable Mr. Elgie

Hansard, December 1, 1981, p.4097, per Honourable Mr. Elgie

1985 Ontario Budget, page 5

1984 Ontario Budget, page 1

1983 Ontario Budget, page 11

1982 Ontario Budget, page 6

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 3, 15

Case on Appeal, Volume 13a, tab 2, Cross-Examination of Foot, Exhibit No. 1

Case on Appeal, Volume 6, Affidavit of Riddell, Exhibit "C", pp.20 23

Case on Appeal, Volume 6B, Cross-Examination of Rosenbluth, Questions 527, 541, 582

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

105. It is submitted that prohibiting employers from retiring long term workers would aggravate the problems of youth and young adult unemployment. The removal of mandatory retirement provisions would likely result in reduced employment opportunities and hence higher unemployment rates for younger workers than would be the case if those provisions were maintained. The Ontario Court of Appeal found that "the problem of unemployment would be aggravated if employers were unable to retire their long-term workers". Therefore, Mr. Justice Gray of the Ontario High Court correctly determined that section 9(a) of the Code is rationally connected with the significant government objective of mitigating youth and young adult unemployment.

Case on Appeal, Volume 13.2, Affidavit of Foot, paragraphs 10, 11, 35, 45 - 50

Reasons for Judgment, Ontario Court of Appeal, p.137 (p.53 O.R.)

Reasons for Judgment, Ontario High Court, pp.73-74 (pp.36-37 O.R.)

O.E.C.T.A. v. Essex County Roman Catholic Separate School Board, supra, per Craig J.

106. It is further submitted that the means chosen to achieve this objective are reasonable and demonstrably justified. Since most individuals will eventually turn 65 years of age the effect of this limitation is to fairly and broadly distribute this obligation over the entire population.

107. The age 65 demarcation was chosen in part because persons 65 years of age and over are entitled to a host of social and economic benefits not provided to persons below that age. Section 14 of the Human Rights Code provides that "a right under Part I to non-discrimination because of age is not infringed where an age of 65 years or over is a requirement, qualification

or consideration for preferential treatment". By virtue of this section persons aged 65 years and over may be offered preferential treatment in the provision of services, goods and facilities, occupancy and accommodation and contracts. Age 65 is also the age at which individuals become eligible for a variety of government pensions and other social and economic benefits.

See paragraph 99, supra,

108. It is submitted that the majority of the Ontario Court of Appeal erred in restricting its section 1 analysis to the university context. Once the court concluded that section 9(a) of the Code was inconsistent with the equality rights of individuals aged 65 or over, the court should have considered whether section 9(a) could be justified in relation to members of that group. The Appellants in this case were not denied the protection of the Code because of their status as university professors, but rather because they were 65 years of age or over. Their status as university professors was not relevant to their rights under section 9(a) of the Code.

109. The majority's analysis of the section 1 test is inconsistent with the first component of the proportionality test enunciated by the Supreme Court of Canada in R v. Oakes, namely, "the measures adopted must be carefully designed to achieve the objective in question". If the objective of section 9(a) of the Code had been to "provide for retirement at a fixed age of 65 for faculty and librarians" in Ontario universities (p.64 O.R.), then section 9(a) would not be carefully designed to achieve that objective because it is not restricted to faculty and librarians in Ontario universities. Section 9(a) must be justified in accordance with its terms. The policies providing for the retirement of university faculty illustrate why the legislature did not prohibit mandatory retirement in the private sector. Although this example serves to demonstrate the reasonableness of the legislative objectives, it should not be confused with the objectives themselves.

110. There may be cases where the record does not provide the court with sufficient information to finally determine the validity of a particular statutory provision. The court may therefore find it necessary to restrict its declaration to a particular fact situation. It is submitted, however, that this is not such a case. The record provided to this court and the courts below

is comprehensive with respect to the evidence available. It is sufficient to permit the court to determine the validity of section 9(a) of the Code, and it is not necessary to restrict the court's declaration to the university context. It is submitted that the Attorney General of Ontario has met the onus under section 1 of the Charter.

PART IV - ORDER REQUESTED

111. It is respectfully submitted that this appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Janet E. Minor of Counsel
for the Attorney General of Ontario

Robert E. Charney of Counsel
for the Attorney General of Ontario.

PART V

TABLE OF AUTHORITIES

	Articles and Texts	Paragraph Number(s)
17.	Ely, Democracy and Distrust (1980)	72
18.	Hansard, May 15, 1981; May 25, 1981; December 1, 1981	81, 82
19.	P.W. Hogg, "Proof of Facts in Constitutional Cases", (1976), U. of T. Law J. 386	66
20.	Note: "The Age Discrimination in Employment Act of 1967" (1976), 90 Harv. L.R. 380	69, 74
21.	Ontario Budgets, 1982, 1983, 1984, 1985	104
22.	W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar Rev. 242	76