

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

BETWEEN:

DAVID WALTER McKINNEY, JR. et al.

Appellants

- and -

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

Respondents

SUPPLEMENTARY FACTUM SUBMITTED ON BEHALF
OF THE RESPONDENT THE GOVERNING COUNCIL
OF THE UNIVERSITY OF TORONTO REGARDING
THE REMEDIES ISSUES RAISED IN THIS APPEAL

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THE REMEDIES ISSUES RAISED IN THIS APPEAL**

PART I - THE FACTS

1. For the purposes of this Supplementary Factum, the Respondent The Governing Council of the University of Toronto ("the Respondent University") relies on the facts set out in paragraph 13(c) of the main Factum of the Respondent universities.

**PART II - THE POSITION OF THE
RESPONDENT UNIVERSITY IN RESPECT OF THE POINTS IN ISSUE**

2. This Supplementary Factum is limited solely to the question of what declaratory relief the Appellants Bregzis and Zacour are entitled to should it be determined that the mandatory retirement policies of the Respondent University infringe the provisions of the Canadian Charter of Rights and Freedoms ("the Charter").

PART III - THE LAW

3. The Appellants, Bregzis and Zacour, claim in their Notices of Application, a declaration that all full-time faculty members and professional librarians at the University of Toronto who were retired contrary to their will at age 65, continue to retain their full-time appointment status and are entitled to all rights, benefits and privileges and remuneration of regular full-time appointments.

4. It is submitted that, should the provisions of the employment contracts of the Appellants Bregzis and Zacour requiring retirement at age 65 be rendered inoperative, the appropriate declaration is that the existing contracts of the Appellants Bregzis and Zacour are void and of no effect, or, alternatively, that any declaration granted which recognizes any continuation of the contracts, should be that the employment contracts of the Appellants Bregzis and Zacour are contracts of indefinite duration and that such contracts are subject to termination for cause or upon the giving of appropriate notice to the Appellants Bregzis and Zacour by the Respondent University.

5. It is submitted that a term of the contract governing its termination is a fundamental term and as such the term requiring retirement at age 65 is not severable from the balance of the contract.

Chitty on Contracts: General Principles (25th ed.) at 642-43.

Attwood v. Lamont, [1920] 3 K.B. 571 at 593.

6. Where parties have entered into a contractual relationship on certain terms, the rendering of one term inoperative by the Court, renders the complete agreement inoperative.

Attorney-General for British Columbia and The Minister of Lands v. Brooke-Bidlake & Whitall, Limited (1922), 63 S.C.R. 466, at 480 aff'd [1923] A.C. 450 (P.C.).

7. It is therefore submitted that the complete contract of tenured professors and professional librarians at the Respondent University is void if the term which brings the contract to an end is rendered inoperative. Accordingly,

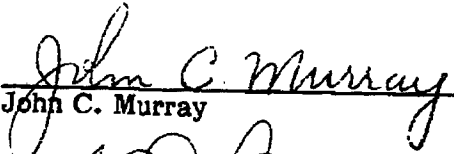
there is no legal basis upon which the Court can grant the declaration sought by the Appellants Bregzis and Zacour.

PART IV - ORDER REQUESTED

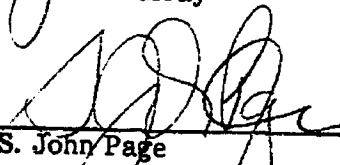
8. It is respectfully requested that any declaration granted to the Appellants Bregzis and Zacour which recognizes any continuation of their contracts of employment be limited to a declaration that the employment contracts of the Appellants Bregzis and Zacour are contracts of indefinite duration and that such contracts are subject to termination for cause or upon the giving of appropriate notice to the Appellants Bregzis and Zacour by the Respondent University.

All of which is respectfully submitted.

April 11, 1989



John C. Murray



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PART V

TABLE OF AUTHORITIES

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