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 UNIVERSITIES

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FACTUM OF THE RESPONDENT UNIVERSITIES

PART I - THE FACTS

A. POSITION OF THE RESPONDENTS REGARDING THE FACTS SET OUT IN THE APPELLANTS' FACTUM

1. The Respondents accept as correct the statements of facts set out in paragraphs 2-5,34, 36-38 of the Appellants' Factum.

2. The Respondents do not accept the remainder of the facts in the Appellants' Factum in that all or portions of these paragraphs are incomplete, argumentative, inaccurate, or conclusions of law.

B. ADDITIONAL FACTS RELIED ON BY THE RESPONDENTS

(a) Facts relevant to section 32 of the Charter

(i) Incorporation of the Respondents

3. The University of Toronto ("U of T"), York University ("York"), the University of Guelph ("Guelph") and Laurentian University ("Laurentian") are all incorporated by acts of the Ontario Legislature. The incorporating acts contain

provisions which establish the governing structures of the Respondents and set out the various powers of those governing bodies.

Reasons for Judgment, Ontario Court of Appeal, Case on Appeal, vol. A ("Judgment") at 98-99.
The University of Toronto Act, 1971, S.O. 1971, c. 56.
The York University Act, 1965, S.O. 1965, c. 143.
The Laurentian University of Sudbury Act, 1960, S.O. 1960, c. 151.
University of Guelph Act, 1964, S.O. 1964, c. 120.
(collectively the "Enabling Statutes").

(ii) Management and Control of the Respondents

4. The Respondent Universities are managed and controlled by their Boards of Governors in the case of Guelph, York, and Laurentian and by the Governing Council in the case of U of T. These governing bodies have the power to contract, conduct financial and business activity, hold real property, and appoint and remove university staff and faculty. In the case of the U of T, Guelph, and Laurentian, the Lieutenant Governor in Council may appoint a minority of the members of the governing body. At York, the Lieutenant Governor in Council does not appoint any members of the Board of Governors.

Judgment at 100.
Enabling Statutes.

(iii) Funding of the Respondents

5. The sources of funds which support the operation of the Respondent universities include the provincial government (by way of operating, capital, and special grants), research grants from both levels of government, student tuition fees, interest and endowment income. The universities' governing bodies determine the allocation of funds through an internal budgeting process. Universities are free to appoint their own auditors and are required to provide audited statements to the provincial government on an annual basis.

DesRosiers Affidavit, para.11 at 7, Case on Appeal, vol. 14.
Cook Affidavit, para.5 and 11 at 7 and 9, Case on Appeal, vol. 2.
Farr Affidavit, para.12 at 7, Case on Appeal, vol. 3.

6. Funding from the provincial government is subject to certain controls which may be summarized as follows:

(a) Operating grants are made in the form of "block" grants and determined on a formula based on the costs of the university program and the number of students enrolled in that program. Universities are free to disburse operating grants in accordance with the Operating Formula Manual ("the Manual") which "is not intended to limit or control the expenditure of funds granted to the universities..." and which Manual "reflects a concern for continuing university autonomy...";

DesRosiers Affidavit, paras.10 and 12 at 7 and Exhibit "C" at 2-3, Case on Appeal, vol. 14.

(b) Capital grants and special grants made to universities must be spent on projects for which they have been specifically granted; and

DesRosiers Affidavit, para.20 at 11, Case on Appeal, vol. 14.

(c) Research funding from both the provincial and federal governments and their various agencies are in most circumstances awarded to the individual faculty members and forwarded to the university to be held in trust for the faculty member. Such funds are disbursed by the university at the direction of the faculty member and in accordance with the approved research proposal.

Cook Affidavit, paras.11-12 at 9-10, Case on Appeal, vol. 2.
Farr Affidavit, para.9 at 5-6, Case on Appeal, vol. 3.

(iv) Admission Standards and Tuition Fees

7. The Respondents determine their own admission requirements. To be eligible for inclusion for the purpose of a provincial operating grant, entering students must have an Ontario Secondary Honours Graduation Diploma. Each university may accept students below the minimum requirement and may establish higher admission requirements.

DesRosiers Affidavit, para.15 at 8-9, Case on Appeal, vol. 14.

8. The Respondents set their own tuition fees. Tuition fees paid by the student are subtracted from the provincial government operating grant. Universities may set tuition fees at 110% of the formula fee without a reduction of operating grants.

DesRosiers Affidavit, para.21 at 11, Case on Appeal, vol. 14.

(v) Academic Programs

9. In the conduct of academic programming, the Respondent universities are autonomous. The Respondent universities institute, determine, and develop all new academic programs and courses offered at the universities. To become eligible for provincial government funding, new programs (unless offered within the core undergraduate Arts and Science programs) must be approved by the Ontario Council on University Affairs ("OCUA") a body established by order-in-council to advise the provincial government on university affairs. The approval process for undergraduate and graduate programs varies. The proposed new programs are reviewed on academic grounds and other considerations such as student demand and duplication with existing programs. Programs are offered which are not funded by the provincial government.

DesRosiers Affidavit, para.16-19 at 9-11, Case on Appeal, vol. 14.
Cook Affidavit, para.5 at 7, Case on Appeal, vol. 2.
Farr Affidavit, para.14 at 8, Case on Appeal, vol. 3.

(vi) Employer/Employee Relations

10. The Respondent universities are the employers of their respective faculty and staff. Each university has freely bargained collective or faculty agreements with various staff and faculty bargaining units. Other than the laws of general application, the universities are free to bargain with their employees both on an individual and collective basis. Faculty members at the Respondent universities are not members of the public service.

Cook Affidavit, para.6 and 7 at 7-8, Case on Appeal, vol. 2.
Farr Affidavit, para.15 and 21 at 8 and 12, Case on Appeal, vol. 3.
Chrysler Affidavit, para.25-27 at 14-15, Case on Appeal, vol. 4.
Ferguson Affidavit, para.18-20 and 22 at 9-10, Case on Appeal, vol. 5.

11. The employment of faculty members at Guelph and the U of T is subject to agreements which operate outside the Ontario Labour Relations Act, R.S.O. 1980,

c. 228. Under these agreements, each university negotiates the terms and conditions of employment with university faculty associations.

Ferguson Affidavit, paras.23-24 at 11, Case on Appeal, vol. 5.
Cook Affidavit, para.6 and 7 at 7-8, Case on Appeal, vol. 2.

12. Faculty members at York and Laurentian are subject to collective agreements governed by the Labour Relations Act. Each faculty union is recognized as the exclusive bargaining agent of all faculty employees within the bargaining unit and terms and conditions of employment are collectively bargained between York and Laurentian and the faculty associations.

Farr Affidavit, para.21 at 12, Case on Appeal, vol. 3.
Chrysler Affidavit, para.25-27 at 14-15, Case on Appeal, vol. 4.

(vii) Retirement Practices and Policies of the Respondents

13. The retirement policies and practices of the Respondent universities, incorporated in various policies, agreements, and pension plans, are summarized as follows:

(a) Guelph - Throughout Guelph's existence and for many years prior to incorporation, the normal age of retirement for all employees, including faculty members, has been 65. The university's present retirement age is not established in any form of university by-law and exists in the form of policy and practice.

Ferguson Affidavit, para.24 and 25 at 11-12 and Exhibit "C" at 24-25, Case on Appeal, vol. 5.

(b) York - York's policy on retirement, which applies to all staff and faculty, provides for a normal retirement at age 65. Since certification in 1976, the faculty union at York has agreed to a policy of retirement in each succeeding collective agreement which provides that the normal retirement date for employees shall be age 65. York's pension plan, which covers both employees subject to individual contracts of employment and by collective bargaining agreements, provides that the normal age of retirement for the pension plan is 65.

Farr Affidavit, para.15, 24 and 25 at 8-10,13-14 and Exhibit "B" at 8 and 14, Case on Appeal, vol. 3.

(c) U of T - In December, 1971, U of T's then Board of Governors adopted a formal policy that the normal age of retirement at the university would be 65. Pursuant to its agreement with the U of T faculty association,

U of T has agreed not to change its policy regarding retirement at age 65, except by mutual consent of the university and the faculty association. U of T's normal age of retirement is incorporated into the definition of academic tenure at the university (which constitutes part of the faculty member's contract of employment) and provides as follows:

> Tenure is defined as ... the holding by a member of the professorial staff of the university of a continuing full-time appointment which the university has relinquished the freedom to terminate before the normal age of retirement except for cause and under the conditions specified ... below.

The present pension plan for U of T staff provides that the normal age of retirement for members of the plan is age 65.

Cook Affidavit, para.14-19 at 11-14, Case on Appeal, vol. 2.

(d) Laurentian - Retirement at age 65 has been part of the employment relationship between the faculty and the Laurentian administration since the inception of the university. The 1984/85 collective agreement between Laurentian and its faculty association provides for retirement at age 65. The Laurentian University retirement plan also provides for "normal retirement" at age 65.

Faculty have never bargained for the removal of age 65 as the bench mark of mandatory retirement. Although the issue of mandatory retirement appeared on the faculty's list of proposals for negotiations in 1985, it was quickly abandoned.

Chrysler Affidavit, paras.25-27 at 14-15, Case on Appeal, vol. 4.

York University has committed itself to the principle of permitting its employees to work beyond age 65. Prior to the elimination of the current retirement policy at York a number of practical matters would have to be resolved. York and its faculty association have established a joint committee to work out details for more flexible retirement and to resolve the numerous issues related to employment of individuals over age 65.

Farr Affidavit, para.26 at 14-15, Case on Appeal, vol. 3.

(viii) Decision of the Ontario Court of Appeal in respect of the application of the Canadian Charter of Rights and Freedoms ("the Charter") to the Respondent Universities

14. A panel of five judges of the Ontario Court of Appeal was unanimous in upholding the decision of Gray J. at trial and concluded that "the Charter has no

direct application to the Respondent universities or to their contracts of employment with the Appellant".

Judgment at 112 and 148.

(b) **Facts about the universities relevant to sections 15(1) and 1 of the Charter**

(i) The Nature of the University

15. Universities are places of advanced research and scholarship and centres for advanced education, not simply the providers of post-secondary education in a broad sense. They are the institutions primarily responsible for basic long term research. In order for Canada to take a leadership role in advanced research universities must focus on excellence in scholarship and research.

Mustard Affidavit, para.3 at 4, Case on Appeal, vol. 14.

16. Academic freedom is the central animating principle of the university and guarantees freedom of inquiry and freedom to publish, transmit and advocate the results of that inquiry. The tenure system is one of the principal safeguards of academic freedom.

Sibley Affidavit, para.2-3 at 4-5, Case on Appeal, vol. 14.
Malloch Affidavit, para.3 at 2, Case on Appeal, vol. 11.

17. Tenure also ensures significant stability in employment. An academic, found by peers worthy of a place in the university, will keep that place until death or retirement unless terminated for cause in a properly conducted hearing process. Because of tenure an academic may have a career life of thirty or thirty-five years.

Evans Affidavit, para.3 at 4 and para.10 at 7, Case on Appeal, vol. 14.
Sibley Affidavit, para.3 at 5, Case on Appeal, vol. 14.
Malloch Affidavit, para.11 at 7, Case on Appeal, vol. 11.

18. The university also has a distinctive organizational character including a significant degree of trust reposed in members who participate collegially in: governance; assessment of peers; choosing new entrants and determining their progress; allocating resources; and determining curriculum. Where collective

bargaining regimes exist, the collective agreement provides another substantial mode of faculty participation in decision-making.

> Evans Affidavit, para.2-3 at 4, Case on Appeal, vol. 14.
> Sibley Affidavit, para.8 and 11-13 at 7-10, Case on Appeal, vol. 14.
> Kerr Cross-examination, q.42-43 at 14, Case on Appeal, vol. 11A.

19. Involvement of faculty in university governance results in the administration having limited leverage. It must rely on persuasion, consensus and collaboration with faculty and is not free to change unilaterally the stabilizing mechanisms which have developed over time within the collegial structure of the university.

> Evans Affidavit, para.2 at 4 and para.4 at 5, Case on Appeal, vol. 14.
> Sibley Affidavit, para.13 at 10, Case on Appeal, vol. 14.

20. Tenure and collegial governance, while safeguarding academic freedom, are also inertial forces within the university which slow its ability to respond to advances in knowledge or even to changes in student demand.

> Evans Affidavit, para.6 at 5, Case on Appeal, vol. 14.

21. For the university to be able to respond to changes in knowledge it is essential that an element of flexibility be injected into the system. In some disciplines, the turnover of knowledge is much shorter than the turnover time of professionals and exceeds the capacity of existing professions to adapt. Accordingly, the university needs flexibility in its resources so as to achieve maximum effectiveness.

> Mustard Affidavit, paras.10-12 at 7-9, Case on Appeal, vol. 14.

22. While adaption to change does not require changes of all faculty members at short intervals, some flexibility at the margins is important. Mandatory retirement is one certain source of that flexibility.

> Evans Cross-examination, q.94 at 26-27; q.198 at 52, Case on Appeal, vol. 14A.

(ii) Methods of Assessment and Performance Evaluation

23. The review which is performed to determine whether a person should receive tenure is the most rigorous performance review of the whole academic career, except perhaps for a dismissal hearing.

Sibley Affidavit, para.4 at 5, Case on Appeal, vol. 14.
Malloch Affidavit, para.16 at 10-11, Case on Appeal, vol. 11.

24. Inherent in the tenure system is the guarantee that the professor will not be dismissed without cause having first been made out by the university in a proper hearing. The grounds for dismissal are set out in university policies and in collective agreements. It is often difficult to determine when cause to terminate exists.

Malloch Affidavit, Exhibit "E", Case on Appeal, vol. 11.
Ferguson Affidavit, Exhibit "C", Case on Appeal, vol. 14.
Cook Affidavit, Exhibit "E", at 3-5, Case on Appeal, vol. 2.
Chrysler Affidavit, Exhibit "J", Case on Appeal, vol. 4.
Sibley Affidavit, para.9 at 8, Case on Appeal, vol. 14.
Sibley Cross-examination, q.459 at 78, Case on Appeal, vol. 14A.

25. In the years 1974 to 1986, there were fifteen dismissal hearings in all of Canada. Five attempts to impose this extraordinary remedy are known to have been unsuccessful.

Savage Cross-examination, q.14 at 8 - q.19 at 10, Case on Appeal, vol. 9A.

26. There are several other occasions upon which an academic undergoes assessment including peer evaluation of research proposals and articles submitted to juried publications and the decision whether to grant annual salary increments, merit increments, or promotion. These evaluations are not as rigorous as the tenure review and can be quite cursory.

Sibley Affidavit, para.5 at 6, Case on Appeal, vol. 14.
Evans Cross-examination, q.51 at 13-14; q.56 at 15-16, Case on Appeal, vol. 14A.
Sibley Affidavit, para.5 at 6, Case on Appeal, vol. 14.

27. Such reviews are called "advancement review", "a reward system" or "positive assessment". Although not without significance, they are not intended to

establish grounds for dismissal. If "negative" they signify lack of merit rather than the presence of actual demerit.

Evans Cross-examination, q.243 at 63, Case on Appeal, vol. 14A.
Sibley Cross-examination, q.33-36 at 10, Case on Appeal, vol. 14A.

28. Absent mandatory retirement, the university must address the question of how it can remove older professors whose performance shows deterioration in the face of his or her determination to stay.

Sibley Affidavit, para.16 at 11, Case on Appeal, vol. 14.

29. If the older professor has deteriorated to the point where cause could be made out under existing tenure rules, he or she would face the destruction of honour and integrity in the hearing process, even after a long and productive career.

Sibley Affidavit, para.25 at 15, Case on Appeal, vol. 14.

30. It is very difficult to evaluate the performance of an older professor. The farther along in his or her career the individual is, the larger a body of retrospective evidence there will be in support of his or her position. The evaluation is likely to be contentious and lengthy.

Evans Cross-examination, q.111 at 33; q.125 at 37; q.187 at 49-50, Case on Appeal, vol. 14A.

31. Dismissal is not the only evaluation problem associated with mandatory retirement. Even though a person may escape dismissal on present standards, continued employment might not be in the interests of the university. It would be preferable to have a faculty member who is performing at a significantly higher level. The academics who have the fewest options may be the ones who want to stay in the university past 65.

Evans Cross-examination, q.187 at 49-50; q.227 at 59; q.236 at 61, Case on Appeal, vol. 14A.
Ziauddin Cross-examination, Case on Appeal, vol. 1A.
Roque-Nunez Cross-examination, Case on Appeal, vol. 1A.

32. At age 65, even a professor performing just above the minimum standard is costly to continue in employment. In addition to paying a salary which has been increased over the years by at least routine annual increments, the university must carry the higher cost of funding pension contributions. The professor may also be eligible to draw a pension.

Sibley Cross-examination, q.485 at 82; q.490 at 84, Case on Appeal, vol. 14A.

33. Even a more stringent evaluation system would not eliminate problems of performance evaluations in the collegial setting. Moreover, it would be necessary to make such an evaluation system apply to all faculty and not single out those at a certain age level. This requirement of extension would involve very unfavourable consequences for the tenure system.

Sibley Affidavit, para.19 at 12, Case on Appeal, vol. 14.
Sibley Cross-examination, q.98-100 at 22; q.481 at 81-82, Case on Appeal, vol. 14A.

34. Those likely to be the subjects of the most intense scrutiny under any revised performance appraisal scheme are those who are underperforming, but not actually liable for dismissal under the present criteria.

Sibley Cross-examination, q.83 at 18, Case on Appeal, vol. 14A.
Mustard Affidavit, para.13 at 9, Case on Appeal, vol. 14.

35. There are, however, several justifiable reasons for underperforming at any particular time, including the transition from PhD work to independent research, or the transition to a new specialty. Under the present regime, it is part of the bargain between a professor and the university that the university will, in effect, "stay with him or her" during those ups and downs providing that reasonable efforts are being made. These aspects of the arrangement, which are protective of the individual, might suffer were a more rigorous evaluation method in use.

Evans Cross-examination, q.62 at 17-18; q.66 at 19, Case on Appeal, vol. 14A.

36. Moreover, to broaden the scope of the evaluation process or change its character to a more inquisitorial one is out of keeping with the traditional notions of tenure.

Sibley Affidavit, para.14 at 11, Case on Appeal, vol. 14.
Sibley Cross-examination, q.66 at 15, Case on Appeal, vol. 14A.
Sibley Re-examination, q.523-530 at 90-93, Case on Appeal, vol. 14A.
Jones Cross-examination, q.39 at 12-13, Case on Appeal, vol. 9A.
Finlayson Cross-examination, q.45-46 at 12, Case on Appeal, vol. 8A.

37. There are also several serious problems in devising an evaluation scheme that would be fair and reasonable. It must be fair and objective with respect to individuals and also across disciplines and reflect all the roles performed by professors.

Mustard Affidavit, para.15 at 9, Case on Appeal, vol. 14.
Evans Affidavit, para.12 at 9, Case on Appeal, vol. 14.

38. It is difficult to establish minimum performance standards on which a finding of incompetence could be based which would withstand scrutiny in the university. The absence of good objective means of scrutiny calls for the judgment of peers not that of the administration.

Evans Affidavit, para.13 at 9, Case on Appeal, vol. 14.
Sibley Affidavit, para.23 at 14, Case on Appeal, vol. 14.
Sibley Affidavit, para.22 at 14, Case on Appeal, vol. 14.

39. If peer review is exclusively, or largely, based within the university itself, there are problems relating to its objectivity or perceived objectivity. A system of peer review by experts, some external to the situation, would be seen to be fair; the reviewers are not likely to be animated by the factors which exist in an institutional setting and, because of their expertise, would be seen to be objective.

Ziauddin Cross-examination, q.21 at 7; q.37 at 9, Case on Appeal, vol. 1A.
Mustard Affidavit, paras.17-19 at 10, Case on Appeal, vol. 14.
Evans Affidavit, para.14 at 8-9, Case on Appeal, vol. 14.

40. If peer review is in place on a university-wide basis, a very significant investment of resources would be dedicated to the assessment function. The credibility of such a peer review system rests on the use of people who are capable of judging, namely true experts. Talented people would leave the universities rather than submit to evaluation by a person not qualified. Canada's talent pool would not be large enough to accommodate an expert system, so that the peer review process would have to use international experts, with the added time and expense that that entails.

Mustard Affidavit, para.21 at 11, Case on Appeal, vol. 14.
Savage Cross-examination, q.148 at 47, Case on Appeal, vol. 9A.
Mustard Affidavit, paras.20, 21 at 10-11, Case on Appeal, vol. 14.

41. Assessment systems tend to have a "steering effect" in that work is selected to fit the timetables and the perceived values of the evaluation system, leading to impairment of the capacity to engage in long-term basic research.

Mustard Affidavit, para.16 at 9-10, Case on Appeal, vol. 14.
Evans Cross-examination, q.206 at 54-55, Case on Appeal, vol. 14A.
Sibley Affidavit, para.24 at 14-15, Case on Appeal, vol. 14.

42. Even under a strict performance review system, some kinds of faculty renewal problems would continue unabated. For example, a department may need someone in a new field for which no existing professor can be retrained. A 65 year old incumbent, successful at his or her work by any standard, is nonetheless teaching diminishing numbers of students while his or her share of faculty resources increase. Absent the retirement of such an older professor, the new person could not be hired.

Evans Cross-examination, q.100 at 29, Case on Appeal, vol. 14A.

(iii) System Funding

43. The Ontario university system has been substantially underfunded giving rise to a hiring freeze which has taken place at all Ontario universities.

Evans Cross-examination, q.147-149 at 42, Case on Appeal, vol. 14A.

Savage Affidavit, para.11 at 8, Case on Appeal, vol. 9.

44. Both the federal and the Ontario governments have curtailed their financial commitments to Ontario universities.

Savage Cross-examination, q.46 at 15-16; q.53-64 at 17-20, Case on Appeal, vol. 9A.

45. The effect of the combination of the hiring boom of the 1960s and 1970s and the fiscal restraint on hiring which now prevails is to cause an unbalanced age structure in the universities. The large "bulge" of faculty hired in the 1960s and 1970s is relatively young; 40% of the faculty is in the age range from 40 to 49 years. The combination of this youthful bulge and fiscal restraint means that only a small group of younger professors is developing. Three percent of faculty are less than 30 years old, and 12 per cent are less than 35.

Sibley Affidavit, para.32 at 18, Case on Appeal, vol. 14.
DesRosiers Affidavit, paras.25-26 at 13-14, Case on Appeal, vol. 14.

46. It is not feasible in the present circumstances of the province to consider that additional funds will be made available to the universities to permit professors to remain in employment past 65 and to ensure flexibility and faculty renewal.

Respondents' Factum, infra, para.49.

47. The Commission on the Future Development of the Universities of Ontario (the "Bovey Commission") recommended several sweeping measures to deal with deterioration in quality caused by prolonged underfunding of the Ontario university system. Among its recommendations was the creation of a one-time Faculty Renewal and Adjustment Fund. This sum of $152 million would permit the hiring of 550 young faculty members in addition to those replacing retiring faculty.

Sibley Affidavit, paras.33-34 at 18-19, Case on Appeal, vol. 14.

48. The Ontario government, however, made available, in 1984-85, a $50 million "Excellence Fund", $10 million of which was allocated for faculty renewal.

DesRosiers Affidavit, para.32 at 16, Case on Appeal, vol. 14.

Sibley Cross-examination, q.261 at 48, Case on Appeal, vol. 14A.

49. The Bovey Commission considered that if mandatory retirement were to be abolished a further $24 million would be required over the next five years to defray the costs associated with older professors remaining in employment. The government of Ontario has given no indication as to whether it would fund the potential extra costs of the abolishment of mandatory retirement.

Sibley Affidavit, para.44 at 24, Case on Appeal, vol. 14.
Jones Cross-examination, q.47 at 16-17; q.49 at 17, Case on Appeal, vol. 9A.

50. Part of the benefit of any increased funding to the universities would be lost if the career life of faculty were automatically extended.

Evans Affidavit, para.8 at 6, Case on Appeal, vol. 14.

51. In any event, one must consider not only getting the resources but also using them in the best way to fulfil the university's goals. Seeking out younger faculty members would better serve these goals than continuing in employment those who have already had the benefit of a lengthy relationship.

Evans Cross-examination, q.127 at 38, Case on Appeal, vol. 14A.
Sibley Affidavit, para.45-46 at 25-26, Case on Appeal, vol. 14.

52. It is not realistic to regard alternatives like flexible retirement times, early or late retirement, job sharing, reduced teaching loads and so on as alternatives to mandatory retirement as the determination as to whether some or all of these mechanisms could be instituted, and the timetable for their implementation, depend to a large extent on the attitude of faculty. If mandatory retirement were abolished by law, and faculty kept all of the prerequisites and benefits that they now enjoy, there would be a little incentive for them to enter into bargaining on such issues.

Savage Affidavit, #1, paras.17-18 at 9-10; #2, para.15 at 10-11 and Exhibit "F" at 12-13, Case on Appeal, vol. 9.
Savage Cross-examination, q.78 at 24 - q.92 at 31, Case on Appeal, vol. 9A.

Schell Cross-examination, q.69 at 15 - q.106 at 25, Case on Appeal, vol. 8A.
Evans Cross-examination, q.198 at 52-53, Case on Appeal, vol. 14A.

(iv) Personnel Planning and Faculty Renewal

53. Given the problems of the age bulge and the hiring freeze, the research structure of Ontario's universities is rapidly and relentlessly aging. Maintaining even present standards of performance requires maximum flexibility.

Mustard Affidavit, para.9-10 at 7, Case on Appeal, vol. 14.

54. Mandatory retirement provides an assurance that at a certain identifiable time all the resources tied to a tenure stream position will be available for faculty renewal. Mandatory retirement thus provides the opportunity to hire new faculty members and to predict when new faculty members can be introduced and how the direct and indirect costs of the addition can be funded.

Evans Affidavit, para.7 at 6, Case on Appeal, vol. 14.
Mustard Affidavit, para.12 at 8-9, Case on Appeal, vol. 14.
Sibley Affidavit, para.27 at 16, Case on Appeal, vol. 14.

55. Given the stability of employment already conferred by tenure, the further automatic extension of the career life of professors by abolishing mandatory retirement will limit the universities' capacity to adapt to changing academic needs. It has been estimated by the Bovey Commission that abolition of mandatory retirement will mean that 300 fewer tenure track positions will become available to the 1990s.

Evans Affidavit, para.9 at 6-7, Case on Appeal, vol. 14.
Sibley Affidavit, para.43 at 24, Case on Appeal, vol. 14.
DesRosiers Affidavit, para.27 at 14, Case on Appeal, vol. 14.

(v) The "Balance" in University Employment

56. Mandatory retirement in the university represents a balance between individual goals and social goals. Society expects the institution to be able to maintain quality of performance and respond to challenges to its intellectual leadership. To do this, it needs flexibility and the capacity to perform orderly

faculty renewal. The individual and the institution benefit from the fostering of exploration and creativity that may come with the security of tenure. In return for ceding any right to indefinite employment which might otherwise be asserted, the professor receives a beneficial salary package, a guarantee of tenure and a pension income at retirement. If the professor can have all of these and keep the right to indefinite employment, the professor gains a windfall and the university loses its ability to meet the needs of society.

> Evans Cross-examination, q.188 at 50; q.229 at 59-60, Case on Appeal, vol. 14A.
> Sibley Cross-examination, q.144 at 31, Case on Appeal, vol. 4A.

57. The nature of the bargain between the university and the professor is that the professor will have protracted employment, as long as certain minimum standards continue to be met, in return for stipulating a definite end to such employment. It is not unfair to suggest that when this point has been reached, the party who has taken the benefit of the arrangement should observe his or her part of the bargain.

> Evans Cross-examination, q.79 at 23, Case on Appeal, vol. 14A.
> Gunderson and Pesando Affidavit, para.6 at 7, Case on Appeal, vol. 12.
> Sibley Cross-examination, q.169 at 34-35, Case on Appeal, vol. 14A.

58. Mandatory retirement ensures some evenhandedness between different groups of faculty members. As the employer, or potential employer of both young and older academics, the university must try to treat both groups fairly. Allowing older professors to remain in employment while precluding younger people from joining the faculty serves only one of the university's constituencies.

> Sibley Affidavit, paras.25-39 at 15-22, Case on Appeal, vol. 14.

59. The mandatory retirement provisions of the universities are not arbitrary, unfair or based on irrational considerations. They form part of the terms and conditions of employment arrived at consultatively through some form of collective bargaining. Also, during the three-year hiatus before the coming into force of section 15 on April 17, 1985, professors had the opportunity to renegotiate

the mandatory retirement aspect of their contract. There is no evidence that any action was taken in this regard.

> Chrysler Affidavit, para.30 at 16-17, Case on Appeal, vol. 4.
> Schell Cross-examination, q.21-29 at 5-6, Case on Appeal, vol. 8A.

60. There is, in addition, evidence of statistically pronounced declines in most basic cognitive functions which become clearly evident after the age of 60. There is also evidence that the gap between productive and non-productive academics widens as they get older. Such evidence is relevant to the reasonableness of using age 65 as a benchmark for retirement and to the issue of whether a rational connection exists between this benchmark and the objectives of mandatory retirement which are detailed above.

> Schaie Cross-examination and Exhibit 8 at 538-542, Case on Appeal, vol. 10A.
> Blackburn Cross-examination and Exhibit 5 at 464-465, Case on Appeal, vol. 10B.

61. Prof. Blackburn admitted on cross-examination that it is "too early" to obtain reliable empirical data on the effects of changes to the mandatory retirement policies at American state universities.

> Blackburn Cross-examination, q.92 at 33, Case on Appeal, vol. 10B.

62. Further, empirical data on faculty retirement in Manitoba shows that the Bovey Commission's assumptions about voluntary retirement of faculty over the age of 65 have not been borne out. The voluntary retirement rate is, in fact, lower than expected.

> Sibley Affidavit, Bovey Commission Report, Exhibit B at 49, Case on Appeal, vol. 14.
> Answers to Undertakings given on Sibley Cross-examination, Case on Appeal, vol. 14A, Tab 3A.

63. In addition, the experience of both Laurentian and York universities has been that all faculty scheduled to retire in 1986 have indicated their desire to remain as full-time faculty members.

Chrysler Affidavit, para.46 at 26-27, Case on Appeal, vol. 4.
Farr Cross-examination, q.977 at 183, Case on Appeal, vol. 3A.

(c) **Social and economic facts relating to sections 15(1) and 1 of the Charter**

64. The Appellants evidence about social and economic issues came through various academics, Agarwal, a specialist in organizational behaviour, and several economists, Krashinsky, Reid, Riddell and Rosenbluth. None of the foregoing affiants had published in the area of mandatory retirement. In addition, the Appellants submitted the affidavit evidence of Mr. Peter Hirst, a private pension consultant with an actuarial background.

Krashinsky Cross-examination, q.5, 364 and 547 to 549 at 6, 91 and 143, Case on Appeal, vol. 6A, Tab C.
Reid Cross-examination, q.4 at 4, Case on Appeal, vol. 6A, Tab A.
Riddell Cross-examination, q.2, 91 to 96 and 100 to 103 at 30 and 34 to 37, Case on Appeal, vol. 6A, Tab 2.
Rosenbluth Cross-examination, q.6 at 3, Case on Appeal, vol. 6B.
Agarwal Affidavit, Exhibit A at 5 to 7, Case on Appeal, vol. 7, Tab 1A.
Hirst Affidavit, para.1 to 3 at 1, Case on Appeal, vol. 7, Tab 2.

65. On the other hand, the Respondents filed the affidavit of Professors Gunderson and Pesando, two economists who have researched and published in the area of mandatory retirement. Professor Gunderson is also an expert on collective bargaining, having published in this area and being, at the time, Director of the Centre for Industrial Relations at the University of Toronto. His research and publications include the economics of discrimination, the implications of the aging work-force and the economic and industrial implications of mandatory retirement. Professor Pesando, then Director of the University of Toronto's Institute for Policy Analysis, also has specialized expertise in pensions. In addition to the Gunderson-Pesando affidavit, the Respondents rely upon the affidavits of Professor Foot (an economist specializing in macroeconomics, econometrics and the economic of demographic change) and Professor Ondrack (a specialist in organizational behaviour), both submitted by the Attorney General of Ontario.

Gunderson and Pesando Affidavit, paras.1.1 and 1.2 at 3-5, Case on Appeal, vol. 12.

Ondrack Affidavit, para.1 at 4, Case on Appeal, vol. 13.1.
Foot Affidavit, paras.1 and 2 at 3 and 4, Case on Appeal, vol. 13.2.

(i) Rationales For Mandatory Retirement

66. Professors Gunderson and Pesando indicate that there are four main rationales for mandatory retirement. First, mandatory retirement serves to open up jobs and promotion opportunities for younger workers. This concern is particularly important in times of high unemployment, or when there is public concern with youth unemployment and the job and promotion opportunities of women and members of minority groups.

Gunderson and Pesando Affidavit, para.11 at 9-10, Case on Appeal, vol. 12.

67. In assessing the rationale, the evidence suggests that the "lump of labour fallacy" must be avoided. According to this notion, it is inaccurate to say that the employment of an additional person will, in the long term, mean the loss of work for another person. Nevertheless, it is clear that on an economy-wide level, the abolition of mandatory retirement would lead to at least transitional unemployment, particularly for younger workers who traditionally experience higher unemployment rates. In any event, economic analysis suggests, in addition, that the impact of unemployment would adversely affect other members of the workforce.

Gunderson and Pesando Affidavit, para.12 at 10, Case on Appeal, vol. 12.
Foot Affidavit, paras.45-50 at 26-28, Case on Appeal, vol. 13.2.
Reid Cross-examination, q.123-133 at 41-44, Case on Appeal, vol. 6A, Tab A.
Pesando Cross-examination, q.175-177 and 704 at 46-47 and 183, Case on Appeal, vol. 12A.

68. 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 abolition of mandatory retirement will likely create significant unemployment, a fact readily acknowledged by some of the Appellants' affiants.

Rosenbluth Cross-examination, q.85-89 and 238-239 at 18-19 and 46, Case on Appeal, vol. 6B.
Reid Cross-examination, q.118 and 119 at 39, Case on Appeal, vol. 6A, Tab A.
Riddell Cross-examination, q.12 at 7, Case on Appeal, vol. 6A, Tab 2.
Pesando Cross-examination, q.214 at 58, Case on Appeal, vol. 12A.

69. Second, mandatory retirement provides certainty and, in particular, a relatively fixed date around which the plans of both employers and employees can be made. This enables employers 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. If mandatory retirement is abolished, and there is uncertainty about how many workers will be retiring and at what age, there will be increased uncertainty about such financial obligations. A fixed retirement date also enables employees to know with certainty when they are to retire so they can plan for the event. Such planning may involve saving for retirement, preparing for it through retirement planning programs (often available through employers), and even decisions to move.

Gunderson and Pesando Affidavit, paras.13 and 14 at 10 and 11, Case on Appeal, vol. 12.
Reid Cross-examination, q.137 at 45, Case on Appeal, vol. 6A, Tab A.

70. Third, mandatory retirement reduces the need for individual monitoring and evaluation and permits toleration of otherwise unacceptable productivity levels toward the end of working life. The abolition of mandatory retirement would result in human and economic costs due to increased monitoring and evaluation. This would not be limited to older workers but would extend to the full age distribution of the workforce.

Gunderson and Pesando Affidavit, para.15 at 11, Case on Appeal, vol. 12.

71. With a fixed retirement age, employees can retire with dignity. The employee, his or her peers and the community know that the employee retired because he or she reached the fixed retirement age and not because of incompetence or the inability to continue at the job.

Gunderson and Pesando Affidavit, para.16 at 11-12, Case on Appeal, vol. 12.
Ondrack Affidavit, para.23 at 12-13 and Exhibit "F" at 105, Case on Appeal, vol. 13.1.

72. Fourth, mandatory retirement exists as a part of an intricate lifetime compensation system by 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.

Gunderson and Pesando Affidavit, para.17 at 12, Case on Appeal, vol. 12.
Ondrack Affidavit, para.17 at 10, Case on Appeal, vol. 13.1.

(ii) Deferred Compensation

73. In administering a deferred compensation system, a termination date for the contractual arrangement is necessary. 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. The worker's compensation need not equal the worker's productivity at every moment. Instead, the worker's expected lifetime compensation equals the value of his or her expected lifetime productivity. In this context, mandatory retirement avoids unjust enrichment by those employees who would otherwise seek to stay on.

Gunderson and Pesando Affidavit, para.18 at 12-13, Case on Appeal, vol. 12.
Pesando Cross-examination, q.29 to 31 at 7-8, Case on Appeal, vol. 12A.

74. In assessing the existence of a deferred compensation system, the following factors must be considered: length of service; productivity levels; and compensation levels. Compensation levels include more than wages, and encompass fringe benefits such as the value of pension entitlements. This latter benefit is

extremely valuable to older workers. Deferred compensation also encompasses the direct and the indirect benefits of seniority provisions.

> Pesando Cross-examination, q.445 at 125, Case on Appeal, vol. 12A.
> Krashinsky Cross-examination, q.510-516 at 134, Case on Appeal, vol. 6A.
> Reid Cross-examination, q.49 and 50 at 15, Case on Appeal, vol. 6A, Tab A.

75. Deferred compensation is a real economic phenomenon. Contrary to the assertion of the Appellants at paragraph 25 of their Factum, there is both direct and indirect evidence supporting its existence, a fact admitted by one of the Appellants affiants, Professor Rosenbluth.

> Gunderson and Pesando Affidavit, para.19 at 13, Case on Appeal, vol. 12.
> Rosenbluth Cross-examination, q.112, 290, 301, 304, 305 and 309-312 at 23, 59, 62 and 63 to 64, Case on Appeal, vol. 6B.

76. This general economic analysis of deferred compensation applies particularly well to universities. Data on average professional salaries alone indicates that older faculty members are paid significantly more than younger faculty members (on average, 2.5 times more). The difference in average total compensation between the two groups is even greater because the cost of providing pension benefits in earnings-based plans rises dramatically with the plan member's age and years of pensionable service.

> Gunderson and Pesando Affidavit, para.47 at 25-26, Case on Appeal, vol. 12.
> Rosenbluth Cross-examination, q.118 at 24, Case on Appeal, vol. 6B.

77. The Appellants rely on an American study (The Cost of Employing Older Workers by the Special Committee on Aging of the United States Senate (1984)) in support of the proposition that deferred compensation is not a widespread phenomenon in the Canadian labour market.

> Reid Affidavit, Exhibit "B", Case on Appeal, vol. 6, Tab 1.
> Krashinsky Affidavit, Exhibit "C", Case on Appeal, vol. 6, Tab 3.

78. Assuming without admitting that the U.S. Senate's study may be relevant to the Canadian labour market, the evidence is that it is fundamentally flawed. The Senate report:

(a) only provides evidence that direct salaries do not always rise with age;
(b) fails to provide evidence that total compensation, which is the relevant measure, does not tend to rise with age;
(c) makes no reference as to whether or not the workers under consideration were covered by mandatory retirement;
(d) contains no data relating to productivity; and
(e) grossly underestimates pension benefits to older workers which arise through retroactive enrichments and hence significantly underestimates the total compensation paid to older workers.

Pesando Cross-examination, q.443-451 at 125-128, Case on Appeal, vol. 12A.
Reid Cross-examination, q.42 and 68 at 13-14 and 23, Case on Appeal, vol. 6A, Tab A.

79. The other primary assertion put forth by the Appellants is that contractual arrangements for mandatory retirement made between employees and employers are inefficient because of imperfect information and irrationality.

Krashinsky Affidavit, para.9 at 6, Case on Appeal, vol. 6, Tab 3.

80. Proponents of the deferred compensation analysis do not assume perfect information on the part of employers and all employees. The assertion that perfect information is essential contradicts the branch of economic analysis known as contract theory which explores efficient outcomes where there are different types of uncertainties facing the bargaining parties. Moreover, unions engaged in collective bargaining have sufficient resources to engage experts to provide needed background information. One significant purpose of collective decision-making is to reduce the need for every individual to make an assessment.

Pesando Cross-examination, q.156 and 476 at 41-42 and at 136-137, Case on Appeal, vol. 12A.
Krashinsky Cross-examination, q.173 at 49-50, Case on Appeal, vol. 6A, Tab C.

81. A deferred compensation system can be mutually beneficial to both employers and employees. Employers may prefer deferred compensation because it can serve to enhance work effort and to reduce unwanted turnover. The deferred

compensation agreement also ensures that the worker has a vested interest in the financial solvency of the firm. As well, deferred compensation systems reduce the need for the firm to monitor and evaluate its workers constantly. Continual monitoring is replaced by the periodic assessment of employee performance with the employee being retained if his or her performance is satisfactory.

> Gunderson and Pesando Affidavit, para.21 at 14, Case on Appeal, vol. 12.
> Krashinsky Cross-examination, q.479 at 126, Case on Appeal, vol. 6A, Tab C.

82. Employees may prefer (or at least willingly accept) a deferred compensation system for a number of reasons. First, deferred compensation is a form of forced saving which many workers may prefer. Second, a worker's compensation need not decline over time if the worker's productivity does decline with his or her age. Third, employees may prefer the periodic monitoring that can accompany the deferred compensation scheme to the continuous monitoring that must otherwise prevail. Fourth, 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 of these features are characteristic of a lifetime contractual arrangement of which mandatory retirement is an integral part.

> Gunderson and Pesando Affidavit, para.22 at 14-15, Case on Appeal, vol. 12.

83. In the implementation of a deferred compensation system, the use of age 65 as a common mandatory retirement point is justified by the fact that most public social benefits commence at 65. For example:

(a) 1951 legislation which provided universal old age security benefits at age 70 was amended to provide that, beginning in 1965, the eligible age would be reduced each year until it reached age 65 in 1970;
(b) income tested benefits under the Guaranteed Income Supplement, originally payable at age 70 became payable at age 65 in 1970; and
(c) the age for receipt of Canada and Quebec Pension Plan pensions was set at 68 in 1967 and reduced a year at a time to reach 65 in 1970.

> M. Elizabeth Atcheson, Lynne Sullivan, "Passage To Retirement: Age Discrimination and the Charter", in A. Bayefsky and M. Eberts, eds. Equality Rights and The

Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) at 237.
Hirst Cross-examination, Tab A, q.25-35 at 7-9, Case on Appeal, vol. 7B.

(iii) Acceptability and Frequency of Mandatory Retirement

84. The evidence presented to the Ontario Court of Appeal indicates that approximately half of the workforce in Canada occupy jobs with contractual provisions providing for retirement at age 65, i.e., mandatory retirement.

Gunderson and Pesando Affidavit, para.2 at 5-6, Case on Appeal, vol. 12.
Foot Affidavit, para.27 at 16, Exhibit "Q" at 69 and Exhibit "R" at 7, Case on Appeal, vol. 13.2.

85. The statistical data as to how many employees would likely stay on beyond the age of 65 in the event that mandatory retirement is prohibited is not entirely clear. The data offered in support of the contention that the abolition of mandatory retirement would not lead to significant delays in retirement has been questioned for various reasons. 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 in a jurisdiction are more likely to retire at or near the 65 year mark in the years immediately following the abolition of mandatory retirement, since for many years their plans and expectations would have been based on retirement at 65. These assumptions and plans would change as employees become more familiar with new assumptions. Third, the American data is questioned in the evidence 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. For example, all professors at York University who would have otherwise retired at the end of the

1985-86 academic year decided not to in accordance with a tentative agreement between the York University Faculty Association and York University.

Pesando Cross-examination, q.688 at 179, Case on Appeal, vol. 12A.
Rosenbluth Cross-examination, q.57 and 68 at 12-13 and 15, Case on Appeal, vol. 6B.
Krashinsky Cross-examination, q.393 at 97, Case on Appeal, vol. 6A, Tab C.
Gunderson and Pesando Affidavit, paras.3, 4, 5 and 49-58 at 6-7 and 27-32, Case on Appeal, vol. 12.
Foot Affidavit, para.35 and 36 at 22-23, Exhibit "L" at 106, Exhibit "Q" at 68-69, Exhibits "R", "r", "u", "v", Case on Appeal, vol. 13.2.
Farr Cross-examination, q.977 at 183, Case on Appeal, vol. 3A.

(iv) Consensual Sources of Mandatory Retirement

86. Mandatory retirement is essentially a contractual arrangement between employees (individually or through collective bargaining agents) and employers. Generally, an employee's existing contractual relationship comes to an end through retirement at age 65 as a result of the provisions of either an individual contract of employment or a collective agreement.

Gunderson and Pesando Affidavit, para.6 at 7, Case on Appeal, vol. 12.
Rosenbluth Cross-examination, q.92 and 251 at 19 and 49, Case on Appeal, vol. 6B.
Krashinsky Cross-examination, q.23 at 9, Case on Appeal, vol. 6A, Tab C.

87. The real issue is whether employees perceive that over their expected work life they are better off with or without a system of mandatory retirement. In essence, workers may prefer a contractual arrangement that limits their flexibility at some time in the future in return for a number of other benefits that occur throughout their work life.

Gunderson and Pesando Affidavit, para.6 at 7-8, Case on Appeal, vol. 12.

88. It is clear that mandatory retirement is highly correlated with the existence of occupational pension plans. A recent Labour Canada report indicates that 95% of the pension plans in Canadian collective agreements of 500 or more

employees contain mandatory retirement clauses, and that approximately 70% of these Canadian collective agreements contain pension provisions. Therefore, about two-thirds of these major collective agreements have mandatory retirement provisions.

> Gunderson and Pesando Affidavit, para.7 at 8, Case on Appeal, vol. 12.
> Hirst Cross-examination, q.39 at 9-10, Case on Appeal, vol. 7B, Tab A.

89. The evidence indicates that mandatory retirement is often the result of a mutually agreed upon collective agreement between employers and unions. Mandatory retirement is not simply a policy imposed upon employees by their employers. Workers employed in the larger, unionized establishments, receiving higher wages and protected by collective agreements negotiated by trade unions, are often subject to mandatory retirement policies. The strong link between mandatory retirement and occupational pension plans draws attention to the fact that, in general, workers who have agreed to mandatory retirement are typically workers who would be labelled "advantaged". Indeed, the Canadian Labour Congress has consistently opposed the abolition of mandatory retirement. The thrust of contract proposals by major trade unions has been for more favourable early retirement provisions, not for the right to defer retirement.

> Gunderson and Pesando Affidavit, para.8 and 10 at 8-9, Case on Appeal, vol. 12.
> Rosenbluth Cross-examination, q.101 at 21, Case on Appeal, vol. 6B.
> Reid Cross-examination, q.105 at 36, Case on Appeal, vol. 6A, Tab A.
> Hirst Cross-examination, q.11-18 at 4-5, Case on Appeal, vol. 7B, Tab A.

90. The evidence is that mandatory retirement policies in Canada do not reflect discriminatory preferences exercised by employers against employees. Rather, mandatory retirement is merely one aspect of the employment relationship. The interrelatedness of numerous employment conditions exists in both collective and individual bargaining situations. Existing salary and other benefits and perquisites tend to be premised on the understanding of retirement at some fixed age, often age 65. In other words, mandatory retirement has provided a premise upon which employees and employers have based their agreements with respect to other terms and conditions of employment. According to the evidence, mandatory

retirement can only be viewed along with the other elements of the employment relationship that were established as a quid pro quo for mandatory retirement.

> Gunderson and Pesando Affidavit, para.9 at 8-9, Case on Appeal, vol. 12.
> Pesando Cross-examination, q.96 at 23-24, Case on Appeal, vol. 12A.
> Rosenbluth Cross-examination, q.102-104 at 21, Case on Appeal, vol. 6B.
> Krashinsky Cross-examination, q.74 at 21-22, Case on Appeal, vol. 6A, Tab C.

(v) The Effect of Abolishing Mandatory Retirement

91. A number of consequences will likely arise from the abolition of mandatory retirement. At the hiring stage, the elimination of mandatory retirement could reduce the employment opportunities of potential new recruits, including youth, women and members of minority groups. Employers may become very reluctant to hire middle-aged workers in the absence of a known age at which their existing contractual arrangement must end. Promotion opportunities may also decline if older workers do not vacate jobs for younger workers. These adjustments could be very important for at least specific sectors like universities where only a limited number of new openings are available. There are no reliable data or studies demonstrating that the impact of forbidding mandatory retirement will be minimal.

> Gunderson and Pesando Affidavit, para.25 at 16, Case on Appeal, vol. 12.
> Reid Cross-examination, q.155-160 at 53-55, Case on Appeal, vol. 6A, Tab A.

92. A deferred compensation scheme would no longer be as feasible without mandatory retirement. As a general proposition, where there is mandatory retirement, there is deferred compensation. Deferred compensation serves to reduce unwanted turnover, thereby making it feasible for employers to provide occupational training. Such training could very well decline without mandatory retirement.

> Gunderson and Pesando Affidavit, para.20 at 14, para.26 at 17, Case on Appeal, vol. 12.
> Pesando Cross-examination, q.28 at 6-7, Case on Appeal, vol. 12A.
> Rosenbluth Cross-examination, q.451 at 95, Case on Appeal, vol. 6B.

93. In work places where deferred compensation is in place, financial incentives exist for older workers to remain as employees well beyond the normal retirement date, resulting in an unjust enrichment or windfall gain to these employees, at least during the transitional period preceding adjustments to salary levels.

Rosenbluth Cross-examination, q.111 at 23, Case on Appeal, vol. 6B.

94. The evidence indicates that other repercussions resulting from the abolition of mandatory retirement could occur:

(a) dismissals of older workers on the basis of performance will likely increase;
(b) the monitoring and evaluation of all workers including older women will increase;
(c) continuous monitoring and evaluation will replace periodic evaluation;
(d) ultimately the compensation of older workers will fall and the compensation of younger workers will rise, but "windfall gains" will be experienced by older workers remaining at work during the adjustment period; and
(e) the importance of seniority will likely decline without mandatory retirement which could significantly affect the rights of older workers.

Gunderson and Pesando Affidavit, paras.27-30 at 17, Case on Appeal, vol. 12.
Rosenbluth Cross-examination, q.140-144, 167 and 179 at 29, 32-33 and 35, Case on Appeal, vol. 6B.

95. The evidence indicates that the abolition of mandatory retirement will have a particularly adverse effect on universities. First, the concept of tenure will need to be reviewed and possibly altered. Secondly, there could be a major impact on new hiring and the evidence indicates that the hiring of new faculty members would be significantly reduced. Compounding both of these concerns is the nature of the work required of university faculty members whereby they can be expected to defer retirement more than the average employee in the economy.

Gunderson and Pesando Affidavit, paras.49-58 at 27-32, Case on Appeal, vol. 12.

96. If mandatory retirement were not permitted, then the design of occupational pension plans would have to be reviewed. Most occupational pension plans are designed around a normal retirement age of 65. The question of how to

treat those employees who opt to work beyond the normal retirement age would have to be addressed.

> Gunderson and Pesando Affidavit, para.33 at 18, Case on Appeal, vol. 12.

97. As now constituted, pension plans form part of the deferred compensation system which generally benefits workers. Contrary to the Appellants' assertion at paragraph 24 of their factum, the elimination of mandatory retirement would create many pension issues which would have to be resolved. Furthermore, Mr. Peter Hirst, the one affiant presented by the Appellants on the pension issue, admitted that in the case of the corporations whom he advises:

(a) these clients are advised to insert a normal retirement age of 65 into their pension plans; and
(b) these clients are not advised to eliminate existing mandatory retirement policies.

> Gunderson and Pesando Affidavit, paras.34-42 at 19-24, Case on Appeal, vol. 12.
> Hirst Cross-examination, q.42 and 56 at 10, 11 and 14, Case on Appeal, vol. 7B, Tab A.

98. Experience in Canada with adjusting pensions to the abolition of mandatory retirement is limited. In the Province of Manitoba, where mandatory retirement was abolished, employees who attain the age of 65 are required to elect whether to continue to contribute to a pension plan or to take an actuarial increase at the time of eventual retirement. The consequences of choosing between these alternatives are very uncertain. In other words, the abolition of mandatory retirement in Manitoba has significantly increased worker uncertainty as far as pensions are concerned. In the Province of Quebec an actuarial increase is mandatory for non-contributory plans but an employee participating in an contributory plan may continue his contributions. Moreover, age requirements continue to exist.

> Hirst Cross-examination, q.57-58, 66-105, 121-124 at 14-15, 17-25 and 28, Case on Appeal, vol. 7B, Tab A.

(vi) Conclusion

99. Mandatory retirement is part of a negotiated arrangement to the overall benefit of workers. Mandatory retirement is required to continue employment patterns and relationships in a stable and effective manner. Finally, mandatory retirement is merely one interrelated aspect of complex employment relationships. According to the evidence, the judicial invalidation of mandatory retirement without other necessary adjustments will produce unintended unfairness and inefficiencies.

Gunderson and Pesando Affidavit, para.9 at 8-9, Case on Appeal, vol. 12.
Pesando Cross-examination, q.96. at 23-24, Case on Appeal, vol. 12A.

PART II - RESPONDENTS' POSITION IN RESPECT OF POINTS IN ISSUE

100. The position of the Respondent universities in respect of the constitutional questions on this appeal are as follows:

(1) Section 9(a) of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53 (the "Code") does not violate the rights guaranteed by section 15(1) of the Charter;
(2) Section 9(a) of the Code is demonstrably justified by section 1 of the Charter as a reasonable limit on the rights guaranteed by section 15(1) of the Charter;
(3) The Charter does not apply to the mandatory retirement provisions of the Respondent universities;
(4) If the Charter does apply to the Respondent universities, the mandatory retirement provisions enacted by each of them do not infringe section 15(1) of the Charter;
(5) If the Charter does apply to the Respondent universities, the mandatory retirement provisions enacted by each of them are demonstrably justified by section 1 of the Charter as a reasonable limit on the rights guaranteed by section 15(1) of the Charter.

PART III - THE LAW

A. SECTION 32 OF THE CHARTER

101. The Respondents' submissions in respect of the application of the Charter to universities in Ontario in general and to the provisions of the universities' employment contracts which incorporate mandatory retirement as a term, are divided into three parts:

(a) the general principles to be applied in interpreting section 32 of the Charter;
(b) a specific response to the Appellants' submissions as to the application of the Charter to the Respondent universities;
(c) the appropriate approach to the issue of whether the Charter applies to the Respondent universities.

(a) General Principles in Approaching Section 32 of the Charter

(i) Onus of establishing that the action complained of is that of the legislature or government

102. It is submitted that just as the Appellants bear the burden of establishing the infringement of a particular right under the Charter, they must first establish that the infringement is the result of governmental or legislative action.

> Re Southam Inc. and the Queen (No. 1) (1983), 41 O.R. (2d) 113 at 124 (Ont. C.A.).

(ii) A "purposive" approach to section 32 of the Charter

103. Courts in Canada, including the Supreme Court of Canada, have adopted a purposive approach to the interpretation of the Charter. To a purposive judge, this means that "the decision about how to apply a rule depends on a judgment of how most effectively to achieve the purposes ascribed to the rule".

> Phillips, M.J., "The Inevitable Incoherence of Modern State Action" (1984), St. Louis University Law Journal 683 at 723.
> R. v. Oakes, [1986] 1 S.C.R. 103 at 119, Dickson C.J. ("Oakes")

104. The purpose of entrenching constitutionally guaranteed rights and freedoms is to protect against legislative or governmental actions which infringe or

deny such rights and freedoms. Thus, the Charter is concerned with the relationship between government and those governed; it is not addressed to regulating conduct between private individuals and entities.

> One view of the matter rests on the proposition that the Charter, like most written constitutions, was set up to regulate the relationship between the individual and the Government. It was intended to restrain government action and to protect the individual.
>
> R.W.D.S.U., Local 580, et al v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 593, McIntyre J. ("Dolphin Delivery").

105. Section 32 specifies the actors to whom the Charter will apply. As Mr. Justice McIntyre stated in Dolphin Delivery (supra) at 597-8:

> In my view, section 32 of the Charter, specifically dealing with the question of charter application, is conclusive on this issue.
>
> ...Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the legislatures are treated as separate or specified branches of government, distinct from the executive branch of government, and therefore where the word "government" is used in s. 32 it refers not to government in its generic sense —meaning the whole of the governmental apparatus of the State—but to a branch of government. The word "government", following as it does the words "Parliament" and "legislature", must them, it would seem, refer to the executive or administrative branch of government.
>
> Dolphin Delivery, supra, at 597-598.

106. In adopting a "purposive approach", the Supreme Court of Canada in Dolphin Delivery rejected the notion that a court order could be an element of governmental intervention necessary to invoke the Charter because such an approach would widen the scope of Charter application to virtually all private litigation. McIntyre, J. stated at 601:

> A more direct and more precisely defined connection between the element of government action and the claim advanced must be present before the Charter applies.

107. In order for the Charter to be applicable, there must be an exercise of or reliance upon governmental action.

Dolphin Delivery, supra, at 603.

108. It is submitted that an expansive interpretation of section 32 is inconsistent with the clear wording of section 32 and with the purpose of the Charter and would, wrongly, extend the regulation of private activity and would, in fact, extend government. Such an interpretation would diminish the area of freedom within which individuals can act without encountering constitutional checks.

Re Bhindi and British Columbia Projectionists Local 348, 29 D.L.R. (4th) 47 at 54-55 (B.C.C.A.), Nemetz, C.J.B.C.; lv. to appeal to S.C.C. refused November 6, 1986. ("Re Bhindi").

(b) **Response to the Appellants' submissions in respect of the application of the Charter to the Respondent Universities**

(i) General

109. It is submitted that the Appellants' approach to the issue of whether the Respondent universities are subject to the Charter is contrary to the general approach taken by this Court in Dolphin Delivery, supra, and other provincial courts of appeal which have considered the application of section 32 of the Charter.

(ii) Do the Respondent universities constitute part of the legislature or government of the province within the meaning of section 32 of the Charter insofar as they are creatures of statute which exercise power pursuant to statute and carry out a public function pursuant to statutory authority?

110. The Appellants' first submission that the Respondent universities are subject to the Charter as "legislature" or "government" of the province is proffered on three grounds:

(1) the universities are "creatures of statute";

(2) the universities exercise powers "pursuant to statute"; and

(3) the universities carry out a public function pursuant to statute.

111. It is submitted that the incorporation of an entity by an Act of the provincial legislature does not constitute the entity as either the legislature or government for the purposes of section 32 of the Charter. The exercise of legislative power is exhausted upon the incorporation of the entity by statute. Subsequent to the enactment of the incorporating statute, there is no legislative or government action under section 32. Pursuant to section 92(1) of the Constitution Act, the province can create a company with the legal attributes of a natural person without limitation as to the kinds of activity which it can pursue. Like a natural person, the corporate entity must comply with applicable federal and provincial laws but the fact of provincial incorporation does not imply any functional limit on its powers.

> Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566 (P.C.).
>
> Hogg, P., Constitutional Law of Canada, 2nd Ed. (Toronto: Carswell, 1985) at 514.

112. It is submitted that the proper inquiry in terms of section 32 of the Charter and the incorporating legislation is a determination of whether there is "a direct and precisely defined" connection between the conduct which is said to be in conflict with the Charter and the legislation which incorporates and empowers the Respondent universities. The Ontario Court of Appeal in this case correctly analyzed the question by concluding as follows:

> If the statutes which create and regulate the conduct of these four universities were to contain mandatory retirement provisions at age 65 which are complained of by the appellants, the court would have to look at those provisions and determine if and to what extent they were in conflict with the Charter.
>
> Judgment at 100.

113. In paragraph 62 of their Factum, the Appellants rely on a quote from Professor Hogg, supra at 671 in which it is asserted that any body exercising statutory authority (including universities) is bound by the Charter and that limitations on statutory authority flow down the chain of statutory authority and apply to all action which depends for its validity on statutory authority. It is respectfully submitted that Professor Hogg's statement cannot stand for the

proposition that, because a university is an incorporated entity, then all activity of a university is subject to Charter scrutiny.

114. Firstly, Professor Hogg is in agreement with prevailing judicial authority that section 32 results in the Charter being applicable where there has been government action. Secondly, private action is a residual category from which one must subtract those kinds of action to which section 32 applies. Professor Hogg gives certain examples (in a passage at 677 approved by the Supreme Court of Canada in Dolphin Delivery) of conduct to which the Charter applies:

> A private person exercising a power of arrest that is granted to "any one" under the Criminal Code and to a private railway company exercising the power to make by-laws (and impose penalties for their breach) that is granted to a railway company by the Railway Act.

115. Based on these examples, it is clear that Professor Hogg's reference to action taken in the exercise of a statutory authority must refer to a special delegated legislative, regulatory or law enforcement power which is founded on statute as in the example of the railway company and its specific delegated legislative power to make by-laws and impose penalties.

116. Contrary to the assertion of the Appellants at paragraph 132 of their factum, it cannot be said that the legislature or Government of Ontario has sanctioned or created the Respondent universities' mandatory retirement provisions.

117. It is submitted that a fundamental problem with any concept of governmental action based on the fact of incorporation by a legislature is that it would clearly catch private authority and private corporations which derive legal status from a grant of authority from the legislature.

118. To ask whether the entity under consideration is an entity owing its legal status to the legislature and to further conclude if the answer is yes, that the Charter applies, is to ask the wrong question. This approach would compel application of the Charter to non-governmental actors; for example, trade unions

have been found to derive their status as legal entities from government. However, the Courts have determined that trade unions are not subject to the Charter.

> International Brotherhood of Teamsters etc. v. Therien, [1960] S.C.R. 265.
> Re Bhindi, supra.

119. Universities conduct virtually all activities as a result of their status as incorporated entities and not from any specific delegation of legislative or regulatory authority. The power to expropriate, given specifically to universities by virtue of the Universities Expropriation Powers Act, S.O. 1980, c. 516, may be an exception to this general statement. This power does not flow from the act of incorporation; it is not a power given to a natural person. It may be an example of specific delegated legislative authority, the exercise of which is subject to Charter scrutiny.

120. It is respectfully submitted that, in establishing mandatory retirement provisions for its employees, the universities were exercising a contractual power similar to that of any employer. Although the universities' powers are granted by statute, in respect of mandatory retirement the power exercised should be characterized as contractual and domestic rather than statutory because the mandatory retirement provisions are effective, not by virtue of the exercise by the universities of a delegated legislative or regulatory power, but by virtue of their incorporation and as a term in the contracts of employment between the universities and their employees. Although the universities have statutory power to appoint, promote, suspend and remove the members of the teaching and administrative staffs (see, for example, University of Toronto Act, 1971, s.2(14)(b)), this power contemplates that its purposes will be accomplished by the university entering into contracts with its employees. Certainly, that is the legal status of the universities' mandatory retirement provisions; they are effective as a matter of contract law not delegated legislation and are not subject to the Charter. There is no statutory provision which compels the mandatory retirement provisions or their incorporation in various university employment and pension agreements. In order for the exercise of power based on statutory authority to be challenged under the Charter, the incorporating statute must compel the action in issue.

> Re Bhindi, supra, at 56, Nemetz, C.J.B.C.

121. The incorporating statutes of the universities which grant enabling power to the Respondents' governing bodies to govern and manage each university are readily distinguishable from the grant of legislative power to a local municipality to pass by-laws of general application or a grant of rule-making power to the Law Society of Upper Canada for the purposes of regulating the legal profession in the public interest.

> Re McCutcheon and City of Toronto et al. (1983), 147 D.L.R. (3d) 193 (Ont. H.C.).
> Re Klein and the Law Society of Upper Canada (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.).

122. The Court of Appeal found the determinative factor in deciding whether an entity is legislature or government is not whether an entity was created by statute but for what purpose or function was the entity created. In commenting on the decision of Linden in Re McCutcheon and City of Toronto et al. (1983) 41 O.R. (2d) 652, the Court of Appeal stated that being a "creature of statute" is not determinative.

> Judgment at 108.

123. The Appellants further argue that the fact that universities in Ontario carry out a public function brings them within the scope of section 32 as either legislature or government.

124. It is respectfully submitted that the "public function" test is fraught with peril, and would, if applied, lead to much uncertainty in application of the Charter, would expand the circumstances of Charter application beyond government and curtail non-governmental conduct. It is simply not the test mandated by the Charter in section 32. The characterization of the Respondents' function by the Appellants as sufficiently "public" to bring all of their activities within the definition of government fails to provide a principled or consistent approach to the application of the Charter.

125. The so-called "public function" test has been consistently rejected in the United States in determining whether the American Bill of Rights should apply to universities.

> Berrios v. Inter American University et al., 535 F. 2d 1330 (1st Cir, 1976).

Grossner v. Trustees of Columbia University et al., 287 F.Supp. 535 at 548-9 (S.D.N.Y. 1968).
Counts v. Voorhees College, 312 F.Supp. 598 (Dist. Ct. 1970).
Pendrell v. Chatham College, 370 F.Supp. 494 at 497 (Dist. Ct. 1974).

> The easy conclusion, shared by too many "bold thinkers", that "whenever any organization or group performs a function of a sufficiently important public nature, it can be said to be performing a governmental function and thus should have its actions considered against the broad provisions of the Constitution" is wrong. Like most easy conslusions about most hard governmental problems it lacks the institutional feel. Perhaps there are private groups in society to which the Constitution should be applied. But one thing is clear: that conclusion should depend on more than an awareness that the group commands great power or performs a function of an important public nature.
>
> Wellington, "The Constitution, the Labour Union and "Government Action" (1961) 70 Yale Law Journal 345 at 374.

126. The practice which developed in the American courts of characterizing apparent private action as a state action was largely a response to an absence of anti-discrimination legislation at the state level. W.S. Tarnopolsky, as he then was, noted:

> ... in our own case every jurisdiction in Canada has an anti-discrimination statute and so the same extension of "state action" to private activities is unnecessary.
>
> "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar Review, 242 at 256.

127. In light of the inherent difficulties of the public function test, the American Courts have made a substantial retreat from applying this test in determining whether the American Bill of Rights is applicable to essentially private action.

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

128. It is apparent that certain parts of the Respondents' activities, for example, the provision of post-secondary education to Ontario residents, can be considered "public" in nature. It is submitted, however, that such characterization does not provide a rational basis for determining whether universities are "government" within the meaning of section 32.

(iii) Are the Respondent universities subject to the Charter because, as the Appellants assert, universities form part of the administrative machinery of government and as such have been held to be subject to the supervisory authority of the Courts through the traditional prerogative writs?

129. The Respondents submit that the availability of judicial review in the university context is not a reliable guide to the interpretation of section 32 of the Charter and, further, that it is inappropriate to reason back from the judicial review and certiorari cases to conclude that a university is government within the meaning of the Charter.

130. When Dickson, C.J. concluded in Martineau v. Matsqui Institution Disciplinary Board (No. 2), [1980] 1 S.C.R. 602 ("Martineau") that "certiorari is available as a general remedy for supervision of the machinery of government", it is respectfully submitted that he was not attempting to define government within the meaning of section 32. Not only was the Charter not yet the law of Canada, but the statement of Dickson, C.J. relied upon by the Appellants (Appellant's Factum, para. 139) was made in the context of a general discussion of the availability of certiorari as a remedy which has expanded and is "capable of expansion consistent with the movement of the common law away from rigidity in respect of the prerogative writs".

131. As Dickson C.J. said in Martineau, the dominant characteristic of recent developments in English administrative law has been the expansion of judicial review to supervise administrative action by public authorities, and further at 628:

> The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision makers.

132. This Court has cautioned against the interpretation of words in the Charter based on pre-Charter decisions.

> In my opinion, the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a very reliable guide to its interpretation and application.
>
> R. v. Therens, [1985] 1 S.C.R. 613 at 638, LeDain J.

133. Certiorari is a flexible remedy. It is designed to ensure decision making is correct legally and procedurally and is not designed to create substantive rights in contrast to cases involving the Charter where the Court has jurisdiction to review the substance of government decision making to determine whether substantive rights and freedoms have been abridged. The basis for the exercise of supervisory jurisdiction by the Courts in university cases is not that the universities are government but that universities are public decision makers.

134. The test proposed by the Appellants would lead to inconsistent results. In Vanek and the Governors of the University of Alberta, 57 D.L.R. (3d) 595, where tenure had been denied by a Tenure Appeals Committee, certiorari was not available. Contrast this to Paine v. University of Toronto (1981), 34 O.R. (2d) 770 where certiorari was held to be available (although not granted).

135. The test proposed by the Appellants would lead to wrong results. In Taff Vale Railway v. Amalgamated Society of Railway Servants, [1901] A.C. 426 the House of Lords held mandamus would lie against a trade union to compel it to perform statutory obligations. But a trade union is not "government" within the meaning of section 32. (Re Bhindi, supra).

136. The test proposed by the Appellants is too broad. Certiorari has been available to review the exercise of a purely contractual rather than statutory power. See Bennett v. Wilfred Laurier University (1984) 43 O.R. (2d) 123 (Ont.Div.Ct.); upheld on appeal (1984) 48 O.R. (2d) 122 (Ont.C.A.). The University, having elected to exercise a purely contractual power, had an obligation to act fairly and certiorari was available.

137. The test proposed by the Appellants will not always "catch" action which is clearly governmental. Certiorari is not available where government exercises a legislative function; A.G. Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735 (S.C.C.). Similarly, while cabinet decisions may be subject to the Charter (Operation Dismantle Inc. et al v. The Queen et al, [1985] 1 S.C.R. 441) certiorari would not be available.

138. The test proposed by the Appellants would lead to Charter applicability in cases involving purely private, domestic tribunals.

Lee v. Showmen's Guild of Great Britain, [1952] 1 All E.R. 1175 (C.A.).

139. The availability of the prerogative remedies or of judicial review is not designed to be, nor should it be, a test of governmental action within the meaning of section 32. To apply such a test would deflect proper inquiry which is to find whether government is an actor in the act complained of.

Judgment at 25.

(iv) Are universities bound by the Charter because the activities of universities should be reviewed as being governmental in nature, based on the relationship between universities and government?

140. At paragraph 144 of the Appellants' Factum, certain factors are asserted as supporting a positive answer to the question posed above. Factors (a) and (b) are, in the respectful submission of the Respondents, simply a reiteration of the arguments made in paragraphs 132 to 142 inclusive of the Appellants' Factum to which specific response has already been made by the Respondents (see paragraphs 109 to 123 above).

141. It is submitted that the extent and manner of funding of the Respondent universities by the Government of Ontario is not a sufficient basis for determining that an entity is government. There are a large number of entities which receive government funding to accomplish desired policy objectives of the provincial or federal government. The mere receipt of funds from government with certain conditions attached does not turn otherwise non-governmental entities into the government.

Re Blainey and Ontario Hockey Association, supra, at 522-523.
Harrison v. University of British Columbia, supra, at 697.

142. The relationship between government and universities does not result in universities being government as defined in section 32 of the Charter.

The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within the

> legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.
>
> Judgment, supra, at 109.
> Harrison v. University of British Columbia, supra, at 695.
> Governors of the University of Toronto v. Minister of National Revenue, [1950] Ex.C.R. 117.

143. In this context, the University Respondents rely on the facts as set out in paragraphs 3 to 13 of the Factum. The facts indicate that there is no control of the universities by government either de jure or de facto. The facts relied upon indicate that a high level of funding by government does not equate to control by the government.

144. The universities are not controlled by the cabinet or a minister. The absence of governmental control is evident upon a review of the incorporating statutes establishing these institutions. A brief consideration of the University of Toronto Act, 1971 will serve as an example. The University of Toronto Act, 1971, by section 2(2) provides that the Governing Council of U of T is to be comprised of 50 members, of whom only 16 are appointed by the Lieutenant-Governor in Council; the remainder are drawn from U of T officers or are elected by the teaching staff, students, the administrative staff and the alumni. The same Act, by section 2(14) provides that the President, who is the Chief Executive Officer of U of T (section 5), is to be appointed by the Governing Council. Thus, the government has no legal power to control U of T even if it were inclined to do so. In fact, of course, there is a long tradition of independence of universities, which is vigorously defended by universities, and which is respected by governments. There is no expectation that even the government's appointees to Governing Council will act under the direction of government (see section 2(3) of the Act).

145. Indeed any attempt by government to influence these decisions, and especially decisions regarding appointment, tenure, retirement and dismissal of professors and other academic staff, would be strenuously resisted by the universities on the basis that such interference could lead to breaches of academic freedom.

146. The Courts have expressed reluctance to involve themselves in university affairs recognizing the autonomous nature of universities. In Harelkin and University of Regina, [1979] 2 S.C.R. 561 at 594, Beetz, J. commented on the University of Regina Act, 1974 as follows:

> The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy.
>
> Paine v. University of Toronto et al, supra, at 774. Decision of Trial Judge, Mr. Justice Gray, at 9-22, Case on Appeal, vol. A, at 45-58.

147. Courts and government, it is respectfully submitted, should recognize not only the autonomous nature of the university but also the need to be autonomous. The academic mission of universities related to scholarship, research and teaching without governmental restraint is an essential characteristic of an independent university system.

148. It is therefore submitted that the relationship between the provincial government and the Respondent universities relied on by the Appellants does not establish that the Respondent universities are government as defined in section 32 of the Charter.

(b) **Respondents' position on the application of the Charter to the universities**

149. The Respondents submit that there are three possible tests for applying section 32 of the Charter:

(i) the "degree of control" test, which asks whether the Respondent institution is controlled by government;

(ii) the "clear nexus" test, which asks whether the impugned action is sufficiently limited and directed by government to constitute government action; and

(iii) assuming the inquiry into (i) or (ii) is positive, then the "nature of the action" or "government function" test, which states that even if there is sufficient control by or a nexus with government, the Charter will not apply if the impugned action is essentially of a private, commercial, contractual or non-governmental nature.

(i) The "degree of control" test

150. It is submitted that a necessary condition for determining the existence of governmental action is the presence of government control. If government is to bear responsibility for disputed activity it must control or direct such conduct. This standard is in accordance with the traditional common law approach in identifying the degree of control of an entity by the Crown or government in order to determine Crown agency or public authority.

> Northern Pipeline Agency v. Perehinec, [1983] 2 S.C.R. 513.
> R. v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board (1963), 38 D.L.R. (2d) 530 at 534-535 (Ont. C.A.).
> Schnurr v. Royal Ottawa Hospital (1986), 56 O.R. (2d) 589 at 593 (C.A.).

151. This absence of control by the government has led Canadian courts to conclude that universities are essentially private autonomous bodies and have denied them the advantages of the Crown Agency Act, R.S.O. 1980, c.106 and the Public Authorities Protection Act, R.S.O. 1980, c.406.

> Governors of the University of Toronto v. Minister of National Revenue, [1950] 2 D.L.R. 732 at 748-750 (Ex. Ct.).
> Powlett and Powlett v. University of Alberta et al., [1934] 2 W.W.R. 209 (Alta. C.A.).

152. It is submitted that the mere presence of a statute either for the purpose of founding an entity or for regulating it cannot and should not, standing alone, determine the application of the Charter. It is submitted that the court must assess "the degree of governmental control" exercised through such statutory means. Clearly, many statutes exhaust governmental authority and control upon the creation of the entity or organization. Thereafter, the actions of such bodies can, in no sense, be attributed to government.

> Canadian Pioneer Management v. Sask. L.R.B., [1980] 1 S.C.R. 433 at 453 (S.C.C.).
> Ontario Business Corporations Act, S.O. 1982, c.4, s.4.
> An Act to Incorporate Knox Presbyterian Church, Ottawa, S.O. 1980, c.108.
>
> The other argument advanced on behalf of the University is that it is an emanation from the Crown or an arm of government. I think a perusal of the University Act (1936

> (Man.), c.47), repels this argument. In one sense I suppose it is true that every corporation is an emanation from the Crown but that is a different thing from being an arm of the Executive government.
>
> Re Taxation of University of Manitoba Lands, [1940] 1 D.L.R. 579 at 595 (Man. C.A.), Robson J.A.

153. It is submitted that an examination of the founding statutes for all of the Respondents does not demonstrate the degree of control necessary to support the conclusion that all of the actions of such universities are those of government.

Enabling Statutes.

154. Indeed, the statutes reveal a clear legislative intent to accommodate academic freedom by the creation of independent autonomous organizations akin to private corporations.

> Harelkin v. University of Regina, supra, at 702, Beetz J.
> Paine v. University of Toronto, supra.

155. In adopting the degree of control approach, courts have distinguished between control exercised pursuant to the terms of a governing statute and mere "influence" by the government through funding or appointments, for example. "State influence" is a particularly common phenomenon in modern Canadian society given government's interest in supporting such areas as research, recreation, cultural and commercial endeavours. If the courts do not focus on the degree of actual governmental control the formulation of a consistent, coherent rationale for government accountability under the Charter will not be possible. Instead, the Charter will spread government regulation, not limit it.

> Westeel-Rosco Ltd. v. Board of Governors of South Sask. Hospital Centre, [1977] 2 S.C.R. 238.
> Re Blainey and The Ontario Hockey Association et al., supra.
> Re Bhindi, supra.
> Powe v. Miles, 407 F. 2d 73 (2nd Cir. 1968).
> Browns v. Mitchell, 409 F. 2d 593 (10th Cir. 1969).
> Phillips, M.J., supra, 683.

156. In the United States courts have held that an incorporating statute, funding and regulation are insufficient to characterize a university as government and cause its actions to be the responsibility of government.

Wahba v. New York University, 492 F. 2d 92 (2nd Cir. 1974), cert. denied, 419 U.S. 874.
Grenya v. George Washington University, 512 F. 2d 556 (D.C. Cir. 1975), cert. denied, 423 U.S. 995.

(ii) The "clear nexus" test

157. It is submitted and acknowledged that government control and therefore responsibility may be found to exist even where an organization is not controlled by government provided that an applicant can establish "a clear nexus" between the action complained of and government involvement. In this situation, a court must scrutinize carefully the challenged conduct to identify specific government responsibility. General regulatory control by government or a government agency will not be sufficient.

> The purpose of this [nexus] requirement is to assure that constitutional standards are involved only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.... A State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the State....
>
> Blum v. Yaretsky, 457 U.S. 991 (1982), at 1004-1005, Rehnquist J.
> Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
> Jackson v. Metropolitan Edison, supra, 419 U.S. 345 (1974).

158. It is submitted that, on the facts at hand, there is no evidence to support the conclusion that the retirement provisions contained in the collective agreements or contracts of employment are the product of government involvement or action. There are no provisions in the incorporating statutes which mandate or compel the parties to agree to a certain retirement age. If mere statutory authorization is adopted as the test of legislative action, every act of every corporation will be subject to the Charter.

159. It is submitted that statutes incorporating universities not only preserve freedom of contract but are less restrictive than general incorporating statutes. Neither the contracts of employment (whether collective or individual) nor the terms thereof which flow from these consensual arrangements can be said to be the responsibility of government nor can they be described as law.

Re Bhindi, supra, at 54-56 (B.C.C.A.), Nemetz C.J.B.C.
Arlington Crane Service Limited et al. v. Minister of Labour et al. (22 December 1988) at 51-3 (Ont. H.C.) [unreported].

160. It is respectfully submitted that the Court of Appeal's conclusion that the Charter does not apply to the Respondents essentially conforms to both the degree of control and nexus tests. Furthermore, the Court of Appeal's conclusion is consistent with prevailing case-law holding that the Charter does not apply to universities in British Columbia. In that province, governmental control over universities is greater than in Ontario.

Harrison and Connell v. The University of British Columbia, (1988), 49 D.L.R. (4th) 687 (B.C.C.A.).
University Act, R.S.B.C. 1979, c.419, ss.18, 19, 22, 25 and 26.

(iii) The "nature of the action" or "government function" test

161. Control or a nexus with government are not, standing alone, sufficient to attract the application of the Charter. As the Court of Appeal indicated, only actions of a governmental nature, entailing governmental functions, can be regulated by the Charter. Other actions, even of a public nature, are not subject to Charter scruting. It is submitted that the activities of a governmental or governmentally controlled organization which are non-governmental and essentially private cannot be subject to the Charter.

> It becomes a two step process: first, does the Charter apply to the respondent universities and second, does it apply to their employment contracts with the appellants? It would appear ... that the appellants would require an affirmative answer to **both parts** of the question to succeed on this branch of their argument [emphasis added].

Judgment at 96, 98-105, 106-112.
OECTA v. Essex County Roman Catholic Separate School Board, (1987), 58 O.R. (2d) 545 (Div.Ct.) ("OECTA").
R. v. East Berkshire Health Authority, Ex Parte Walsh, [1984] 3 All E.R. 425 (C.A.).
Comstock International Ltd. v. The Queen (1982), 126 D.L.R. (3d) 323 (Ont. Div. Ct.).

162. It is submitted that the test of whether the Charter applies to a particular action, such as a policy that normal retirement is at age 65, must conform to the purpose of the Charter which is to constrain unconstitutional action

executed or compelled by government. It is therefore imperative to determine the action in question, whether it has been compelled by government, and whether it is governmental in nature.

> OECTA, supra, at 560, Anderson J.
> Bartello v. Canada Post Corp. (1987), 62 O.R. (2d) 652 at 664-66 (H.C.J.).

163. The Charter is designed to regulate the relationship between subject and state. It was not developed to regulate ordinary contractual relationships, such as that between employer and employee, even where one of the contracting parties is government. It is submitted that the Charter's purpose demands that it only apply to government conduct qua government and not to government qua contractor or employer. It is therefore submitted that the Charter does not apply to governmental conduct that is essentially contractual and private in nature.

> I see nothing in the language of the Charter, nor in its purpose as I understand it, which would call for intervention by the court in the incidents of a contractual relationship solely because one of the contracting parties has some nexus with government.
>
> OECTA, supra, at 563, Anderson J.

164. It is submitted that the emphasis on the impugned "action" and not simply the "actor" is consistent with the courts' general view of public authorities. The mere incorporation of an entity by the legislature, and even general governmental control, has not been sufficient to render a particular action governmental.

> Bradford Corp. v. Myers, [1916] 1 A.C. 242 (H.L.).
> Berardinelli v. Ontario Housing Corp. et al., [1979] 1 S.C.R. 275.
> Schnurr v. Royal Ottawa Hospital, supra.
> Government of Malaysia v. Lee Hock Ning, [1974] A.C. 76 (P.C.).
> Ainsworth Electric Co. Limited v. The Board of Governors of Exhibition Place et al. (1987), 58 O.R. (2d) 432 (Div. Ct.).

165. At paragraphs 150 to 154 of the Appellants' Factum, it is submitted that the Charter applies to all actions of government, even those of a private nature. It is respectfully submitted that this submission ignores the true nature of even the relatively generous nexus test, which is to determine whether impugned action is

government directed. Even where an institution is controlled by government in respect of its basic public purposes, it may not be controlled by government in respect of its traditionally private conduct such as entering into ordinary commercial and employment contracts.

166. At paragraph 153 of the Appellants' Factum it is stated that the U.S. Supreme Court has applied the Bill of Rights to all actions of governmental bodies. This submission ignores the historical distinction between the protection of civil liberties in the United States and Canada. In Canada, rights of a generally private nature have traditionally been protected legislatively. It is submitted that the Charter was developed against the backdrop of this essential fact. Indeed, it is suggested that the U.S. "state action" doctrine in its precise form was rejected by the drafters of the Charter, who chose to apply the Charter to specific organs of the state such as the governments and the legislatures.

> Judgment at 105.
>
> [I]t may be seen that Parliament and the legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word 'government' is used in s. 32 it **refers not to government in its generic sense - meaning the whole of the governmental apparatus of the State - but to a branch of government** [emphasis added].
>
> Dolphin Delivery, supra, at 596, McIntyre J.

167. At paragraph 152 of the Appellants' Factum it is submitted that the courts, including the Supreme Court of Canada, have held that the Charter applies to private litigation. In support of this principle the Appellants cite a number of authorities, including three Supreme Court of Canada decisions, each of which is distinguishable or inapplicable:

(a) Dolphin Delivery which clarifies that while the Charter can conceivably apply to private litigation, there must be government action which one of the litigants is seeking to impugn;

(b) Air Canada v. A.G. British Columbia, [1986] 2 S.C.R. 539, which dealt with the application of sections 91 and 92 of the Constitution Act, 1867 and not the Charter with its section 32;

(c) Fraser v. P.S.S.R.B., [1985] 2 S.C.R. 455, which has no bearing on the Charter at all because, as Dickson C.J.C. said at 462:

> This appeal is not about certain things. It does not arise under ... the ... Charter (which had not been proclaimed when the events in this case arose)....

164. It is submitted that the legal basis upon which the Respondents required the Appellants to retire was the exercise of a contractual power which is within the powers of a university as a natural person. In requiring the Appellants to retire in accordance with their collective agreements or employment contracts, the universities did not rely on any authority in their incorporating statutes but rather upon their contractual rights as natural persons.

Judgment at 108.
Enabling Statutes.

B. SECTION 15 OF THE CHARTER - EQUALITY RIGHTS

(a) The University Retirement Policies are Not Law

169. The retirement policies at issue in this proceeding are not established by statute, regulation or order-in-council. Rather they are exercised as discretionary management prerogatives or are established as negotiated terms of employment.

Respondents' Factum, paras.13-14.

170. Section 15 of the Charter relates only to equality before and under "the law" and equal benefit of "the law". It is therefore submitted that a challenge under Section 15 of the Charter can only succeed if it relates to "the law".

OECTA, supra, at 561-566.
Harrison v. University of British Columbia (1986), 30 D.L.R. (4th) 206 (B.C.S.C.) at 215-216 (reversed on other grounds).

171. It is submitted that the word "law" in section 15(1) refers to the manifestation of a legislative act or the proper characterization of rights, duties, powers or other binding legal norms existing at common law, or by necessary implication therefrom. Not every act taken pursuant to statutory authority can be considered "law" for the purposes of the Charter.

OECTA, supra.
Re McCutcheon and City of Toronto et al, supra.

R. v. Therens, supra.

172. Where an individual is treated pursuant to a practice or policy which is entirely or primarily discretionary it cannot be said that such a person is being dealt with in accordance with or under a "law".

OECTA, supra.
Martineau, supra.
Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (1983), 41 O.R. (2d) 583 (Div. Ct.), aff'd 45 O.R. (2d) 80 (C.A.).
Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise (1985), 17 D.L.R. (4th) 503 (Fed. C.A.).

173. The same conclusion is reached when one considers provisions of contracts of employment. Such bilateral arrangements are certainly permitted by and are subject to "laws". However, by virtue of their bilateral, consensual nature, such agreements (which may be effected pursuant to or under the law) cannot properly be said to have, themselves, the status of "law", even where such arrangements are contemplated by statute. To argue, as do the Appellants, that such activity amounts to "contracting out" of Charter obligations is circular.

OECTA, supra.
Re Bhindi, supra.
Appellants' Factum, para.162.

174. In contrast to the protection established by section 15, the protections against differential treatment based on age established by provincial human rights legislation are not expressly limited solely to matters established by or under "law". Thus, while such human rights legislation may properly apply to the kinds of executive and administrative acts referred to by the Appellants in paragraph 160 of their factum, section 15(1) of the Charter applies to a more limited class of actions, namely those involving legislative activity.

Human Rights Code, 1981, S.O. 1981, c.53, s.4.

175. Significantly, many other protections in the Charter are clearly intended to apply to all forms of governmental activity, including administrative or executive acts.

Charter, Sections 8, 9 and 10.

176. The Appellants rely upon the extended applicability of the "equal protection" clause of the Bill of Rights (the "state action theory") to administrative acts. However, this analysis is of little relevance in interpreting section 15 of the Charter.

Appellants' Factum, paras.153 and 159.
Respondents' Factum, para.166.

177. It is therefore submitted that the retirement policies of the Respondents are not "law" for the purposes of subsection 15(1) of the Charter. Accordingly, neither those policies nor the retirements effected pursuant thereto contravene Section 15 of the Charter.

OECTA, supra.
Harrison v. University of British Columbia, supra (B.C.S.C.).

(b) **The University Retirement Policies are Not Inconsistent with Section 15 of the Charter**

(i) Interpretation and meaning of section 15

178. The interpretation of the content of section 15 should be carried out independently of the consideration of the possible impact of section 1 of the Charter. Section 15 sets out the substance of "equality rights" whereas section 1 merely states how these rights may be limited. The analysis of the two sections should be kept distinct.

R. v. Oakes, supra at 132-135.
Re Andrews v. Law Society of British Columbia (1986), 27 D.L.R. (4th) 600 at 604 (B.C.C.A.).
Judgment at 30.

179. Even assuming that the retirement policies are "laws" for the purposes of section 15(1), it is submitted that section 15(1) does not require that all laws treat all individuals identically, regardless of the circumstances. The mere fact that a law draws distinctions (i.e., creates so-called "inequalities") between individuals or groups of individuals does not, of itself, constitute a violation of section 15(1) requiring, in turn, justification under section 1 of the Charter.

Re Andrews, supra, at 605.

Judgment at 33-34.

180. To succeed in proving an infringement of section 15(1) of the Charter, an applicant must first demonstrate that the impugned law denies "equal protection" or "equal benefit". In determining the question of equal treatment, the court should not focus on the impugned law in isolation. Rather, it is essential to consider the impugned provision within the context of the entire system of the "law" bearing on the matter in question.

> Shewchuk v. Ricard (1986), 28 D.L.R. (4th) (B.C.C.A.) 429 at 443 and 446, MacFarlane J.A.
> Reference re Workers' Compensation Act 1983 (Nfld.) (1987), 44 D.L.R. (4th) 501 at 512-514 (Nfld.C.A.).

181. Moreover, where individuals are not similarly situated with respect to the purpose of the challenged law, a finding of "inequality" contrary to section 15 cannot be made.

> R. v. Ertel (1987), 20 O.A.C. 257 at 272.
> Re Andrews, supra, at 605.
> Smith, Kline and French Laboratories Ltd. v. A.G. Canada (1986), 34 D.L.R. (4th) 584 at 591-592 (F.C.A.).
> R. v. CLP Canmarket Lifestyle Products Corp., [1988] 2 W.W.R. 170 (Man. C.A.).
> C(D) v. Family and Children's Services of Cumberland County et al (1988), 48 D.L.R. (4th) 119 (N.S.S.C.T.D.), aff'd 86 N.S.R. (2d) 344 (C.A.).
> Reference re Workers' Compensation Act, supra.

182. Finally, even where inequality in treatment can be demonstrated between similarly situated individuals, such treatment must still, in order to constitute a violation of section 15, involve the further element of "discrimination". In the absence of "discrimination" there is no violation of section 15.

183. Discrimination for the purposes of this analysis means more than simply a difference in treatment or the existence of an unequal benefit. Rather, for a court to hold that a law is "discriminatory", regard must be had to such issues as fairness, rationality, invidiousness, degree of prejudicial impact, etc.

> Re Andrews, supra, at 605-610.
> Cabre Explor. Ltd. v. Arndt, [1988] 5 W.W.R. 289 (Alta. C.A.).
> R. v. CLP Canmarket, supra.

Judgment at 32-41.
C(D) v. Family and Children's Services, supra.
Reference re Workers' Compensation Act, supra, at 514-523.
R. v. Emile, [1988] 5 W.W.R. 481 (N.W.T.C.A.).
Smith, Kline and French Laboratories Ltd., supra.

184. However, in conduction this examination the section 15 analysis need not involve the balancing of the competing interests of other groups or general societal values. These latter considerations may be of greater relevance to section 1. Rather, the focus should be on fairness, rationality, invidiousness etc. as it relates to the individual in question.

185. Since distinctions based upon certain enumerated heads (eg. age, sex) will not, in all cases, be invidious, irrational or unfair, the three inquiries described above (i.e. the denial of equal benefit, the determination of similar situation and the subsequent assessment of discrimination) are all equally relevant and necessary whether the distinction in question is based upon an enumerated or a non-enumerated characteristic. In other words, contrary to the submission of the Appellants at paras.80-87, the mere fact that a legislative distinction is based upon a characteristic expressly enumerated in section 15 does not mean that the distinction is "per se discriminatory" and necessarily inconsistent with section 15 requiring, in turn, justification under section 1. The approach submitted by the Appellants is mechanical, non-functional and is inconsistent with the language and structure of section 15.

Re Andrews, supra, at 608-611.
Re Shewchuk and Ricard, supra, at 446.
Re Harrison, supra, (B.C.C.A.).
R. v. Le Gallant (1986) 33 D.L.R. (4th) 444 (B.C.C.A.).
Reference re Family Benefits Act (1986), 26 C.R.R. 336 at 352 and 356 (N.S.C.A.).
R. v. R.L. (1986), 26 C.C.C. (3d) 417 (Ont. C.A.).
R. v. Boyle and Hess (1988), 25 O.A.C. 43.
Re McDonald and the Queen, supra.
Tetrault-Gadoury v. Canada Employment and Immigration Commission et al (23 September 1988), (F.C.A.) [unreported].
Denise Headley v. Public Service Commission Appeal Board (1987), 71 N.R. 185 at 191-192, paras.23 and 24, Pratte J.
Brudner, Alan, "What are Reasonable Limits to Equality Rights?" (1986), 64 Can. Bar. Rev. 469 at 496-502.
Hogg, P., supra, at 798-799.

186. It is submitted that the enumeration of certain characteristics in section 15(1) provides guidance ejusdem generis to the courts in determining the types of non-enumerated characteristics which might give rise to section 15 rights but is not intended to create two classes of rights with different levels of protection, depending on whether they are enumerated or not.

Re Harrison, supra.

(ii) University retirement policies do not deny any benefit

187. Turning to the application of the foregoing tests, it is submitted that the appropriate focus for determining whether an improper distinction exists in this case is to examine the employment status of tenured faculty. As stated previously, it is appropriate to consider the "law" in question within a broad context.

188. All tenured faculty enjoy a relationship with the university which provides security of employment and academic freedom, reduces the drawing of invidious distinctions among tenured faculty members on the basis of competence, productivity and usefulness and features a compensation package which escalates in value over the life of the arrangement and which includes ample pension provisions. In return, in order to allow the university to fulfill its own mission and renew faculty resources, tenured faculty retire at age 65. Thus, a faculty member whose term of employment expires at age 65 is denied no benefit vis-a-vis other faculty members at any stage of their careers. The retiring faculty member has had the benefits of increasingly generous income (2.5 times that of junior faculty by retirement), academic freedom and security of employment at one stage of the process and continues to enjoy the benefits of pension and various forms of association with the university at another.

Mustard Affidavit, para.12 at 8, Case on Appeal, vol. 14.
Sibley Affidavit, paras.26-32 at 15-18, Case on Appeal, vol. 14.

189. It is submitted that the benefit described in paragraph 188 above is, in fact, a benefit which has two parts (pre- and post-retirement) and amounts to an intricate lifetime compensation arrangement. Viewing the entire relationship between faculty and the university in this light, it is submitted, clearly

demonstrates that there has been no denial of the equal benefit of the law. All faculty who have achieved tenure enjoy the benefits of a carefully balanced arrangement which not only serves their individual interests in security and independence, but also preserves the institution in which they work.

Respondents' Factum, paras.15-63.

(iii) University faculty of retirement age are not similarly situated to other faculty members

190. As set out in detail in Part I of the Respondents' Factum, the retirement policies of the Respondents are designed to achieve the purpose of academic renewal. The retirement policies, further, are integrally related to the principles of tenure and academic freedom which are central to the nature of the university. The policies are also important in the university's budgeting and personnel planning processes and have tremendous significance for the methods used by the university in the assessment of academic faculty.

191. Moreover, the retirement at age 65 of tenured faculty ensures that the university employment system has vertical as well as lateral equity, in that it provides to younger academics and youthful untenured faculty members the benefit of available employment opportunities.

Mustard Affidavit, para.12 at 8, Case on Appeal, Tab 14.
Mustard Cross-examination, q.202 at 47-48; q.209-225 at 5254.
Sibley Affidavit, paras.26-32 at 15-18, Case on Appeal, vol. 14.

192. It is not appropriate for the Appellants to seek to compare themselves with tenured faculty who have yet to reach the age of 65. The Appellants have had the full benefit of the arrangement between tenured faculty and the university; the latter group has not. The "purpose" of the system of which mandatory retirement is a part has been achieved in the case of the Appellants; that purpose remains to be achieved with respect to the latter group. Mandatory retirement is not the forcible termination of a privileged status which the Appellants are legally entitled to have continued. Rather it is the natural expiry of a relationship which, by age 65, has produced all of the benefits to which they, as tenured faculty, are entitled, including the benefit of a satisfactory pension for their retirement years.

Sibley Affidavit, paras.26-32 at 15-18, Case on Appeal, vol. 14.

193. Accordingly, with respect to the particular purposes of academic renewal and flexible allocation of resources, faculty who have reached age 65 are not similarly situated to other faculty.

(iv) The University retirement policies are not discriminatory

194. Even if it is accepted that the Appellants are similarly situated to pre-retirement tenured faculty, it is submitted that any distinction between them arising out of the Respondents' retirement policies is not "discrimination" within the meaning of section 15.

195. The onus of showing the distinction to be discriminatory is on the Appellants.

Re Andrews, supra, at 612.
Judgment at 30.

196. The emphasis placed by the Appellants upon "effect" rather than "intent" (Appellants' Factum, paras. 81-82) is irrelevant to the case at hand. This is not a case of unintentional "adverse effect" discrimination. That there may be some adverse effect upon the appellants is obvious. The issue at hand is whether those effects constitute "discrimination" as that word is used in section 15 of the Charter.

197. It is respectfully submitted that a section 15 violation is not established merely by proof of a "prejudicial and adverse impact" on an individual which is attributable to age. Such a finding does not establish "discrimination". Rather, it merely establishes either "unequal benefit" or "unequal protection", the first element in the section 15 analysis. There must still be proved "discrimination" in the sense of invidious, irrationality or unfairness.

R. v. Ertel, supra, at 272.
R. v. Boyle and Hess, supra, at 49-51.

198. It is submitted that the use of age as a standard to determine when the tenured employment relationship should end is not invidious, irrational or unfair.

This proposition can be established without consideration of the interests of the other members of the university community or general societal values (i.e. in a context which is analytically distinct from the process of justification under section 1.).

1) "discrimination" and rationality

199. In assessing the rationality of drawing age-based distinctions, it is noteworthy that in both the United States and Canada age has been frequently used as a statutory proxy for the determination of various rights, obligations and benefits. In fact, the Constitution Act itself accepts age as a legitimate proxy in determining the age of compulsory retirement of Senators and Superior Court Justices in Ontario, Quebec, Nova Scotia and New Brunswick.

Re Gerol and A.G. of Canada (1985), 53 O.R. (2d) 275.
The Constitution Act, 1867, 30-31 Vict (U.K.), c.3, ss. 29(2) and 99(2).

200. Courts in the United States have upheld mandatory retirement practices generally despite the provisions of the Fifth Amendment and the "equal protection" clause of the Fourteenth Amendment, respectively.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).
Vance v. Bradley, 99 S.Ct. 939 (1979).

201. This approach has not been regarded as "invidious" in the United States because age is something which cuts fully across racial, religious and economic lines.

Weiss v. Walsh 324 F. Supp. 75 (N.Y. Dist. Ct. 1971) at 77, aff'd 461 F.2d 486 (2d Cir. 1972), cert. denied 409 U.S. 1129 and 410 U.S. 970.
Hogg, P., supra.

202. In particular, mandatory retirement of university faculty in the United States has been consistently held not to violate the "equal protection" provisions of the Fourteenth Amendment to the Bill of Rights of the United States.

Mittelstaedt v. The Board of Trustees of the University of Arkansas, 487 F. Supp. 960 (ED. Ark.W.D., 1980) at 964-5.
Palmer v. Ticcione, 576 F.2d 459 (2nd Cir. 1970), cert. denied 440 U.S. 945.

Lamb v. Scripps, 627 F.2d 1015 (9th Cir. 1980).
Klain v. Pennsylvania State University, 434 F. Supp. 571 (M.D. Penn. 1977), aff'd 577 F.2d. 726.
Reuhausen, O.M., "Age As a Criterion For the Retirement of Tenured Faculty" (1986) The Record, 16.

203. Mandatory retirement is not an irrational method of dealing with the legitimate concerns of the Respondents relating to orderly planning, gradual declines in professorial capability, faculty renewal, etc., which concerns are further complicated by the existence of the tenure system.

Respondents' Factum, paras.15-63.

2) "discrimination" and fairness

204. As stated above, the concept of "discrimination" necessarily involves some analysis of the fairness of the distinction being drawn. In determining whether or not the Respondents' retirement policies are "unfair", it must be borne in mind that the concept of mandatory retirement at age 65 has historically formed a basic quid pro quo in the development of the tenure system. All of the Appellants (and indeed all tenured faculty of the Respondents) were only offered the extraordinary security tenure provides on the understanding that they would cede their positions upon reaching the normal age of retirement.

Respondents' Factum, paras.15-63, supra.

205. It is readily acknowledged that parties cannot typically "contract out" of the protections afforded by human rights statutes. Even assuming that the same result applies with respect to Charter rights, this only means that a court is not bound by law to give effect to such contractual provisions. It does not preclude a court from taking into consideration the consensual nature of such provisions in assessing the "fairness" of the means adopted by a respondent in the context of an allegation of "discrimination" under section 15.

206. The retirement policies at issue in the instant proceedings have been central to the Respondents for many years, to the knowledge and with the acceptance of all. They were never "imposed" upon the Appellants. Rather they were either expressly or implicitly agreed to at the time of hiring and conferral of tenure. It is clear that the enforced abolition of mandatory retirement would be inconsistent with the reasonable expectations of the Respondents.

207. Accordingly, despite the alleged adverse effects on those retired, it is submitted that enforcement of the mandatory retirement component of the "tenure bargain" would not be unfair. Indeed, it would be unfair to do otherwise than to give effect to that arrangement. It is therefore submitted that the mandatory retirement of the applicants is not unfair.

208. The Respondents, therefore, submit that their mandatory retirement policies are not invidious, unfair or irrational, and consequently they do not infringe the rights established by section 15 of the Charter.

C. THE APPLICATION OF SECTION 1 OF THE CHARTER

(a) General Principles

209. Rights and freedoms guaranteed by the Charter are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. To come within the justificatory provisions of section 1, two criteria must be met:

(a) the objective which the legislation is designed to achieve must relate to concerns which are pressing and substantial; and
(b) the means chosen must be proportional to the objective sought to be achieved. Three important components of proportionality have been identified as being:
  (i) the measures adopted must be rationally connected to the objective;
  (ii) the means should impair as little as possible the right or freedom in question; and
  (iii) there must be a proportionality between the effects of the measures and the objective.

210. It is submitted that Charter rights can be limited where their exercise would be inimical to the realization of collective goals of fundamental importance.

> Oakes, supra, at 225.
> Edwards Books and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713 at 779, Dickson C.J. ("Edwards Books").

211. Economic harm may be a pressing and substantial concern within the meaning of Oakes. Further, courts must exercise considerable caution when confronted with matters of economic and social policy.

Dolphin Delivery, supra, at 590, McIntyre J.
PSAC v. the Queen, [1987] 1 S.C.R. 424 at 442, Dickson C.J.

212. The nature of the proportionality test will vary depending on the circumstances. In each case, however, the Court is to balance the interests of society with those of individuals and groups.

Oakes, supra, at 227.
Edwards Books, supra, at 772, 776-782.
Dolphin Delivery, supra.

213. The proportionality requirement does not mean that a limitation must be tuned with great precision. In applying this test, simplicity and administrative convenience are legitimate concerns, for all limitations, indeed all laws, must to some degree cut across individual circumstances in order to establish general rules.

Edwards Books, supra, at 772, 776-7, 780-2, Dickson C.J.

214. Further, in reviewing the connection between a limitation on rights and a compelling objective, the court may consider the social and legislative context in which the limitation exists.

Dolphin Delivery, supra, at 592.
Shewchuk v. Ricard, supra, at 446-449, Macfarlane J.A.

215. As part of its inquiry, it is submitted that the Court will consider what alternative measures might have been available when the limit at issue was selected.

Oakes, supra, at 227.
Edwards Books, supra, at 772-783, Dickson C.J.

216. The existence of alternate measures, however, will not upset measures which are otherwise justified under section 1 where to insist upon another more acceptable scheme would impose an excessively high standard in view of the complex balancing of constitutional, statutory and institutional values which must occur in matters of economic and social policy or where to do so would defeat the pressing and substantial objective sought to be achieved.

Edwards Books, supra, at 782-783, Dickson C.J.

Canadian Newspapers Co. & A.G. Canada, [1988] 2 S.C.R. 122 at 132.
British Columbia Government Employees' Union v. A.G. Province of British Columbia, (20 October, 1988) at 35-37 (S.C.C.) [unreported].

217. In order to satisfy the third element of the proportionality test, the Court will look at three criteria. Firstly, it will examine the nature of the right or freedom violated, and assess how fundamental and inviolable it is in light of its history in the common law and its position in the context of the Charter. Secondly, the Court will examine the extent of the violation, and lastly will consider the degree to which the measures will trench upon the integral principles of a free and democratic society.

Oakes, supra, at 227-228.
R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344 (S.C.C.).
Re Southam Inc. and the Queen (No. 1) (1983), supra, at 124-125.

(b) **Application of section 1 to retirement policies of the Respondent Universities**

(i) Importance of the objective

218. The central objectives of the mandatory retirement regime in the university are: (1) to enhance the institution's capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal; and, (2) to preserve academic freedom and the collegial form of association by minimizing destructive modes of performance evaluation.

219. It is submitted that fostering the attainment of excellence in the universities and preserving the collegial form of government with its concomitant academic freedom are pressing and substantial objectives in a free and democratic society. Academic freedom itself is closely akin to the rights guaranteed in section 2 of the Charter. The approach of mandatory retirement avoids making invidious distinctions between older faculty on the basis of performance and avoids the risk that a fine career will end in the ignominy of a dismissal hearing. To that extent, mandatory retirement demonstrates a respect for human dignity and avoids subjective evaluation of merit which may tend to impair academic freedom of

thought and expression. The objective of the overall approach being to safeguard tenure and the institutions of the university, it can be argued that mandatory retirement promotes a social and political institution which enhances the participation of individuals and groups in society.

Oakes, supra, at 228-229
Dolphin Delivery, supra, at 590.

220. It is submitted that the Court may look to the overall policy and to legislative schemes for assistance in determining the importance of a limitation and its congruence with social policy as a whole. Mandatory retirement, as set out above, is part of an overall scheme of employment relationship at the university.

Dolphin Delivery, supra, at 592, McIntyre J.

(ii) The means chosen are proportional

1) Rational connection

It is submitted that mandatory retirement is rationally related to the objectives of the university in that it permits personnel planning and faculty renewal, avoids the necessity for individual faculty assessment late in a career and preserves the integrity of academic freedom represented by the tenure system in the universities by obviating the need for invasive assessments relating to competence and productivity.

221. If the establishment of some benchmark for mandatory retirement is not discriminatory, it is submitted that the particular age chosen is constitutional so long as it is reasonably related to the objective. Age sixty-five is reasonable for the following reasons:

(a) the use of age 65 as a benchmark to achieve the objective is reasonable as an enhancement of the planning and renewal functions of retirement and the avoidance of individual assessments.
(b) the age of sixty-five has been widely recognized as a valid age for retirement in Canada and in addition to its role in private pension arrangements, forms the basis of several retirement or income maintenance programs included in statutes. Atcheson and Sullivan, supra, at 236-237.
(c) the age of 65 falls within a zone of reasonableness related to the aging process and cognitive functioning generally.

(d) in responding to a recommendation that mandatory retirement be abolished at the federal level, the Government of Canada has taken the position that there may be circumstances which merit a departure from a rule against compulsory retirement.

Canada, Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights (Ottawa: Queen's Printer, 1985) at 10.

2) Least impairment

223. It is submitted that the degree of impairment of the right in this case is very small. The right protected by section 15 is the right to be treated equally before and under the law and to receive the equal benefit and protection of the law without discrimination on the basis of age.

Charter, section 15.

224. It is submitted that the professor receives substantial benefits from the system predicated upon mandatory retirement at 65, including: the guarantee of tenure; a long period of continuity in employment; a salary structure that puts a premium on continuity in employment; and, in most cases, the protection of a pension plan at retirement. Mandatory retirement also provides, for many, a dignified way of leaving their employment. These substantial benefits must be taken into account in assessing the degree of impairment of the right to equality. The court may also consider the career bargain involved in the remuneration and conditions of employment afforded to academic faculty in assessing the degree of impairment. Even if all these benefits are not enough to remove entirely the finding that discrimination has occurred, then it is submitted that they constitute substantial mitigation of the severity of any violation.

Shewchuk v. Ricard, supra, at 447-449, MacFarlane J.A.
Dolphin Delivery Ltd., supra, at 590-591.

225. Further, the alternative of increased and ongoing assessments of competence would amount to undesirable university sponsored enquiries into matters inevitably involving questions of acadamic freedom (and, therefore, section 2 rights under the Charter). The Court should also reject the Appellants' attempt to derive a windfall gain from the rollback of provisions designed, in part, to improve the conditions of younger academics.

Edwards Books, supra, at 779-80.

3) Proportionality of effect and objective

226. It is respectfully submitted that there is proportionality between the effect of the limit and the objective which has been identified having regard to the nature of the right in question, the limited extent of any infringement of rights and the limited degree to which mandatory retirement trenches on social and democratic values.

227. The right to be free of distinctions in law on the basis of age is of relatively recent origin in Canada. Age was not specifically mentioned as a prohibited ground of distinction in paragraph 1(b) of the Canadian Bill of Rights. Under the Bill of Rights, the Supreme Court of Canada held that age distinctions in federal corrections legislation were valid.

> Canadian Bill of Rights, R.S.C. 1970, Appendix III.
> R. v. Burnshine, [1975] S.C.R. 693.

228. Age was included as a ground of prohibited discrimination in human rights codes fairly recently, being added to those codes after the enactment of protections against racial, religious and, in some cases, sex-based discrimination. In Ontario, protection against discrimination based on age was first enacted in 1966 and was originally limited, in the employment context, to persons between the ages of 40 and 65.

> Thomas Flanagan, "The Manufacture of Minorities," in Neville & Kornberg, eds., Minorities in the Canadian State (1985), at 115-117.
> Atcheson and Sullivan, supra, at 240-243.
> Judgment at 135-136.

229. The Constitution Act, 1867 itself recognizes that distinctions based on age must be made.

> Constitution Act, 1867, supra, ss.29(2), 84 and 99(2).

232. Further, age is not among enumerated grounds protected from discriminating conduct in numerous international declarations, including the convention on employment and occupational matters adopted by the United Nations in 1988.

Universal Declaration of Human Rights, GA Res. 217 (III), U.N. Doc. A/810 (1948).
Discrimination (Employment and Occupation) Convention, ibid.
International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), 21 UNGAOR, Supp No. 16 at 52, U.N. Doc. A/6316 (1966).

231. Age itself as a ground of distinction is less invidious than those based on "stigmata", namely those characteristics which the individual cannot change, such as sex or race, or should not be expected to change given our constitutional ethos, such as religion. As a ground of distinction based on life cycle, age is differentiated by the fact that all individuals will pass through a full range of ages and be subject to the pains or benefits peculiar to any one of them.

Flanagan, supra, at 109-114.
Tarnopolsky W., "The Equality Rights" in W. Tarnopolsky & T. Beaudoin, The Canadian Charter of Rights and Freedoms (1982), at 395.

232. Accordingly, it is submitted that the protection of persons against all distinctions based on age is not a "superordinate" value of our society, and the age guarantees of section 15 should be interpreted with some flexibility.

Re Southam (No. 1), supra.
Flanagan, supra, at 118-119.
Le Societe des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch, [1986] 1 S.C.R. 549.

233. It is, moreover, submitted that the values protected by mandatory retirement in the universities (freedom of thought, belief, opinion and expression) are themselves significant and compelling. The value of protecting them should outweigh the small harm that may be done by the mandatory retirement rule.

234. It is submitted that mandatory retirement in the university is the only presently available means of preserving the values it protects.

Respondents' Factum, supra, paras.15-63.

(c) **Retirement policies in other "free and democratic societies"**

235. In determining whether a law which limits a right contained in the Charter is a reasonable limit demonstrably justified in a free and democratic society under section, the court is entitled to take into account and derive assistance from the approach taken by other acknowledged free and democratic societies in similar fields.

> Federal Republic of Germany v. Rauca (1982), 38 O.R. (2d) 705 at 716-17 (H.C.).

236. In assessing the assistance that can be derived from the approaches taken in other free and democratic societies the courts have attempted to discern whether a majority approach to the issue exists.

> Re Ontario Film and Video Appreciation Society, supra.

237. It is submitted that the majority of acknowledged free and democratic societies, which includes Great Britain, Ireland, West Germany, Japan, Norway, Italy, and Australia, have to an extent established either by legislation or practice that an individual may be required to retire from employment at a particular age.

GREAT BRITAIN	- Employment Protection (Consolidated) Act 1978, (U.K.), 1978, c.44, s.64(10)(b) as amended; Hepple and O'Higgins Encyclopedia of Labour Relations Law (1986), vol. 2, para.1868.
IRELAND	- Unfair Dismissals Act, 1977, 1977, No.1, s.2(1)(b); Redundancy Payments Act, 1973, (Ire.), 1973, No. 11, s.3(1); Blainpain, International Encyclopedia for Labour Law and industrial Relations, (1987), vol. 6, para. 269, 270 and 284.
WEST GERMANY	- Blainpain, International Encyclopedia For Labour Law and Industrial Relations, (1985), vol. 5, para.362-364.
JAPAN	- Sodei, T., "A Description of Mandatory Retirement in Japan", Aging and Work, 1981; Blainpain, International Encyclopedia for Labour Law and industrial Relations, (1987), vol. 6, para. 44.

Osako, M., "How Japanese Firms Cope with Effects of an Aging Labour Force", Aging and Work, vol. 5, No.1, 1982.

NORWAY - Ginsberg, "Flexible and Partial Retirement for Norwegian and Swedish Workers", Monthly Labour Review, October, 1985, at 34.

ITALY - Blainpain, International Encyclopedia For Labour Law and Industrial Relations, (1988, Legislation, Vol. II at 245-247).

- Act To Issue Rules for Dismissal of Individual Employees, 1966, No. 604, s.11.

AUSTRALIA - Commonwealth Employees (Redeployment and Retirement) Act, 1979, (Aust.), 1979, No. 52, s.22.

238. The Employment Protection (Consolidated) Act 1978, U.K., c.44, as amended in paragraph 64(1)(b), excepts from the provisions of the Act prohibiting unfair dismissal, the dismissal of an employee upon attaining the age which is the "normal retiring age" for the position, or age 65. Normal retiring age has been held, prima facie, to mean the retiring age laid down in the terms and conditions upon which the employee was employed.

Waite v. Government Communications Headquarters, [1983] I.C.R. 653 (H.L.).

239. Moreover, with respect to the retirement of tenured higher education faculty, even governments which have legislatively extended age discrimination protection to all ages have tended to exempt tenured faculty from the extended protection.

UNITED STATES

Federal - Age Discrimination in Employment Act Amendments of 1986, P.L. 99-592, s.6.

State

CALIFORNIA - California Government Code, 12942.

MASSACHUSETTS - Massachusetts General Law Ann. ch.151B, s.4(17)(c).

NEW JERSEY - New Jersey Revised Statutes, as amended by c.73, L.1985.

NEW YORK - N.Y. Exec. art. 15 section 296, 3(f).

VERMONT - Vermont Statutes Ann., as amended by H. 51 L. 1985, effective July 1, 1985, s.495(g).

CONNECTICUT - Connecticut General Statutes, as amended, s.47a-60(10)(b)(1)(a).

NETHERLANDS - Blainpain, International Encyclopedia for Labour Law and Industrial Relations (1985), vol. 7, at para.109-10.

240. The rationale in the United States for legislatively exempting tenured faculty from the expanded federal age discrimination laws was stated, upon the introduction of Bill H.R. 4154 to the House of Representatives, to be special demographic problems of universities where most faculty openings occur only upon the death or retirement of faculty members and that immediate elimination of mandatory retirement for faculty members hired during a time of expanding enrollments might result in a shortage of openings for new college faculty members.

U.S. Congressional Records, House, October 17, 1986, H 11283

241. Similarly, the Courts in the United States have recognized and accepted legitimate government interests which are furthered by legislation or policies that permit the retirement of tenured faculty at a particular age.

Mittelstaedt v. The Board of Trustees of the University of Arkansas, supra, at 964-5.
Palmer v. Ticcione, supra.
Lamb v. Scripps, supra.
Klain v. Pennsylvania State University, supra.

242. Furthermore, there exists scholarly approval in the United States of the aforementioned rationales together with the notion of a prearranged retirement age as an integral part of the tenure bargain and the reasonableness of age as a criterion for the retirement of tenured faculty.

Ruehausen, O.M., supra.

D. THE CONSTITUTIONALITY OF SECTION 9(a) OF THE ONTARIO HUMAN RIGHTS CODE

(a) General Principles

243. It is respectfully submitted that the Ontario Court of Appeal was correct in limiting its consideration of the constitutional issues raised in this appeal to the effect of the Charter on provisions for mandatory retirement with respect to members of the teaching staff of universities and university librarians in the Province of Ontario.

Judgment at 90-91, 137.

244. It is well settled that the function of the courts is not to rule on abstract or hypothetical propositions of law when the decision cannot be given practical, direct and immediate effect between the parties. The reference procedure was designed to allow for judicial intervention in other cases.

Coca-Cola Company of Canada Limited v. Mathews, [1944] S.C.R. 388.
Re Maltby and A.G. of Saskatchewan (1984), 13 C.C.C. (2d) 308 (Sask C.A.).
Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 19.

245. This is particularly true in the context of evolving Charter jurisprudence, a [illegible] process in which judicial comment is restricted to what is required by the issues before the Court. It would be improper for a court to make a determination of the constitutional validity of a legislative provision with respect to matters not in issue or by invoking the rights of hypothetical third parties.

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 at 383.
R. v. Smith, [1987] 1 S.C.R. 1045 at 1084-1085, McIntyre, J. (in dissent).
Newfoundland and Labrador Housing Corporation v. Williams (1987), 190 A.P.R. 269 (Nfld. C.A.) at 272-274.

246. Accordingly, to the extent that the Appellants herein raise alleged infringements of section 15 rights or alleged failure to justify infringements under section 1 in respect of parties not before the Court on these applications, the appeals do not raise justiciable issues appropriate for determination by this Honourable Court.

(b) **Section 15 of the Charter - Equality Rights**

(i) Parts I and II of the Code

247. It is important to note that while part I of the Code establishes the right to equal treatment without discrimination in a variety of contexts including employment Part II of the Code entitled "Interpretation and Application" consists, with some exceptions, of provisions which limit what would otherwise be unrestricted rights established by Part I.

(ii) The validity of section 9(a) of the Code

248. While it is admitted that section 9(a) is a "law" within the meaning of section 15, the Respondents repeat and rely on the submissions at paragraphs 187 to 189 of the Respondents' Factum with respect to the question of whether section 9(a) of the Code represents the denial of a benefit within the meaning of section 15(1) of the Charter.

249. It is submitted that section 9(a) of the Code must be viewed in its social, economic and legislative context. Existing legislative provisions providing certain benefits to individuals over the age of 65 form part of the legislative scheme of which section 9(a) is only one part. Extensive benefits to individuals over age 65 ran[illegible]om those found in social security statutes to section 14 of the Code itself. Section 9(a) effects a compromise between competing social and economic goals, the fine tuning and administration of which is properly left to the legislature.

Respondents' Factum, paras.64-99

250. With respect to the questions of whether persons in employment relationships who are "similarly situated" are similarly treated by virtue of the combined effects of sections 4(1) and 9(a) of the Code, the Respondents repeat and rely on the submissions made in paragraphs 190-193 of the Respondents' Factum.

251. With respect to the question of whether section 9(a) of the Code constitutes discrimination within the meaning of section 15(1) of the Charter, the Respondents repeat and rely on the submissions made at paragraphs 194 to 208 of the Respondents' Factum. When viewed comprehensively in context, while the Code

contains distinctions based on age, these distinctions cannot be viewed as discriminatory. Overall, the law deals with various groups differently but with equal consideration.

Atcheson and Sullivan, supra.

252. It is further submitted that section 9(a) of the Code is designed to achieve a legitimate social purpose that cannot be viewed as discriminatory.

Respondents' Factum, paras.64-99.

253. Further, the Respondents specifically submit that in the context of the totality of legislative and social programs concerning those over 65, the provisions of section 9(a) of the Code are not invidious, irrational or unfair.

254. Accordingly, it is submitted that section 9(a) of the Code, does not contravene the guarantees of section 15 of the Charter.

(c) **Application of section 1 of the Charter to section 9(a) of the Code**

255. If it is held that section 9(a) of the Code does contravene the guarantees of section 15 of the Charter, it is submitted that section 9(a) is nonetheless valid because it is a reasonable limit demonstrably justifiable in a free and democratic society.

(i) Importance of the Objective

256. Section 9(a) of the Code arises out of concerns which are of sufficient importance to justify a limitation on section 15 rights. These concerns are:

(a) the sharing of limited job opportunities with younger workers;
(b) employee and employer retirement and personnel planning;
(c) avoidance of invidious assessments of older workers as to competence and productivity; and
(d) the implied bargain as to life time or deferred compensation in the work force which is premised on a certain end to the employment relationship.

(ii) The Means Chosen are Proportional

1) Rational Connection

257. It is submitted that mandatory retirement is rationally related to the objectives outlined above in that it frees up jobs for younger workers, provides a fixed point at which both employee and employer can plan for retirement of the individual worker from the work force, avoids the necessity for continuous assessment of competence and productivity and allows long term, deferred income arrangements to function. Further, for the reasons set out above, age 65 is within a justifiable range of reasonableness, empirically supported, and congruent with a commonly accepted threshold for the availability of various benefits and social programas.

2) Least Impairment

258. For the reasons advanced by The Attorney General of Ontario, it is respectfully submitted that section 9(a) of the Code is, in its entirety, the least impairment reasonably possible in the circumstances and represents a limited though flexible legislative response to the compelling objectives which it is designed to foster. Any conditions of employment for those over the age of 65, whether by legislation or private contractual arrangement, would inevitably have to accomodate these concerns which have been identified as pressing and substantial. Section 9(a) is a practical and fair compromise of the competing interests, permitting flexible implementation of a range of possible accomodations which may involve compensation, workload, job responsibilities and the like. Without section 9(a), the accomodation of these concerns would not be possible under the provisions of section 4(1) of the Code. Further, the legislative balance of competing employment and economic interests is an ongoing process, e.g., the recent amendments to Ontario's pension laws.

Edwards Books, supra at 772, 776-7, 780-2, Dickson C.J.
An act to revise The Pension Benefits Act S.O. 1987, c.35.

259. In the alternative, it is respectfully submitted that section 9(a) of the Code should be upheld as not over-inclusive because the limit on the protection against age discrimination is the least impairment of the rights of the class of persons who allege their rights under section 15 have been infringed, i.e., the teaching faculty and librarians of the Respondent universities. The procedure and evidentiary reasons for this approach have been set out at paragraphs 244 to 247

above. There are, in addition, sound reasons of principle firmly rooted in constitutional jurisprudence for adopting this view.

260. The constitutional adjudication of individuals' rights in relation to social and economic laws of general application raises essentially different interpretive and remedial problems than do traditional constitutional cases involving the division of powers and the question of ultra vires. Accordingly, it is appropriate for the Courts to develop new and more flexible approaches to the interrelationship of constitutional rights and laws of general application. Complete invalidation of any laws of general application is, in any event, an inappropriate and blunt instrument for adjudicating competing but valid claims to economic benefits in our society.

> C. Rogerson, "The Individual Search for Appropriate Remedies under the Charter" in Sharpe, ed. (1986) Charter Litigation, at 223-305.
> P. Cote, "La Preseance de la Chartre Canadienne des droits et libertes" (1984), 18 R.J.T. 105.

261. The Court of Appeal's approach reflects that taken by the United States Supreme Court in similar circumstances. In the U.S., the courts endeavour not to entirely invalidate impugned statutory provisions, but rather to adjudicate only the rights of the parties directly before the court. Courts are not roving commissions assigned to pass judgement on the nation's laws.

> United States v. Raines, 362 U.S. 17, 21-2 (1960).
> Broadrick v. Oklahoma, 413 U.S. 601, at 610-11 (1973), White J.

262. This constitutional doctrine is more than a standing requirement; it is designed also to ensure that the role of the court is limited to adjudicating questions determined by the precise facts before it.

> Brocket v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985).
> Secretary of State of Maryland v. Joseph H. Munson Company, Inc., 104 S. Ct. 2839, 2848 (1984).

E. REMEDIAL ISSUES

(a) Constitution Act, 1982, section 52

267. If this Honourable Court concludes that section 9(a) of the Code cannot be justified as set out above in accordance with the criteria enunciated in Oakes, it is respectfully submitted that the remedial provisions of section 52 of the Constitution Act, 1982, in any event, mandate the application of the principles outlined in paragraphs 258 to 265 of the Respondents' Factum.

R. v. Rao, supra, at 109.
Re Rocket and Royal College of Dental Surgeons, supra, at 651.
Rogerson, supra, at 235 and 239.

268. It is submitted that the Appellants, for the reasons outlined at paragraphs 15 to 63 above, are within a sphere of justifiability in relation to the universities' mandatory retirement practices permitted by section 9(a) of the Code.

269. It is respectfully submitted that section 9(a) of the Code should, accordingly, only be declared invalid to the extent of its inconsistency, i.e., to the extent that these provisions cannot be justified pursuant to section 1 of the Charter.

270. Section 9(a) is for the reasons set out above, therefore, valid at least to the extent of its limited application to the case at bar.

(b) Severability of Section 9(a) of the Code

271. If this Honourable Court concludes that section 9(a) of the Code is inconsistent with section 15 of the Charter and that section 9(a) of the Code is of no force or effect in its entirety, it is respectfully submitted that that section itself may only be struck down if it is first concluded that section 9(a) is severable from the other provisions of the Code.

272. Where one part of a statute is struck out and where it can be assumed that the legislature would not have enacted what survives without enacting the part

that has been struck out, the whole of the relevant portion of the enactment should fail.

A.G. Alberta v. A.G. Canada, [1947] A.C. 503 at 518-519 (P.C.), Viscount Simon.
Hogg, P., supra, at 325-327.

273. It is submitted that in enacting the provisions of the Code relating to age, the Legislature has promulgated a balanced, comprehensive system with respect to discrimination in the regulation of employment matters. The elimination of one part of that system would produce a result which was never intended, i.e., a blanket prohibition against age-based classifications in private employment relations in Ontario.

274. It is respectfully submitted that the proper remedy is not to strike out only section 9(a) of the Code but all of the provisions of Parts I and II that make reference to age. Only in this way could wholesale judicial revision of provincial legislation be avoided. Such a result would permit the Legislature to put in place another comprehensive scheme which could contain justifiable limitations to the rights contained therein. Many exceptions may be necessary to prevent undue hardship or arbitrary windfall gains as a result of a general prohibition of mandatory retirement.

Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights, supra, at 10.

275. It is further submitted that to isolate section 9(a) of the Code from the remainder of the age provisions of the Code and to strike out only that one section as being invalid on constitutional grounds would be to rewrite the statute and produce a benefit the nature of which the Legislature was under no obligation to create, did not by the original enactment of the Code create and did not intend to create.

Hunter v. Southam Inc., supra, at 659-50 (S.C.C.), Dickson J.

PART IV - ORDER REQUESTED

276. The Respondents respectfully request that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PART V

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