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

SUPPLEMENTARY FACTUM SUBMITTED ON BEHALF OF THE RESPONDENT UNIVERSITIES

TORY, TORY, DesLAURIERS & BINNINGTON
Barristers & Solicitors
IBM Tower, Suite 3200
Toronto-Dominion Centre
Toronto, Ontario M5K 1N2

Mary Eberts (416) 865-7307
Michael A. Penny (416) 865-7526

Solicitors for the Respondent
The Board of Governors of
Laurentian University

CASSELS, BROCK & BLACKWELL
Barristers & Solicitors
40 King Street West
Suite 2100
Toronto, Ontario
M5H 1B5

S. John Page (416) 869-5481
John C. Murray (416) 368-3600

Solicitors for the Respondent
The Governing Council of the
University of Toronto

HICKS, MORLEY, HAMILTON STEWART, STORIE
Barristers & Solicitors
30th Floor
Toronto-Dominion Tower
Toronto-Dominion Centre
Box 371
Toronto, Ontario M5K 1K8

Christopher Riggs (416) 362-1011
Michael A. Hines (416) 362-1011

Solicitors for the Respondent
Board of Governors of the
University of Guelph

CAMPBELL, GODFREY & LEWTAS
Barristers & Solicitors
Suite 3600
Toronto-Dominion Centre
Toronto, Ontario M5K 1C5

George W. Adams (416) 868-3490
Richard J. Charney (416) 868-3490

Solicitors for the Respondent
Board of Governors of York University

SCOTT & AYLEN
60 Queen Street
Ottawa, Canada
K1P 5Y7

James I. Minnes (613) 237-5160

Ottawa Agents for the Respondent Universities

TO: SACK, CHARNEY, GOLDBLATT & MITCHELL
Barristers & Solicitors
20 Dundas Street West
Suite 1130
Toronto, Ontario M5G 2T8

Jeffrey Sack
James K. McDonald
Steven M. Barrett

(416) 977-6070

Solicitors for the Appellants

AND TO: SOLOWAY, WRIGHT, HOUSTON, GREENBERG, O'GRADY, MORIN
Barristers & Solicitors
99 Metcalfe Street
Ottawa, Ontario
K1P 6L7

Robert E. Houston
(613) 782-3222

Ottawa Agent for the Appellants

AND TO: MINISTRY OF THE ATTORNEY GENERAL
8th Floor
720 Bay Street
Toronto, Ontario
M5G 2K1

Janet E. Minor
Robert E. Charney

(416) 326-4137

Counsel for the
Attorney General of Ontario

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

SUPPLEMENTARY FACTUM OF THE RESPONDENT UNIVERSITIES

1. On February 2, 1989, the decision of this Honourable Court in Law Society of British Columbia et al v. Andrews et al was released. Factums in the instant case had, by that date, already been filed by the parties with the Court. The purpose of this Supplementary Factum is to address the Andrews decision as it relates to the interpretation and application of Sections 15 and 1 of the Charter in this case.

Section 15

(a) The **Andrews** Decision

2. Section 15 does not establish a general guarantee of equal treatment as between individuals or groups within society. It is concerned only with the application of law.

per McIntyre J., pp. 7-8

Factum of the Respondent Universities, paras. 169-177

3. To be in violation of Section 15, laws which treat individuals or groups unequally must also be "discriminatory".

per McIntyre J., page 16

Factum of the Respondent Universities, paras. 179 and 182

4. In evaluating the concept of "discrimination" under Section 15, the direction that "those who are similarly situated shall be similarly treated" cannot be mechanically applied as a fixed rule or formula. This guideline must be used with due regard to 1) the content of the law, 2) its purpose and 3) its impact upon those to whom it does and does not apply.

per McIntyre J., pp. 9-12

5. A law which draws distinctions and imposes unequal burdens and/or establishes unequal benefits is not ipso facto in violation of Section 15. "Equality" will frequently require the establishment of such distinctions through legislation.

per McIntyre J., pp. 12-13

6. The real purpose of Section 15 is to ensure that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

per McIntyre J., p. 9

per LaForest J., pp. 2-3

Factum of the Respondent Universities, para. 183

7. This purpose is realized through the inclusion in Section 15 of the requirement that the impugned law not be "discriminatory". The law in question must not limit an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.

per McIntyre J., p. 18, citing from C.N.R. Co. v. Canada (Canadian Human Rights Commission) [1987] 1 S.C.R. 1114

8. Put another way, the inquiry must focus upon whether or not there is "discrimination" in the pejorative sense of that word, based upon stereotypical assumptions and resulting in "prejudicial" disadvantage.

per McIntyre J., at pp. 24-25, citing from Smith, Kline & French Laboratories v. Canada (Attorney General) [1987] 2 F.C. 359

9. Thus, the words "without discrimination" require more than a mere finding of an adverse distinction between the treatment of individuals or groups identified by the enumerated categories of Section 15.

per McIntyre J., at pp. 25-26

Factum of the Respondent Universities, paras. 185 and 194-197

10. Section 15 therefore both permits consideration and requires proof of such factors as irrationality, stereotypical assumptions and prejudice even where adverse distinctions are made on the basis of such enumerated factors as age. If this were not the case;

"... such universally accepted and manifestly desirable legal distinctions as those prohibiting children...from driving motor vehicles will be viewed as violations of fundamental rights and be required to run the gauntlet of s. 1."

per McIntyre J., pp. 25-26, citing from Law Society of British Columbia et al v. Andrews et al (1986), 27 D.L.R. (4th) 600 (B.C.C.A.)

(b) Application to the Instant Case

11. The Respondent Universities have not attempted to apply the "similarly situated" analysis mechanically, but have instead applied it with due regard to the content, purpose and impact of their mandatory retirement policies and the provisions of Section 9(a) of the Ontario Human Rights Code, 1981.

Factum of the Respondent Universities,
paras. 190-193 and 250

12. With respect to the issue of "discrimination", neither the mandatory retirement policies of the Respondent Universities nor Section 9(a) are based upon irrelevant personal differences or stereotypical assumptions. Rather they are primarily motivated by administrative, institutional and socio-economic considerations which typically assume nothing about those who reach the age of sixty-five.

Factum of the Respondent Universities,
paras. 15 - 99

Section 1

(a) The Andrews Decision

13. Three of the six members of the Court who participated in the judgment approached the Section 1 issue

from a perspective which requires a formal and stringent application of Section 1 criteria.

per Wilson J., pp. 4-10, L'Heureux-Dube J. and Dickson C.J.C., concurring

14. By contrast, the other three members of the Court who participated in the judgment approached the issue from a perspective which emphasizes a more flexible application of Section 1.

per McIntyre J., pp. 28-37, Lamer J., concurring

per LaForest J., p. 8

15. It is submitted that where the legislation challenged under Section 15 concerns administrative and regulatory matters, the requirement of a "pressing and substantial" purpose is too stringent. Rather, the test should be whether the limitation represents a legitimate exercise of legislative power for the attainment of a desirable social objective which warrants overriding constitutionally protected rights.

per McIntyre J., p. 29

16. Once such a legitimate purpose has been established it should not be necessary to meet any mechanically applied formula concerning "proportionality". Had Parliament intended that certain fixed criteria be proven in every case involving Section 1, such a formula

would have been clearly and expressly established in the Charter itself.

17. The Courts must interpret the words chosen by Parliament in drafting the Charter. The essence of Section 1 is found in the expression "reasonable", an expression which traditionally in the law of Canada has denoted flexibility and realism rather than rigidity and formalism.

per McIntyre J., p. 36

per LaForest J., p. 8

18. In other words, there is no single test under Section 1. The ultimate question is whether the infringement is reasonable and demonstrably justifiable.

per McIntyre J., p. 29

19. In cases where the broad and abstract provisions of Section 15 are involved, a court should not seek to determine whether the Legislature's response to a perceived need is right or wrong, or to require of the Legislature a standard of perfection. Where legislation of an administrative or regulatory character is found to infringe Section 15, the test under Section 1 will be satisfied if it can reasonably be said that the legislation is conducive to the desired result.

per McIntyre J., p. 34

(b) Application to the Instant Case

20. It is submitted that both the Respondent Universities in establishing their retirement policies and the Legislature in enacting Section 9(a) of the Code have exercised their respective powers in order to achieve desirable social objectives which, in the circumstances at hand, warrant overriding the rights of the Applicants under Section 15 of the Charter.

Factum of the Respondent Universities, paras. 218-220 and 256

21. It is further submitted that, given the nature of the alleged infringement, the nature of the Charter right involved and the administrative/regulatory nature of the objectives, the limitations in question, being clearly conducive to the desired result, are on the whole both reasonable and demonstrably justifiable.

Factum of the Respondent Universities, paras. 221-234 and 257-266

Conclusion

22. It is therefore respectfully submitted that neither the retirement policies of the Respondent Universities nor Section 9(a) of the Code infringe Section 15(1) of the Charter as interpreted in the Andrews decision. In any event, any infringement is saved under Section 1 of the Charter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Christopher G. Page

Michael A. Hines

of counsel for the Respondent the Board of Governors of the University of Guelph

"Mary Eberts" per

Mary Eberts

Michael A. Penny

of counsel for the Respondent the Board of Governors of Laurentian University

George W. Adams per

George W. Adams

Richard J. Charney

of counsel for the Respondent the Board of Governors of York University

John C. Murray per J.P.

John C. Murray

S. John Page

of counsel for the Respondent the Governing Council of the University of Toronto