McKinney *v.* University of Guelph, [1990] 3 S.C.R. 229

David Walter McKinney, Jr. *Appellant*

v.

Board of Governors of the University of Guelph and the Attorney General for Ontario
Respondents

and between

Horacio Roque-Nunez *Appellant*

v.

Board of Governors of Laurentian University and the Attorney General for Ontario
Respondents

and between

Syed Ziauddin *Appellant*

v.

Board of Governors of Laurentian University and the Attorney General for Ontario
Respondents

and between

John A. Buttrick *Appellant*

v.

Board of Governors of York University and the Attorney General for Ontario
Respondents

and between

Bernard Blishen *Appellant*

v.

Board of Governors of York University and the Attorney General for Ontario
Respondents

and between

Tillo E. Kuhn *Appellant*

v.

Board of Governors of York University and the Attorney General for Ontario
Respondents

and between

Hollis Rinehart, on his own behalf and on behalf of all other members of the York University Faculty Association
Appellants

v.

Board of Governors of York University and the Attorney General for Ontario
Respondents

and between

Ritvars Bregzis *Appellant*

v.

Governing Council of the University of Toronto and the Attorney General for Ontario
Respondents

and between

Norman Zacour *Appellant*

v.

Governing Council of the University of Toronto and the Attorney General for Ontario
Respondents

and

The Attorney General of Canada,
the Attorney General of Nova Scotia and
the Attorney General for Saskatchewan *Interveners*

indexed as: mckinney *v.* university of guelph

File No.: 20747.

1989: May 16, 17; 1990: December 6.

Present: Dickson C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Applicability of Charter -- Government -- Whether or not university "government" so as to attract Charter review of policies -- If so, whether or not mandatory retirement policy "law" -- Canadian Charter of Rights and Freedoms, ss. 15, 32.

Constitutional law -- Charter of Rights -- Equality rights -- Equality before the law -- Age discrimination -- Mandatory retirement at age 65 -- Whether or not mandatory retirement policy "law" -- If so, whether or not s. 15(1) of the Charter infringed -- Canadian Charter of Rights and Freedoms, ss. 15, 32.

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* Chief Justice at the time of hearing.

Consitutional law -- Civil rights -- Age discrimination -- Protection against age discrimination in employment not extending to those over 65 -- Whether provision infringing s. 15 of the Charter -- If so, whether justified under s. 1 -- Canadian Charter of Rights and Freedoms, ss. 1, 15 -- Human Rights Code, 1981, S.O. 1981, c. 53, s. 9(a).

The appellants, eight professors and a librarian at the respondent universities, applied for declarations that the universities' policies of the mandatory retirement at age 65 violate s. 15 of the *Canadian Charter of Rights and Freedoms* and that s. 9(*a*) of the *Human Rights Code, 1981*, by not treating persons who attain the age of 65 equally with others, also violates s. 15. They also requested an interlocutory and permanent injunction and sought reinstatement and damages. The mandatory retirement policies had been established through various combinations of resolutions of the board, by-laws, pension plan provisions and collective agreements, depending on the university.

Several of the appellants filed complaints with the Ontario Human Rights Commission but the Commission refused to deal with the complaints because its jurisdiction was confined with respect to employment to persons between eighteen and sixty-five. It advised the appellants that it would review its position when their application concerning the constitutional validity of s. 9(*a*) was decided.

The High Court dismissed appellants' application and a majority of the Court of Appeal upheld that decision. Five constitutional questions were stated for consideration by this Court: (1) whether s. 9(*a*) of the *Human Rights Code, 1981* violated the rights guaranteed by s. 15(1) of the *Charter*; (2) if so, whether it was justified by s. 1 of the *Charter*; (3) whether the *Charter* applies to the mandatory retirement provisions of the respondent universities; (4) if applicable, whether their respective mandatory retirement provisions infringe s. 15(1); and finally, (5) if

s. 15(1) is infringed, whether the respective mandatory retirement provisions are demonstrably justified by s. 1.

The Attorneys General of Canada, Nova Scotia and Saskatchewan intervened.

Held (Wilson and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and La Forest and Gonthier JJ.: The wording of s. 32(1) of the *Charter* indicates that the *Charter* is confined to government action. It is essentially an instrument for checking the powers of government over the individual. The exclusion of private activity from *Charter* protection was deliberate. To open up all private and public action to judicial review could strangle the operation of society and impose an impossible burden on the courts. Only government need be constitutionally shackled to preserve the rights of the individual. Private activity, while it might offend individual rights, can either be regulated by government or made subject to human rights commissions and other bodies created to protect these rights. This Court, in limiting the *Charter*'s application to Parliament and the legislatures and the executive and administrative branches of government in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, relied not only on the general meaning of government but also on the way in which the words were used in the *Constitution Act, 1867*.

The fact that an entity is a creature of statute and has been given the legal attributes of a natural person is not sufficient to make its actions subject to the *Charter*. The *Charter* was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing.

While universities are statutory bodies performing a public service and may be subjected to the judicial review of certain decisions, this does not in itself make them part of government within the meaning of s. 32. The basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision makers.

The fact that a university performs a public service does not make it part of government. A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty and is not mandated by s. 32. Although the *Charter* is not limited to entities discharging inherently governmental functions, more would have to be shown to make them subject to *Charter* review than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments.

The universities are legally autonomous. They are not organs of government even though their scope of action is limited either by regulation or because of their dependence on government funds. Each has its own governing body, manages its own affairs, allocates its funds and pursues its own goals within the legislated limitations of its incorporation. Each is its own master with respect to the employment of professors. The government has no legal power to control them. Their legal autonomy is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom.

The actions of universities do not fall within the ambit of the *Charter* because they do not form part of the government apparatus. The universities were not implementing government policy in establishing mandatory retirement. If, however, universities formed part of the

"government" apparatus within the meaning of s. 32(1) of the *Charter*, their policies on mandatory retirement would violate s. 15 of the *Charter*.

For section 15 of the *Charter* to come into operation, the alleged inequality must be one made by "law". Had the universities formed part of the fabric of government, their policies on mandatory retirement would have amounted to a law for the purposes of s. 15 of the *Charter*. Indeed, in most of the universities, these policies were adopted by the universities in a formal manner. The fact that they were accepted by the employees should not alter their characterization as law, although this would be a factor to be considered in deciding whether under the circumstances the infringement constituted a reasonable limit under s. 1 of the *Charter*.

Acceptance of a contractual obligation might well, in some circumstances, constitute a waiver of a *Charter* right especially in a case like mandatory retirement, which not only imposes burdens but also confers benefits on employees. On the whole, though, such an arrangement would usually require justification as a reasonable limit under s. 1 especially where a collective agreement may not really find favour with individual employees subject to discrimination.

On the assumption that these policies are law, they are discriminatory within the meaning of s. 15(1) of the *Charter*, given *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, since the distinction is based on the enumerated personal characteristic of age. The *Charter* protects not only from direct or intentional discrimination but also from adverse impact discrimination. The similarly situated test has not survived *Andrews*.

The distinction made in the universities' policies, though based upon an enumerated ground to the disadvantage of individuals aged 65 and over, constitutes a reasonable limit under s. 1 of the *Charter* to the right to equality accorded under s. 15.

The combined objectives of the impugned provisions meet the "objectives test". Excellence in higher education is an admirable aim and should be fostered. The preservation of academic freedom too is an objective of pressing and substantial importance.

Mandatory retirement is rationally connected to the objectives sought. It is intimately tied to the tenure system which undergirds the specific and necessary ambience of university life and ensures continuing faculty renewal, a necessary process in enabling universities to be centres of excellence on the cutting edge of new discoveries and ideas. It ensures a continuing, and necessary, infusion of new people. In a closed system with limited resources, this can only be achieved by departures of other people. Mandatory retirement achieves this in an orderly way that permits long-term planning both by the university and the individual.

In assessing whether there has been minimal impairment of a consitutional right, consideration must be given not only to the reconciliation of claims of competing individuals or groups but also to the proper distribution of scarce resources -- here access to the valuable research and other facilities of universities. The universities had a reasonable basis for concluding that mandatory retirement impaired the relevant right as little as possible given their pressing and substantial objectives. Against the detriment to those affected must be weighed the benefit of the universities' policies to society. Academic freedom and excellence is necessary to our continuance as a lively democracy. Staff renewal is vital to that end. It ensures infusion of new people and new ideas, a better mix of young and old that is a desirable feature of a teaching staff, and better access to the universities' outstanding research facilities

which are essential to push forward the frontiers of knowledge. As well, while mandatory retirement has serious detrimental effects on the group affected, it has many compensatory features for them, notably an enriched working life comprising a large measure of academic freedom with a minimum of supervision and demeaning performance tests. These are part of the "bargain" involved in taking a tenured position, a bargain long sought by faculty associations and other groups in society.

The effects of the universities' policies of mandatory retirement are not so severe as to outweigh the government's pressing and substantial objectives. The same factors had to be balanced in dealing with deleterious effects.

Following a long history, mandatory retirement at age 65 became the norm and is now part of the very fabric of the organization of the labour market in this country. It has profound implications for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others. This was the situation when s. 9(*a*) of the *Human Rights Code, 1981* was enacted and when the *Charter* was proclaimed. There are factors that must be considered in a *Charter* evaluation.

The section 1 analysis of s. 9(*a*) of the *Human Rights Code, 1981* cannot be restricted to the university context as was done in the court below. The appellants in this case were denied the protection of the Code, not because they were university professors but because they were 65 years of age or over. To restrict its application to the university context would be inconsistent with the first component of the proportionality test enunciated in *R. v. Oakes*.

The objective of ss. 9(*a*) and 4 of the *Human Rights Code, 1981* is to extend protection against discrimination to persons in a specified age range, originally those between 45 and 65.

Those over 65 benefited from numerous other social programmes. In enacting the provision, the Legislature balanced its concern for not according protection beyond 65 against the fear that such a change might result in delayed retirement and delayed benefits for older workers, as well as for the labour market and pension ramifications. Assuming the test of proportionality can be met, these warranted overriding the constitutional right of the equal protection of the law. The Legislature also considered the effect on young workers, but the evidence on this is conjectural, and should be accorded little weight.

The legislation is rationally connected to its objectives as is evident from the considerations concerning whether it impairs the right to equality "as little as possible." But consideration of the propriety of the legislature's cautious conduct involves recognition of the fact that it was motivated by concern for the orderly transition of values. The United Nations Resolution aimed at discouraging age discrimination justifies its recommendation by limiting it to "wherever and whenever the overall situation allows".

Mandatory retirement impairs the right to equality without discrimination on the basis of age as little as possible. The historical origins of mandatory retirement at age 65 and its evolution as one of the important structural elements in the organization of the workplace was very relevant to making this assessment. The repercussions of abolishing mandatory retirement would be felt in all dimensions of the personnel function with which it is closely entwined: hiring, training, dismissals, monitoring and evaluation, and compensation. The Legislature was faced with competing socio-economic theories and was entitled to choose between them and to proceed cautiously in effecting change. On issues of this kind, where there is competing social science evidence, the Court should consider whether the government had a reasonable basis for concluding that the legislation impaired the relevant right as little as possible given the government's pressing and substantial objectives.

The concern about mandatory retirement is not about mere administrative convenience in dealing with a small percentage of the population. Rather, it is with the impact that removing a rule, which generally benefits workers, would have on the compelling objectives the Legislature has sought to achieve. Mandatory retirement is not government policy in respect of which the *Charter* may be directly invoked. It is an arrangement negotiated in the private sector, and it can only be brought into the ambit of the *Charter* tangentially because the Legislature has attempted to protect, not attack, a *Charter* value. The provision in question had no discriminatory purpose.

The legislation simply reflects a permissive policy which allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. Mandatory retirement was not government policy and it was not a condition imposed on employees. It was favoured both by the universities and labour organizations.

For the same considerations as were discussed with the issue of minimum impairment, there was a proportionality between the effects of s. 9(*a*) of the Code on the guaranteed right and the objectives of the provision. The Legislature sought to provide protection for a group which it perceived to be most in need and did not include others for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others. A Legislature should not be obliged to deal with all aspects of a problem at once. It should be permitted to take incremental measures to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal globally with them.

The cut-off point was within a reasonable range according to the evidence and was appropriately defined in terms of age, notwithstanding the fact that age was a prohibited ground of discrimination. The precise point was not an issue for the Court. The *Charter* itself by its authorization of affirmative action under s. 15(2) recognized that legitimate measures for dealing with inequality might themselves create inequalities. Section 1 therefore should allow for partial solutions to discrimination where there are reasonable grounds for limiting a measure.

A measure of deference for legislative choice is invited by the fact that the *Charter* left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. Generally, the courts should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection but the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right.

Per Sopinka J.: The reasons of La Forest J. for concluding that a university is not a government entity for the purpose of attracting the provisions of the *Canadian Charter of Rights and Freedoms* were agreed with. The core functions of a university are non-governmental and therefore not directly subject to the *Charter*. This applies *a fortiori* to the university's relations with its staff which in the case of those in these appeals are on a consensual basis. Some university activities, however, may be governmental in nature.

The determination as to whether the policies and practices of the universities relating to mandatory retirement are law cannot be made on the assumption that the universities are

governmental bodies. In attempting to classify the conduct of an entity in a given case it is important to know, first, that it is a governmental body and, second, that it is acting in that capacity in respect of the conduct sought to be subjected to *Charter* scrutiny. The role of the *Charter* is to protect the individual against the coercive power of the state. This suggests that there must be an element of coercion involved before the emanations of an institution can be classified as law. In order to make the determination in this case that the policies and practices relating to mandatory retirement are law, highly relevant factors would have to be assumed as being present. Such a determination would have a wholly artificial foundation and would simply distort the law. The conclusion that mandatory retirement is justified under s. 1 is more in accord with the democratic principles which the *Charter* is intended to uphold. The contrary position would impose on the whole country a regime not forged through the democratic process but by the heavy hand of the law.

Per Cory J.: The tests put forward by Wilson J. for determining whether entities not self-evidently part of the legislative, executive or administrative branches of government are nonetheless a part of government to which the *Charter* applies were agreed with. So too were her findings that universities form part of "government" for purposes of s. 32 of the *Charter*, that their mandatory retirement policies were subject to s. 15 scrutiny, and that they contravened s. 15 because of discrimination on the basis of age. These policies, however, survive *Charter* scrutiny under s. 1. Although s. 9(*a*) of the *Human Rights Code, 1981* contravenes s. 15(1) of the *Charter* by discriminating on the basis of age, it is a reasonable limit prescribed by law under s. 1.

Per Wilson J. (dissenting): Under s. 32 the *Charter* applies to legislation broadly defined and to acts of the executive or administrative branch of government. It does not apply to private litigation divorced from any connection to government. The government/private action

distinction may be difficult to make in some circumstances but the text of the *Charter* must be respected. The *Charter* was not intended as an alternate route to human rights legislation for the resolution of allegations of private discrimination.

The concept of government purely restrictive of the people's freedom is not valid in Canada. Government has also played a beneficent role. Freedom is not co-extensive with the absence of government; rather freedom has often required the intervention and protection of government against private action.

A concept of minimal state intervention should not be relied on to justify a restrictive interpretation of "government" or "government action". Government today must assume many different roles *vis-à-vis* its citizens and some of these cannot be best effected directly by the apparatus of government itself. Form therefore should not be placed ahead of substance: the *Charter* should not be circumvented by the simple expedient of creating a separate entity and having it perform the role. The nature of the relationship between that entity and government must be examined in order to decide whether when it acts it truly is "government" which is acting.

The following questions should be asked about entities that are not self-evidently part of the legislative, executive or administrative branches of government in order to determine if they are subject to the *Charter*: (1) does the legislative, executive or administrative branch of government exercise general control over the entity in question; (2) does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state; (3) is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

Each test identifies aspects of government in its contemporary context. An affirmative answer to one or more of these questions would be a strong indicator, but no more, that the entity forms part of government. The parties can explain why the body in question is not part of government, or in the case of a negative answer, why some other feature of the entity not touched upon by the questions listed makes it part of government.

Given the various connections between the province and the universities, the state exercises a substantial measure of control over universities in Canada. This control is exercised: (1) through heavy provincial funding; (2) through the statutory basis of their governing structure; (3) through some of their decision-making processes being subject to judicial review; and, (4) through some of their policies and programs requiring government approval.

The government had no direct involvement in the policy of mandatory retirement instituted by the universities. A specific connection between the impugned act and government, however, is not required. The universities' internal policies and practices should have to conform to the dictates of the Constitution. The principle of academic freedom, which is narrow in focus and protects only against the censorship of ideas, is not incompatible with administrative control being exercised by government in other areas.

Education at every level has been a traditional function of government in Canada as evidenced from the legislation dealing with it both before and after Confederation. The universities perform an important public function which government has decided to have performed and, indeed, regards it as its responsibility to have performed. The universities therefore form part of government for the purposes of s. 32 of the *Charter* and their policies of mandatory retirement are subject to scrutiny under s. 15 of the *Charter*.

Section 15 is declaratory of the rights of all to equality under the justice system. If an individual's guarantee of equality is not respected by those to whom the *Charter* applies, the courts must redress that inequality.

The term "law" in s. 15 should be given a liberal interpretation encompassing both legislative activity and policies and practices even if adopted consensually. The guarantee of equality applies irrespective of the particular form the discrimination takes. Discrimination, unwittingly or not, is often perpetuated through informal practices. Section 15 therefore does not require a search for a discriminatory "law" in the narrow context but merely a search for discrimination which must be redressed by the law.

It was not strictly necessary for the Court to come to a definitive conclusion on this aspect of s. 15 in this case. Under the more liberal approach, the policies instituting mandatory retirement constitute "law" within the meaning of s. 15. But even given the most restrictive interpretation of "law", the discrimination took place under the universities' enabling statutes and, accordingly, the denial of equality was effected in one of the prohibited ways.

All the methods used by the universities to institute mandatory retirement constituted "binding rules" in the broad sense. It made no difference that some of the rules came about as a result of collective agreement negotiations. It was, in effect, the "law of the workplace". Mandatory retirement distinguished between different individuals or different classes of individuals in purpose or effect and this distinction gave rise to discrimination.

The purpose of the equality guarantee is to promote human dignity. This guarantee focuses on stereotype and prejudice as the principal vehicles of discrimination and is meant to protect

against them. The similarly situated test has no place in equality jurisprudence because of the centrality of the concept of "prejudice".

The grounds enumerated in s. 15 represent some blatant examples of discrimination which society has at last come to recognize as such. Their common characteristic is political, social and legal disadvantage and vulnerability.

The mere fact that the distinction at issue was drawn on the basis of age did not automatically lead to some kind of irrebuttable presumption of prejudice. Rather it compelled a number of questions. Was there prejudice? Did the mandatory retirement policy reflect the stereotype of old age? Was an element of human dignity at issue? Were academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? The answer was clearly yes and s. 15 was therefore infringed.

The universities derived their authority over employment relations with their faculty and staff through their enabling statutes which in and of themselves do not infringe the *Charter*. The action taken pursuant to them, however, lead to the violation. It was not necessary to determine specifically whether the actual policies compelling retirement at age 65 were "law" within the meaning of s. 1. The measures instituting mandatory retirement, if not reasonable and demonstrably justified, would fall outside the authority of the universities and be struck down.

The mandatory retirement policies cannot meet the minimal impairment test. The test is only met where alternative means of dealing with the stated objective of government are not

clearly better than the one which has been adopted by government. There are better means in this case.

In a period of economic restraint competition over scarce resources will almost always be a factor in the government distribution of benefits. Moreover, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. To treat such price as a justification for denying the constitutional rights of the appellants would completely vitiate the purpose of entrenching rights and freedoms. There may be circumstances, however, in which other factors militate against interference by the courts where the legislature has attempted a fair distribution of resources. Even if fiscal restraint *simpliciter* were a sufficient reason to take a more relaxed approach to the minimal impairment requirement, the facts here do not support the application of this standard of review.

The *Oakes* standard presumptively applies and only in exceptional circumstances should the full rigors of *Oakes* be ameliorated. The respondent universities did not meet the onus of showing that the application of a more relaxed test under s. 1 was appropriate. And even if that test were appropriate, that standard was not met. Clearly better alternatives exist given the documented success of alternative techniques.

Young academics are not the kind of "vulnerable" group contemplated in those cases applying a relaxed standard of minimal impairment. Their exclusion flows solely from the government's policy of fiscal restraint and not from their condition of being young or from the nature of their relationship with the universities.

It is doubtful whether citizens should be able to contract out of equality rights having regard to the nature of the grounds on which discrimination is prohibited in s. 15 and the fact that the equality rights lie at the very heart of the *Charter*. It is not necessary to decide this in this case.

Section 24(1) of the *Charter* confers a broad discretion upon the Court to award appropriate and just relief, including the relief of the type sought by appellants. Ordinary principles of contract should not necessarily dictate which remedies are appropriate and just within the meaning of s. 24(1). The courts should strive to preserve agreements while ridding them of their unconstitutional elements.

Reinstatement was an appropriate and just remedy for righting the wrong caused to the appellants, especially given the paucity of academic positions available and difficulties in relocating. An award of compensatory damages was also just and appropriate because the loss of income and benefits sustained by the appellants arose because of the breach of their s. 15 rights. Compensation for losses which flow as a direct result of the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise. Impecuniosity and good faith are not a proper basis on which to deny an award of compensatory damages.

An interlocutory and a permanent injunction should not be awarded. Appellants were "made whole" by virtue of their having been awarded the declaration, the order for reinstatement and the order for damages.

Section 15 of the *Charter* is infringed by s. 9(*a*) of the *Human Rights Code, 1981* which strips all protection against employment discrimination based upon age from those over the age of 65. Once government decides to provide protection it must do so in a non-discriminatory

manner and this the province failed to do. Indeed, in the field of human rights legislation, the standard of *Charter* scrutiny should be more rigorous, not less, than that applied to other types of legislation. By denying protection to these workers the Code has the effect of reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with.

Section 9(*a*) must be struck down in its entirety. This section did not confine itself to the legislature's stated objective enabling mandatory retirement but extended to permit all forms of age discrimination in the employment context for those over the age of 65. The rational connection branch of the *Oakes* test was accordingly not met. The Court, in choosing the appropriate disposition of the constitutional challenge, must be guided by the extent to which the provision is inconsistent with the *Charter*.

Section 9(*a*) would not, in any event, pass the minimal impairment test which is the second branch of the *Oakes* proportionality test. When the majority of individuals affected by a piece of legislation will suffer disproportionately greater hardship by the infringement of their rights, the impugned legislation does not impair the rights of those affected by it as little as reasonably possible. Even if it is acceptable for citizens to bargain away their fundamental human rights in exchange for economic gain, the majority of working people in the province do not have access to such arrangements.

Per L'Heureux-Dubé J. (dissenting): Universities may not have all of the necessary governmental touchstones to be considered public bodies and yet neither are they wholly private in nature. Their internal decisions are subject to judicial review and their creation, funding and conduct are governed by statute. Some public functions performed by universities, therefore, may attract *Charter* review.

The fact that universities are substantially publicly funded cannot be easily discounted. But the level of government funding does not establish government control over the employment contracts at issue so as to attract *Charter* review. Mandatory retirement was not adopted because of legislative or executive mandate. Furthermore, the universities' private contracts of employment, not their delegated public functions, were alleged to conflict with the *Charter*.

Wilson J.'s broad test for determining the scope of government and government action for the purposes of s. 32(1) of the *Charter* was agreed with. The universities, however, do not qualify even under that test for essentially the reasons outlined by La Forest J. An historical analysis yields the same result as the functional approach: Canadian universities have always fiercely defended their independence. The word "government", as generally understood, never contemplated universities as they were and are constituted. Therefore, questions four and five did not need to be answered.

Section 9(*a*) of the *Human Rights Code, 1981* constitutes unreasonable and unfair discrimination on the basis of age against persons over 65 contrary to s. 15(1) of the *Charter*. It constitutes an arbitrary and artificial obstacle which prevents persons aged 65 and over from complaining about employment discrimination.

The breach of s. 15(1) cannot be justified under s. 1. There is no convincing evidence that mandatory retirement is the *quid pro quo* of the tenure system. The value of tenure is threatened by incompetence, not by the aging process. The presumption of academic incapacity at age 65 is not well founded. The discrepancies between physical and intellectual abilities amongst different age groups may be more than compensated for by increased experience, wisdom and skills acquired over time. There is therefore no pressing and substantial objective addressed by the mandatory retirement policy.

Even assuming a legitimate objective exists, the means used are too intrusive. Persons over 65 are excluded from the protection of the Code solely because of age and, regardless of circumstances, are denied access to protective and remedial human rights legislation covering employment. Since retirement was set at 65, advances in medical science and living conditions have significantly extended life expectancy and improved the quality of life. An "elite" group of people can afford to retire, but the adverse effects of mandatory retirement are most painfully felt by the poor. Women are particularly affected as they are less likely to have adequate pensions. There is no reasonable justification for a scheme which sets 65 as an age for compulsory retirement.

Section 9(*a*) of the Code is severable and accordingly should be struck out in its entirety as unconstitutional.

Cases Cited

By La Forest J.

Considered: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; **distinguished**: *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (leave to appeal denied, [1986] 1 S.C.R. xii); **referred to**: *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Re Bhindi and British Columbia Projectionists* (1986), 29 D.L.R. (4th) 47; *Martineau v. Matsqui Institution Disciplinary Board*

(No. 2), [1980] 1 S.C.R. 602; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193; *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489; *Greenya v. George Washington University*, 512 F.2d 556 (D.C. Cir. 1975); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Bakke v. Regents of the University of California*, 438 U.S. 265 (1978); *Roth v. United States*, 354 U.S. 476 (1957); *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *R. v. Oakes*, [1986] 1 S.C.R. 103; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Lamb v. Scripps College*, 627 F.2d 1015 (1980); *Palmer v. Ticcione*, 576 F.2d 459 (1978); *Beauregard v. Canada*, [1986] 2 S.C.R. 56.

By Wilson J. (dissenting)

RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1988] 2 W.W.R. 718; *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Stoffman v. Vancouver Gen. Hosp.* (1988), 21 B.C.L.R. (2d) 165; *Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board* (1987), 58 O.R. (2d) 545; *R. v. Therens*, [1985] 1 S.C.R. 613; *Reference Re Workers' Compensation Act, 1983*, [1989] 1 S.C.R. 922; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695; *R. v. S. (S.)*, [1990] 2 S.C.R. 254; *Canadian National Railway Co. v. Canada (Canadian Human*

Rights Commission), [1987] 1 S.C.R. 1114; *R. v. Thomsen*, [1988] 1 S.C.R. 640; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Behram Khurshid v. State of Bombay*, A.I.R. (42) 1955 Supreme Court 123; *Basheshar Nath v. Commissioner of Income-tax*, A.I.R. (46) 1959 Supreme Court 149; *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Bute v. Illinois*, 333 U.S. 640 (1948); *Brookhart v. Janis*, 384 U.S. 1 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Haddad v. U.S.*, 349 F.2d 511 (1965); *Zap v. United States*, 328 U.S. 624 (1946); *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513.

By L'Heureux-Dubé J. (dissenting)

Harelkin v. University of Regina, [1979] 2 S.C.R. 561; *Harrison v. Univ. of B.C.* (1988), 21 B.C.L.R. (2d) 145; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113; *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Headly v. Public Service Commission Appeal Board* (Can.) (1987), 72 N.R. 185; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202; *Alberta (Human Rights Commission) v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561; *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297.

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Act for the establishment of Free Schools and the advancement of Learning in this Province, R.S.L.C. 1845, Class I, c. 2.

Act respecting Public Schools, S.O. 1877, c. 204.

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Act to Improve the Common and Grammar Schools of the Province of Ontario, S.O. 1871, c. 33.

Act to incorporate the College of Chambly, R.S.L.C. 1845, Class I, c. 4.

Act to make better provision for promotion of superior Education and the establishment and support of Normal Schools in Lower Canada and for other purposes, S.L.C. 1856, c. 54.

Act to provide for the establishment of Normal Schools, R.S.L.C. 1845, Class I, c. 3.

Act to repeal certain Acts therein mentioned, and to make further provision for the establishment and maintenance of Common Schools throughout the Province [Common Schools Act], S. Prov. C. 1841, c. 18.

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APPEAL from a judgment of the Ontario Court of Appeal (1987), 63 O.R. (2d) 1, 46 D.L.R. (4th) 193, 37 C.R.R. 44, dismissing an appeal from a decision of Gray J. (1986), 57 O.R. (2d) 1, 32 D.L.R. (4th) 65, 14 C.C.E.L. 1, refusing to deal with complaints for want of jurisdiction. Appeal dismissed, Wilson and L'Heureux-Dubé JJ. dissenting.

Jeffrey Sack, Q.C., *James K. McDonald*, *Steven M. Barrett* and *Ethan Poskanzer*, for the appellants.

Christopher G. Riggs and *Michael A. Hines*, for the respondent Board of Governors of the University of Guelph.

Mary Eberts and *Michael A. Penny*, for the respondent Board of Governors of Laurentian University.

George W. Adams and *Richard J. Charney*, for the respondent Board of Governors of York University.

John C. Murray and *S. John Page*, for the respondent Governing Council of the University of Toronto.

Janet E. Minor and *Robert E. Charney*, for the respondent the Attorney General for Ontario.

Duff Friesen, Q.C., and *Virginia McRae Lajeunesse*, for the intervener the Attorney General of Canada.

Alison W. Scott, for the intervener the Attorney General of Nova Scotia.

Robert G. Richards, for the intervener the Attorney General for Saskatchewan.

//*La Forest J.*//

The judgment of Dickson C.J. and La Forest and Gonthier JJ. was delivered by

LA FOREST J. -- This appeal is concerned with the application of s. 15(1) of the *Canadian Charter of Rights and Freedoms* to mandatory retirement in universities. It raises a number of broad issues, namely,

(a) whether s. 15 of the *Charter* applies to universities;

(b) assuming it does, whether the universities' policies of mandatory retirement at age 65 violate s. 15(1) of the *Charter*;

(c) whether the limitation of the prohibition against discrimination in employment on grounds of age in s. 9(*a*) of the *Human Rights Code, 1981*, S.O. 1981, c. 53, to persons between the ages of 18 and 65 violates s. 15(1) of the *Charter*; and

(d) whether, if such violation exists, it is justifiable under s. 1 of the *Charter*.

The appeal was argued at the same time as *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 450[**]; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, and *Douglas/Kwantlen Faculty Assn v. Douglas College*, [1990] 3 S.C.R. 570, all of which are issued concurrently. The first of these also deals with retirement from universities, while the second is concerned with retirement from association with a research hospital and the third from employment in a community college. The cases raise many of the same issues, most of which will be discussed in the present appeal.

Background

Facts

The appellants, eight professors and a librarian at the respondent universities, applied for declarations that the policies of the universities, which require the appellants to retire at age 65, violate s. 15 of the *Charter*, and that s. 9(*a*) of the *Human Rights Code, 1981*, by not treating persons who attain the age of 65 equally with others, also violates s. 15. The appellants also ask for certain consequential relief. The appellants' competence has never been seriously questioned; they are highly qualified academics. The sole ground for their retirement is that they have reached the mandatory age of 65.

The respondent universities have established mandatory retirement policies in somewhat different ways. At the University of Toronto, it has been effected by a formal resolution of the Board, and the university's pension plan provides for retirement at age 65 and is funded on that basis; as well, the collective agreement between the university and the faculty

[**] See Erratum, [1991] 1 S.C.R. iv

association refers to retirement at age 65 as basic policy and stipulates that there will be no change in this policy during the term of the agreement. At York University, both the university plan and the collective agreement with the faculty association provide for retirement at age 65. At the University of Guelph, mandatory retirement is based on policy and practice and a pension plan that provides for retirement at age 65. At Laurentian University, retirement policy is established by the general by-laws, the collective agreement between the university and the faculty, and the retirement plan for the staff.

There can be little question that, while the impact will vary from individual to individual, mandatory retirement results in serious detriment to the appellants' working lives, including loss of protection for job security and conditions, economic loss, loss of a working environment and facilities necessary to support their work, diminished opportunities for grants, and generally seriously diminished participation in activities both within and outside the university.

Several of the appellants filed complaints with the Ontario Human Rights Commission, but the Commission refused to deal with the complaints because its jurisdiction was confined with respect to employment to persons between eighteen and sixty-five. The applicable provisions of the *Human Rights Code, 1981* read:

> **4.**-- (1) Every person has a right to equal treatment with respect to employment without discrimination because of . . . age ....
>
> **9.** . . .
>
> (*a*) "age" means an age that is eighteen years or more, except in subsection 4 (1) where "age" means an age that is eighteen years or more and less than sixty-five years;
>
> **23.** The right under section 4 to equal treatment with respect to employment is not infringed where,

. . .

> (*b*) the discrimination in employment is for reasons of age . . . if the age ... of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

On further communication with the Commission, the appellants were advised that when their application concerning the constitutional validity of s. 9(*a*) was decided, the Commission would review its position, noting that it had recommended the abolition of mandatory retirement.

Judicial History

Gray J. of the Ontario High Court (1986), 57 O.R. (2d) 1, dismissed the appellants' application. The *Charter*, he held, did not apply to the mandatory retirement policies of the universities. There was no statutory provision directing or authorizing mandatory retirement. Though universities served public purposes, they were essentially private institutions. The fact that they were incorporated and heavily funded by government was insufficient to make them fall within the rubric of "government" to which the application of the *Charter* is limited by s. 32(1)(*b*). They were essentially autonomous bodies which ran their own affairs. As he put it, at pp. 21-22, "the "governmental function", "governmental control", "State action" or "nexus" which links the essentially private universities with the province is insufficient to invoke s. 32(1)(*b*) of the Charter". In the present context, he saw mandatory retirement as a "creature of contract, negotiated in good faith for the parties' own economic and other benefits" (p. 17).

Gray J., however, did conclude that, in denying persons sixty-five years of age or older the right to complain that their rights to equal treatment with respect to employment had been

infringed, s. 9(*a*) of the *Human Rights Code, 1981* offended s. 15(1) of the *Charter*. In the context of the contractual relationships, however, he saw s. 9(*a*) as constituting a reasonable limit that is demonstrably justified in a free and democratic society in accordance with s. 1 of the *Charter*. He noted, at p. 32, that "Ramifications relating to the integrity of pension systems and the prospects for younger members of the labour force were the predominant concerns" of the legislature in limiting protection against age-based employment discrimination. These objectives and concerns were, in his opinion, "of sufficient importance to warrant overriding a constitutionally protected right".

On an appeal to the Ontario Court of Appeal (1987), 63 O.R. (2d) 1, the majority (Howland C.J.O. and Houlden, Thorson and Finlayson JJ.A.) found nothing in the enabling legislation creating the respondent universities that conflicts with the *Charter*. There is, they observed at p. 16, "no statutory restriction on the term of employment of faculty or staff". In their opinion, the *Charter* has no direct application to the universities or to their contracts of employment with the appellants.

So far as s. 9(*a*) of the *Human Rights Code, 1981* was concerned, the majority agreed with the conclusion of Gray J. that the section discriminates against staff over the age of 65 and denies them the equal treatment to which they are entitled under s. 15(1) of the *Charter*. The majority also agreed, at p. 41, that Gray J. was correct in finding that s. 9(*a*) of the Code was inconsistent with the *Charter* "without requiring the appellants to prove that the discrimination it created was "unreasonable"".

Gray J., however, had applied a lesser standard of scrutiny to legislation involving age-based discrimination than to other types of discrimination. The majority disagreed with this approach. The fact that the justification of discriminatory legislation will be more difficult in

some cases than in others did not, in their view, mean that different standards of proof apply to different categories of cases. The onus of establishing s. 1 limitations on s. 15 rights "requires careful factual analysis in every case" (p. 47).

In the opinion of the majority, the Court of Appeal was in a position only to deal with the effect of the *Charter* on the provisions of s. 9(*a*) as they apply to mandatory retirement of the teaching staff and librarians of the universities. They, therefore, considered only evidence pertinent to the universities and found that, in the university context, the objectives of making it possible for parties to negotiate a mandatory retirement date in keeping with the tenure system, of preserving existing pension plans, and of facilitating faculty renewal, were pressing and substantial and, therefore, warrant overriding a constitutionally protected right.

The majority was further of the view that there exists a clear rational connection between the measures adopted by s. 9(*a*) and the objectives of that section in the university context. They concluded, as well, that the provisions of the impugned section impair "as little as possible" the right to freedom from discrimination on the basis of age in so far as they apply to the mandatory retirement policies of the universities. Nor were they persuaded that the measures imposed by the policies are out of proportion with the objectives of s. 9(*a*).

Blair J.A., dissenting, disagreed with the view that the compulsory retirement of tenured university professors and staff is justifiable under s. 1 of the *Charter*. In his opinion, the function of the court was to review the Code in order to determine whether it complies with the *Charter*. It was not open to it (at p. 67) "to read qualifications or exceptions into the statute which might under s. 1 justify a Charter infringement". It was not free to restrict its examination of the provision to the university context alone. To do so would have the effect of amending the Code, something only the legislature is entitled to do. Furthermore (at p. 74),

s. 9(*a*), "being facially invalid, is not a provision that can be saved by allowing a "constitutional exemption" to its operation where appropriate facts exist". In his view, at p. 76, s. 9(*a*) "falls clearly within the category of legislative provisions which are inconsistent with the Charter" and is incapable of being applied to the appellants.

Although Blair J.A. agreed that s. 9(*a*) met the first two requirements of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, he found, at p. 77, that it did not satisfy the third requirement that the measure adopted "should impair `as little as possible' the right or freedom in question". That section, rather than merely restricting the right under s. 15(1), eliminates it, since the Code provides no protection against age discrimination in employment after the age of 65.

Blair J.A. further remarked that, while his conclusion would be limited to a declaration that the appellants are not subject to compulsory retirement, it would have "wider ramifications" for the reason that it is based upon two findings applicable to all employees in Ontario. Those findings are that the impugned section is inconsistent with the *Charter* and that there are no standards within the Code upon which a justification of the denial under s. 1 of the *Charter* could be based.

Leave to appeal to this Court was granted and the following constitutional questions were stated:

1. Does s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. Is s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

The Attorneys General of Canada, Nova Scotia and Saskatchewan intervened.

As the constitutional questions indicate, the issues may be divided into two broad groups. The first concerns the possible effect of the *Charter* on the universities' mandatory retirement policies, the second concerns its possible effect on s. 9(*a*) of the *Human Rights Code, 1981*. For convenience, I shall deal with the universities' policies first, beginning with the question whether the *Charter* applies to these policies at all.

The Application of the *Charter*

The application of the *Charter* is set forth in s. 32(1), which reads:

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

These words give a strong message that the *Charter* is confined to government action. This Court has repeatedly drawn attention to the fact that the *Charter* is essentially an instrument

for checking the powers of government over the individual. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, Dickson J. (as he then was) observed: "It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action." In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 490, Wilson J. noted that "the central concern of [s. 7 of the *Charter*] is direct impingement by government upon the life, liberty and personal security of individual citizens" (emphasis added). See also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 347, *per* Dickson J.; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, especially at pp. 593-98; and *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the Unites States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.

To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, "diminish the area of freedom within which individuals can act". In *Re Bhindi and British Columbia Projectionists* (1986), 29 D.L.R. (4th) 47, Nemetz C.J., speaking for the majority of the British Columbia Court of Appeal, made it

clear that such an approach could seriously interfere with freedom of contract. It would mean reopening whole areas of settled law in several domains. For example, as has been stated: "In cases involving arrests, detentions, searches and the like, to apply the Charter to purely private action would be tantamount to setting up an alternative tort system" (see McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361, at p. 367, cited in *RWDSU v. Dolphin Delivery Ltd.*, *supra*, at p. 597). And that is by no means all.

Opening up private activities to judicial review could impose an impossible burden on the courts. Both government and the courts have recognized the need to limit judicial review by means, for example, of privative clauses and deference to specialized tribunals, techniques that would be unavailable in a *Charter* context. As well, as I noted earlier, government may, in many cases, establish more flexible means to deal with individual rights. Thus Human Rights Commissions have more flexible techniques for dealing with discriminatory practices without unduly constraining the exercise of other democratic rights that are extremely hard to balance; see McLellan and Elman, *ibid.*, and Tarnopolsky (now Mr. Justice Tarnopolsky), "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 *Can. Bar Rev.* 242, at p. 256.

The leading authority in this area is, of course, this Court's decision in the *Dolphin Delivery* case, *supra*, which sets forth many other considerations of this kind. In that case, McIntyre J. made it clear that the *Charter* was by s. 32 limited in its application to Parliament and the legislatures, and to the executive and administrative branches of government. As he put it, at p. 598: ". . . it [s. 32] 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). So far as a legislature was concerned, he stated, it was only by way of legislation that it could

infringe the *Charter*. Action by the executive and administrative branches of government would generally depend upon the legislation but there were also situations (which do not concern us here) where it could depend on common law rules or the prerogative.

McIntyre J. thus carefully limited the *Charter*'s application to Parliament and the legislatures and the executive and administrative branches of government. It is significant, too, that in buttressing his view as to the meaning of government, he relied not only on its general meaning, but also on the manner in which the words were used in the *Constitution Act, 1867*. He thus put it, at p. 598:

> The word `government', following as it does the words `Parliament' and `Legislature', must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word `government' is used in s. 32 of the *Charter* in the sense of the executive government of Canada and the Provinces. This is the sense in which the words `Government of Canada' are ordinarily employed in other sections of the *Constitution Act, 1867*. Sections 12, 16, and 132 all refer to the Parliament and the Government of Canada as separate entities. The words `Government of Canada', particularly where they follow a reference to the word `Parliament', almost always refer to the executive government.

The Court in *Dolphin Delivery* did not have to decide on the extent to which the *Charter* applies to the actions of subordinate bodies that are created and supported by Parliament or the legislatures, but it did leave open the possibility that such bodies could be governed by the *Charter*. Thus, McIntyre J. stated, at p. 602:

> It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures.

It was not incumbent upon him to define more closely the scope of government or to enter into the question of what could constitute action by the government.

The appellants first argued that "universities constitute part of the legislature or government of the province within the meaning of s. 32 of the **Charter**, insofar as they are creatures of statute which exercise powers pursuant to statute and carry out a public function pursuant to statutory authority". Undoubtedly, as the Court of Appeal recognized, a statute providing for mandatory retirement in the universities would violate s. 15 of the *Charter*, and it is also true that the government could not do so in the exercise of a statutory power. That is because, as McIntyre J. pointed out, they -- the legislative, executive and administrative branches of government -- are the actors to whom the *Charter* applies under s. 32(1).

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, affords a recent example of a situation where action pursuant to statutory power was held to fall within the ambit of the *Charter*. That case dealt with an order of an adjudicator appointed by the Minister of Labour which was alleged to infringe the employer's *Charter* right of freedom of expression. The *Canada Labour Code*, R.S.C. 1970, c. L-1, is, of course, a statute regulating labour relations within federal competence. As part of the machinery for the settlement of labour disputes, the Minister was authorized to appoint an arbitrator who, under s. 61.5(9)(*c*), was given a number of discretionary powers to effect that purpose. The arbitrator was, therefore, part of the governmental administrative machinery for effecting the specific purpose of the statute. It would be strange if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute. Section 61.5(9)(*c*) was, therefore, "interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal" that is consistent with the *Charter*. The close

nexus between the statute and the legislative scheme and governmental administration is immediately obvious.

But the mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the *Charter*. Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government. It would significantly undermine the obvious purpose of s. 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations, and it would fly in the face of the justifications for so confining the *Charter* to which I have already referred. In *Re Bhindi and British Columbia Projectionists*, *supra*, the British Columbia Court of Appeal refused to apply the *Charter* to a collective agreement though such agreements are provided for by statute (they were unenforceable at common law) and the legal status of the union itself derived from statute. The employer, too, was a creature of statute. The majority of the court had this to say, at p. 54:

> In my opinion, Mr. Justice Gibbs was right in rejecting the extension of the Charter to a private contract such as this. It is a rare commercial contract which does not *ex facie* infringe on some freedom set out in s. 2 or some legal right under s. 7. To include such private commercial contracts under the scrutiny of the Charter could create havoc in the commercial life of the country.

The appellants strongly relied on a statement by Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 671, cited by this Court in *Slaight Communications Inc. v. Davidson*, *supra*, at p. 1078, to the effect that Parliament and the legislatures cannot authorize action by others that would be in breach of the *Charter*. That statement would, no doubt, be true of a situation such as occurred in *Slaight Communications Inc. v. Davidson*, *supra*, where a statute authorizes a person to exercise a discretion in the course of performing a governmental objective. But the

Charter was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility. Professor Hogg himself makes this clear, at n. 140 on p. 677:

> There is perhaps a faint argument that the Charter applies to the actions of all Canadian corporations, whether publicly or privately owned, and even if they are engaged only in commercial activity. The argument would start from the premise that the existence and powers of a modern corporation depend upon the statute which authorized its incorporation. In that sense, it could be argued, all modern corporations act under statutory authority and should be held to be bound by the Charter. But the better view is that a corporation, once it has been brought into existence and empowered (admittedly under statutory authority), is thereafter exercising the same proprietary and contractual powers as are available to any private person.

The situation just described is entirely different from requiring a person to do something, and it is different also from empowering someone within the government apparatus to do something. It is true that Hogg, in the first of the passages referred to -- a passage cited with approval by this Court in *Slaight Communications Inc. v. Davidson* -- includes universities among a number of governmental institutions exercising statutory power bound by the *Charter*. It should be underlined, however, that the passage was cited in *Slaight Communications Inc. v. Davidson* in support of the proposition that the *Charter* covers a discretionary exercise of authority under a statute in effecting the statutory scheme. The case did not more widely address the issue of what entities may form part of the governmental apparatus, and cannot be taken as accepting Professor Hogg's inclusion of universities among entities like the Governor in Council and administrative tribunals (which was all that was in question in that case) that are obviously part of government, a question which, of course, is a central issue in the present case.

The appellants sought to draw a distinction between commercial corporations and corporations serving a public interest (or at least to confine their argument to the latter). In this context, the appellants cited a number of cases holding that statutory bodies exercising powers of decision may be subjected to judicial review by the courts to ensure that they perform their duties and do so fairly; see *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, and especially the reasons of Dickson J. (as he then was).

It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*. Essentially, the prerogative writs were designed to ensure that administrative decision-making was legally and procedurally correct. They did not deal with substantive rights like those enshrined in the *Charter* and their scope extends beyond what one would normally characterize as government. In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. As Beetz J. observed in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 594, it is only "in a sense" that a university may be regarded as a public body. It is clear from that case that judicial review may be available in certain circumstances even though a university may be an autonomous body. The following passage from Beetz J.'s reasons, at pp. 594-95, is instructive:

> 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. While a university incorporated by statute and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of insuring the higher education of a large number of citizens, as was held in *Polten* [(1975), 59 D.L.R. (3d) 197], its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances the domestic autonomy of the university by making provision for the solution of conflicts within the university.

The *Charter* apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a *Charter* attack cannot be sustained on that ground. There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative. Unless, then, it can be established that they form part of government, the universities' action here cannot fall within the ambit of the *Charter*. That cannot be answered by the mere fact that they are incorporated and perform an important public service. Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse, as Beetz J.'s statement from *Harelkin v. University of Regina* indicates; see also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), *per* Rehnquist J., for the court, at pp. 350-51. I would refer, in this respect, to McIntyre J.'s statement in *Dolphin Delivery*, *supra*, at p. 598, that s. 32(1) does not refer "to government in its generic sense -- meaning the whole of the governmental apparatus of the state". A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty. It is simply not the test mandated by s. 32. As Wellington, "The Constitution, the Labor Union and "Governmental Action"" (1961), 70 *Yale L.J.* 345, has stated, at p. 374, in relation to the United States Constitution:

> 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 conclusions 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.

In attempting to support the view that government went beyond the administrative and executive branches of the government of Canada and the provinces but included statutory bodies serving the public interest, the appellants referred to *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. H.C.), where Linden J. expressed the view that municipalities are part of the government within the meaning of s. 32 of the *Charter*. Assuming the correctness of Linden J.'s view, about which I express no opinion, I agree with the Court of Appeal that, if the *Charter* covers municipalities, it is because "municipalities perform a quintessentially governmental function. They enact coercive laws binding on the public generally, for which offenders may be punished; see also *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.), *per* Callaghan J., at p. 528. The same can obviously not be said of universities. I hasten to add that I agree with my colleague Wilson J. that the *Charter* is not limited to entities which discharge functions that are inherently governmental in nature. As to what other entities may be subject to the *Charter* by virtue of the functions they perform, I would think that more would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments. It seems to me that my colleague Wilson J. takes the contrary view. To the extent that she does, I respectfully disagree.

The appellants also submit that the universities constitute part of the government under s. 32 of the *Charter* having regard to the nature of their relationship to the provincial government. The entire context must, they say, be looked at including the facts that they are established by statute which determines their powers, objects and governmental structures, that their historical development was as part of a public system of post-secondary education, that their

survival depends on public funding, and that government structures largely coordinate and regulate their activities, through operating and capital grants, special funds, control over tuition fees and approval of new programs.

There is no question that the relationship of government to Canadian universities has always been significantly different from that existing in Europe when communities of scholars first banded together to pursue learning. From the early days of this country, several of the provinces acted to establish provincial universities, one of which, of course, was the University of Toronto which was established by the Ontario legislature in 1859. Its governing statute is now *The University of Toronto Act, 1971*, S.O. 1971, c. 56. Other universities were created out of specialized educational bodies under the direct control of the province, such as the University of Guelph, which was created in its present form in 1964 by *The University of Guelph Act, 1964*, S.O. 1964, c. 120. Others were founded by private groups for religious and linguistic purposes such as Sacred Heart College in Sudbury, which became Laurentian University with the passage of *The Laurentian University of Sudbury Act, 1960*, S.O. 1960, c. 151, rep. & sub. 1961-62, c. 154, ss. 1-7. Others, like York University, were originally affiliates of older universities but later became separate universities: *The York University Act, 1965*, S.O. 1965, c. 143. These statutes set out the universities' powers, functions, privileges and governing structure. While these vary from university to university, they are in general much the same. As well, the *University Expropriation Powers Act*, R.S.O. 1980, c. 516, gives them expropriation powers, a matter not in issue here. The *Degree Granting Act, 1983*, S.O. 1983, c. 36, restricts the entities that can operate a university and grant university degrees.

There can be no doubt that the reshaping in the 1950s and 1960s of the universities of Ontario (a process that also occurred in other provinces) resulted from provincial policies aimed at promoting higher education. Nor did the Legislature confine itself to rationalizing

the existing system. It heavily funds universities on an ongoing basis. The operating grants alone range, according to the evidence, between a low for York of 68.8% of its operating funds to a high for Guelph of 78.9%. The Ontario Council on University Affairs makes annual global funding recommendations to the government, but the latter assumes responsibility for determining the amounts. It also effectively defines tuition fees within a formula that limits the universities' discretion within a narrow scope. The province also provides most of the funds for capital expenditures, and provides special funds earmarked to meet specific policies. It exercises considerable control over new programs by requiring that they be specifically approved to be eligible for public funds.

It is evident from what has been recounted that the universities' fate is largely in the hands of government and that the universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds. It by no means follows, however, that the universities are organs of government. There are many other entities that receive government funding to accomplish policy objectives governments seek to promote. The fact is that each of the universities has its own governing body. Only a minority of its members (or in the case of York, none) are appointed by the Lieutenant-Governor in Council, and their duty is not to act at the direction of the government but in the interests of the university (see, for example, s. 2(3) of *The University of Toronto Act, 1971*). The remaining members are officers of the Faculty, the students, the administrative staff and the alumni.

The government thus has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources.

What Beetz J. said of the University of Regina in *Harelkin v. University of Regina*, *supra*, in the passage at pp. 594-95, quoted above, applies equally here. I simply reiterate his general conclusion: "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." In short, I fully share the following conclusion of the Court of Appeal (1987), 63 O.R. (2d) 1, at pp. 24-25:

> 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.

The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions. Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.

I should perhaps note that a similar approach has been followed in the United States. For example, in *Greenya v. George Washington University*, 512 F.2d 556 (D.C. Cir. 1975) , the court refused to find the university to be a governmental entity, though it was incorporated by the

state, was given tax exemption and received federal capital funding and funding for some of its programs. A similar approach has been followed in respect of other entities rendering public services that are heavily regulated by government (see *Jackson v. Metropolitan Edison Co.*, *supra* -- there a public utility) or that are heavily funded (see *Blum v. Yaretsky*, 457 U.S. 991 (1982) -- there a nursing school where virtually all the school's funds were derived from government funding).

It is true that there are some cases where United States courts did hold that significant government funding constitutes sufficient state involvement to trigger constitutional guarantees, but these were largely confined to cases of racial discrimination which was the prime target of the 14th Amendment (see *Greenya v. George Washington University*, *supra*, at p. 560). As Professor (now Mr. Justice) Tarnopolsky has noted in a passage quoted by the Court of Appeal (at pp. 21-22), these judicial intrusions, devised to meet a problem particular to the United States, should not be imported here; see "The Equality Rights in the Canadian Charter of Rights and Freedoms" *supra*, at p. 256. Nor is there reason to consider the American authorities on state universities; Canadian universities, as I have explained, are private entities.

I, therefore, conclude that the respondent universities do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the *Charter*. Nor in establishing mandatory retirement for faculty and staff were they implementing a governmental policy.

With deference to my colleague Wilson J., I do not rest this conclusion on a belief that "the role of government should be strictly confined" (at p. 000) and that "social and economic ordering should be left to the private sector" (at p. 000). My conclusion is not that universities

cannot in any circumstances be found to be part of government for the purposes of the *Charter*, but rather that the appellant universities are not part of government given the manner in which they are presently organized and governed. By way of parenthesis, I would note that it seems to me that if one were indeed committed to the doctrine of "constitutionalism" as my colleague describes it (at p. 000), one would interpret government for the purposes of s. 32(1) as broadly as possible, and not in "its narrowest sense".

The foregoing is sufficient to dispose of the issues concerning the mandatory retirement policies of the universities. However, I also propose to discuss the issue of whether, on the assumption that the universities form part of the apparatus of government, these policies violate s. 15 of the *Charter*. Not only was it fully argued. It is of considerable assistance in considering other issues in this appeal by throwing light on the repercussions of mandatory retirement on the organization of the workplace generally which figures largely on other issues in this appeal. It also is of relevance in considering a number of the issues in the companion cases. The university setting is not, of course, a perfect microcosm of the larger whole. I recognize that each sector of the workplace will have different dynamics depending on the individual configuration of that sector, whether it is managerial, professional, technical, skilled or unskilled, whether or not it has a seniority or tenure system attached to it, and whatever the physical and intellectual demands of the work may be. But there are many common or related features.

Do the University Policies Violate s. 15?

I now propose to deal with the question whether the universities' policies on mandatory retirement violate s. 15 of the *Charter* on the basis of the assumption that the universities form part of "government" apparatus within the meaning of s. 32(1) of the *Charter*.

"Law"

For section 15 of the *Charter* to come into operation, the alleged inequality must be one made by "law". The most obvious form of law for this purpose is, of course, a statute or regulation. It is clear, however, that it would be easy for government to circumvent the *Charter* if the term law were to be restricted to these formal types of law-making. It seems obvious from what McIntyre J. had to say in the *Dolphin Delivery* case that he intended that exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s. 15, constitute an infringement of that provision. At all events, this Court has now acted on this basis in *Slaight Communications Inc. v. Davidson*, *supra*; see also the remarks of Linden J. in *Re McCutcheon and City of Toronto*, *supra*, at p. 202. On the assumption that the universities form part of the fabric of government, I would have thought their policies on mandatory retirement would amount to a law for the purposes of s. 15 of the *Charter*. Indeed, in most of the universities, these policies were adopted by the universities in a formal manner. That being so, the fact that they were accepted by the employees should not alter their characterization as law, although this would be a factor to be considered in deciding whether under the circumstances the infringement constituted a reasonable limit under s. 1 of the *Charter*.

In the case of some of the universities, however, it may not be as clear that one is dealing with university policy as simply an agreement entered into with a view to respond to what is really desired by the employees. Here again, however, I am unwilling to accept that a power by government to contract should include the power to contract in violation of a *Charter* right. It would be easy for the legislatures and governments to evade the restrictions of the *Charter* by simply voting money for the promotion of certain schemes. In *Operation Dismantle Inc. v. The Queen*, *supra*, at p. 459, Dickson J. drew attention to the possibility "that if the supremacy

of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52". I have no doubt that this is true of s. 15 of the *Charter*. One need simply examine s. 15(2) which provides that s. 15(1) "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . ." (emphasis added). There would be no need to refer to programs and activities if s. 15(1) were confined to legislative activity. This is supported by the experience in the United States. In that country, no court ever appears to have suggested that the equal protection of the law or due process is restricted to legislative activity. Rather, the cases appear to afford protection against discriminatory state action whether by way of legislation or conduct; see *Bakke v. Regents of the University of California*, 438 U.S. 265 (1978); *Roth v. United States*, 354 U.S. 476 (1957).

It may be that the acceptance of a contractual obligation could, in some circumstances, constitute a waiver of a *Charter* right especially in a case like mandatory retirement, which not only imposes burdens, but benefits on employees. On the whole, though, I think such an arrangement would usually require justification as a reasonable limit under s. 1. That is especially true in the case of a collective agreement, which may or may not really find favour with individual employees subject to discrimination. In the present case, I am, therefore, of the view that the mandatory retirement provisions are law even if they are as much desired by the unions as by the universities.

Discrimination

Assuming the policies of the universities are law, it seems difficult to argue in light of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, that they are not discriminatory within the meaning of s. 15(1) of the *Charter* since the distinction is based on

the enumerated personal characteristic of age. In *Andrews v. Law Society of British Columbia*, this Court applied the following test for discrimination under s. 15(1), at pp. 174-75:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

There is no doubt that the policies, agreements and regulations impose burdens on the employees. In *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368, employment was described as follows:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Mandatory retirement takes this away, on the basis of a personal characteristic attributed to an individual solely because of his association with a group.

Two arguments were put forward for the proposition that even in light of *Andrews v. Law Society of British Columbia*, the mandatory retirement provisions in issue here do not violate s. 15. First, it was argued that the words "without discrimination" in s. 15 require more than a mere finding of adverse distinction, but also require proof of irrationality, stereotypical assumptions and prejudice, for if this were not the case, universally accepted and manifestly desirable legal distinctions would be viewed as violations of s. 15 and require justification under s. 1 of the *Charter*. It was somewhat weakly argued that a mandatory retirement policy

is not based on irrelevant personal differences or stereotypical assumptions, but rather is motivated by "administrative, institutional and socio-economic" considerations. This is all irrelevant, since as *Andrews v. Law Society of British Columbia* made clear in the above-cited passage, not only does the *Charter* protect from direct or intentional discrimination; it also protects from adverse impact discrimination, which is what is in issue here.

The second argument was that the similarly situated test is still the governing test, provided it is not applied mechanically. Simply put, I do not believe that the similarly situated test can be applied other than mechanically, and I do not believe that it survived *Andrews v. Law Society of British Columbia*.

I therefore have no hesitation in concluding that the policies of the universities violate s. 15 of the *Charter*, on the assumption, of course, that they are "law" and that the *Charter* applies to the universities. They make a distinction based upon an enumerated ground to the disadvantage of individuals aged 65 and over. What requires examination then is whether this distinction constitutes a reasonable limit under s. 1 of the *Charter* to the right accorded under s. 15.

Section 1 of the Charter

General

The approach to be followed in weighing whether a law constitutes a reasonable limit to a *Charter* right has been stated on many occasions beginning with *R. v. Oakes*, [1986] 1 S.C.R. 103, and I need merely summarize it here. The onus of justifying a limitation to a *Charter* right rests on the parties seeking to uphold the limitation. The starting point of the inquiry is

an assessment of the objectives of the law to determine whether they are sufficiently important to warrant the limitation of the constitutional right. The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right, the extent of its infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society.

This balancing task, as the Court recently stated in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at pp. 1489-90, should not be approached in a mechanistic fashion. For, as was there said, "While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature." Indeed, early in the development of the balancing test, Dickson C.J. underlined that "Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards"; see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 768-69. Speaking specifically on s. 15 in *Andrews v. Law Society of British Columbia*, at p. 198, I thus ventured to articulate the considerations to be borne in mind:

> The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

I should add that by state interest, here I include not only those where the state itself is, in the words of the majority in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at

p. 994, "the singular antagonist", typically prosecuting crime, but also where the state interest involves "the reconciliation of claims of competing individuals or groups or the distribution of scarce . . . resources". I shall have more to say about this later.

I turn, then, to the objectives of the "law".

Objectives

The universities advance a combination of intertwined purposes to justify their policies of mandatory retirement which have been put into place by collective and other agreements and pension plans. The central objectives of these policies, they say, are intended: (1) to enhance and maintain their 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 distinctive modes of performance evaluation. These combined objectives, I have no doubt, meet the "objectives test". Certainly, excellence in higher education is an admirable aim and should be fostered. The preservation of academic freedom is also an objective of pressing and substantial importance.

Proportionality

It then becomes necessary to assess whether the measures adopted are appropriate and proportional to the objectives sought. In carrying out this assessment, Dickson C.J., in *R. v. Edwards Books and Art Ltd., supra,* at p. 768, has set out a three-step approach that must ordinarily be taken in the following passage:

> Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

Rationality

The next question then is whether the policies of mandatory retirement are rationally connected to the objectives sought by the universities by these policies.

To answer this question, it becomes imperative to look briefly at the relationship between the needs of the universities and the tenure of faculty members. By and large, members of a faculty begin their careers in university in their late 20s to mid-30s and with retirement age at 65 this means that they continue on staff for some thirty to thirty-five years. During this period, they must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas. Rigourous initial assessment is necessary as are further assessments in relation to merit increases, promotion and the like. But apart from this, and excepting cases of flagrant misconduct, incompetence or lack of performance, strict performance appraisals are non-existent and, indeed, in many areas assessment is extremely difficult. In a tenured system, then, there is always the possibility of dismissal for cause but the level of interference with or evaluation of faculty members' performance is quite low. The desire to avoid such evaluation does not, as I see it, relate solely or even principally to administrative convenience. Rather, the desire is to maximize academic freedom by minimizing interference and evaluation. Elimination of mandatory

retirement would adversely affect this for there could well be an increase in evaluation and attempts to dismiss for cause, though it must be said that evidence on this point is unavoidably lacking. The general situation is well stated by the Court of Appeal, at p. 54:

> The policy of tenure in university faculties is fundamental to the preservation of academic freedom. It involves a vigorous assessment by one's peers of academic performance after a probationary period of up to five years. Once tenure is granted, it provides a truly free and innovative learning and research environment. Faculty members can take unpopular positions without fear of loss of employment. It provides stability of employment, because once an academic is found worthy of tenure by his or her peers, he or she can be assured of keeping that position until death, or the normal age of retirement, unless there is termination for cause following a properly conducted hearing before one's peers. This is based usually on gross misconduct, incompetence, or persistent failure to discharge academic responsibilities. Collegial governance is also a safeguard of academic freedom. In addition to tenure, peer review is involved in promotions, merit increases, appointment to senior administrative posts in a department or faculty, and eligibility for research grants. Without mandatory retirement, the imposition of a stricter performance appraisal system might be required. It would be fraught with many difficulties, and would probably require an assessment by one's peers or by outside experts. It could not be unilaterally imposed by university administration because of the role of the faculty or faculty associations in the governance of the university.

Mandatory retirement is thus intimately tied to the tenure system. It is true that many universities and colleges in the United States do not have a mandatory retirement but have maintained a tenure system. That does not affect the rationality of the policies, however, because mandatory retirement clearly supports the tenure system. Besides, such an approach, as the Court of Appeal observed, would demand an alternative means of dismissal, likely requiring competency hearings and dismissal for cause. Such an approach would be difficult and costly and constitute a demeaning affront to individual dignity.

Mandatory retirement not only supports the tenure system which undergirds the specific and necessary ambience of university life. It ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence. Universities need to be on the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new

people. In a closed system with limited resources, this can only be achieved by departures of other people. Mandatory retirement achieves this in an orderly way that permits long-term planning both by the universities and the individual.

There are, it is true, conflicting arguments and evidence about the effect of mandatory retirement on faculty renewal. There is evidence that losing faculty to retirement does generate new jobs for younger faculty. There is also evidence that this is not always the case and that often the correlation is not on an even one-to-one basis, i.e., it does not necessarily follow that for every faculty member who retires, a new one is hired. That there is some correlation, however, cannot, on my view of the evidence, be denied in a closed system like a university. It is a question of resource allocation and some resources are obviously freed when a teaching member retires. A similar approach has been judicially approved in the United States. In *Lamb v. Scripps College*, 627 F.2d 1015 (1980), the United States Court of Appeals, Ninth Circuit, accepted the legitimacy of the following justifications for mandatory retirement in the academic context, at p. 1022:

> . . . the opening of positions for younger professors and minorities; relieving the financial burden caused by the retention of highly paid senior employees; and avoiding the difficulty of assessing individual performances for purposes of good cause discharges.

See also *Palmer v. Ticcione*, 576 F.2d 459 (1978), which adopts the same rationale for other sectors.

From the above considerations, I have no difficulty in concluding that there is a rational connection between the university policies on mandatory retirement and the objectives sought to be achieved by those policies. I turn, then, to the question whether measures to attain these objectives infringed the right as little as possible.

Minimal Impairment

In assessing proportionality and particularly the issue whether there has been a minimal impairment to a constitutionally guaranteed right, it must be remembered that we are concerned here with measures that attempt to strike a balance between the claims of legitimate but competing social values. In the case of broadly based social measures like these, where government seeks to mediate between competing groups, it is by no means easy to determine with precision where the balance is to be struck. As the majority of this Court observed in *Irwin Toy Ltd. v. Quebec (Attorney General), supra*, at p. 993:

> Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.

The approach taken to these cases has been marked by considerable flexibility having regard to the difficulty of the choices, their impact on different sectors of society and the inherent advantages in a democratic society of the legislature in assessing these matters. Implicit in earlier cases, this was expressly adopted in *Irwin Toy Ltd. v. Quebec (Attorney General)*. There, the majority put it this way, at pp. 993-94:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (*Edwards Books and Art Ltd., supra*, at p. 772).

In short, as the Court went on to say, the question is whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives. Speaking specifically of the right in question there, the Court had this to say, at p. 994:

> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective. [Emphasis added.]

It is worth repeating the government's (or rather the universities') pressing and substantial objectives in the present case. They are: (1) to enhance and maintain their 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 distinctive modes of performance evaluation. Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic freedom and excellence is essential to our continuance as a lively democracy. Faculty renewal is required if universities are to stay on the cutting edge of research and knowledge. Far from being wholly detrimental to the group affected, mandatory retirement contributes significantly to an enriched working life for its members. It ensures that faculty members have a large measure of academic freedom with a minimum of supervision and performance review throughout their period at university. They need not be unduly concerned with a "bad year" or a few bad years, or that their productive capacity may decline with the passing years. Security of employment is well protected for a substantial number of years and they are spared demeaning tests that would otherwise have to be employed. That is not to say, and there can be no doubt, that mandatory retirement can be a source of considerable anguish

for those who do not wish to retire. But the "bargain" involved in taking a tenured position has clear compensatory features even for the individual affected, and it is noteworthy that it is the bargain sought by faculty associations and indeed by labour unions in many other sectors of our society.

Against the detriment to those affected must be weighed the benefit of the universities' policies to society generally and the individuals who compose it. It must be remembered as well that, in a closed system with limited resources like universities, there is a significant correlation between those who retire and those who may be hired. Thus the young must be deprived of the opportunities to contribute to society through work in the universities as part of the cost of retaining those currently employed on an indefinite basis. The right to work, as this Court has stated, is important. But it is important for the young as well as the old. By this I am not suggesting that discrimination against the old is as such justifiable to alleviate the difficulties faced by the young. But from the standpoint of the university, and in turn of society, staff renewal is vital. Again, the fact that the young would suffer some measure of deprivation were mandatory retirement abolished would mean that students in turn would, to that extent, be deprived of younger faculty members and of the better mix of young and old that is a desirable feature of a teaching staff. The evidence indicates that there is at present a significant problem of an older teaching staff in universities.

Another matter merits consideration. Universities comprise some of the outstanding research facilities that are essential to push forward the frontiers of knowledge. These have been acquired over the years by the expenditure of significant private and public funds and there is need not only to encourage the best use that can be made of them but also to adopt policies to give access to as many as can benefit from, and contribute to, society by their use. The majority in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, made it clear that the

reconciliation of claims not only of competing individuals or groups but also the proper distribution of scarce resources must be weighed in a s. 1 analysis. Having observed that the courts can ascertain with "some certainty" whether the "least drastic means" has been chosen to achieve a desired objective where the government is the "singular antagonist", typically in the case of criminal sanctions and prosecutions, the majority then noted that this was not the case with polycentric situations. It added, at p. 994:

> The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.

Weighing all the above matters, I conclude that, to paraphrase the remarks from *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, previously cited, on the evidence the universities had a reasonable basis for concluding that their mandatory retirement policies impaired the appellants' rights as little as possible given the pressing and substantial objectives they sought to achieve.

One final point may be mentioned. It may be argued that in these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in "line drawing", and in *R. v. Edwards Books and Art Ltd.*, *supra*, at pp. 781-82, 800-801, this Court made it clear that this was an exercise in which courts should not lightly attempt to second-guess the legislature. While the aging process varies from person to person, the courts below found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards; see the reasons of Gray J., *supra*, at pp. 76-77, and of the Court of Appeal, *supra*, at pp. 145-46. To raise the retirement age, then, might give rise to greater demands for demeaning tests for those between the ages of 60 and 65 as well as other shifts and adjustments to the organization of the workplace to which I have previously referred.

Effects

It is evident from what I have said in relation to the "minimal impairment" that the effects of the universities' policies on mandatory retirement are not so severe as to outweigh the government's pressing and substantial objectives. In the present circumstances, the same factors have to be balanced in dealing with deleterious effects and I need not repeat them.

Section 9(*a*) of the *Human Rights Code, 1981*

Does s. 9(a) contravene s. 15(1) of the Charter?

I come now to the question whether s. 9(*a*) of the *Human Rights Code, 1981* contravenes s. 15(1) of the *Charter* by reason of the fact that it confines the Code's prohibition against discrimination in employment on grounds of age to persons between the ages of 18 and 65. The effect of the restriction in s. 9(*a*), the appellants say, is that they are denied protection against age-based employment discrimination under the *Human Rights Code, 1981*. There is no question that, the Code being a law, the *Charter* applies to it. In *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (leave to appeal denied, [1986] 1 S.C.R. xii), the Ontario Court of Appeal held invalid s. 19(2) of the Code which provided that the right to equality without discrimination because of listed personal characteristics accorded under s. 1 of the Code is not infringed where membership in athletic activity is restricted to persons of the same sex.

Nor can there be any doubt since the *Andrews* case, which I have already discussed, that the differential treatment to which the appellants have been subjected constitutes discrimination for the purposes of s. 15(1) of the *Charter*. It deprives them of a benefit under the Code on the

basis of their age, a ground specifically enumerated in the *Charter*. It must be underlined that s. 15(1) expressly guarantees the right to equality before and under the law; it also guarantees the right to equal protection of the law. The following remarks of McIntyre J. in *Andrews v. Law Society of British Columbia*, *supra*, at p. 171, are apposite:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component. Howland C.J. and Robins J.A. (dissenting in the result but not with respect to this comment) in *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, attempt to articulate the broad range of values embraced by s. 15. They state at p. 554:
>
> > In our view, s. 15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of "equal justice" and "equal access to the law", the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and respect.

It is right, however, to indicate with some precision what the discrimination is, and what it is not. The Code does not impose mandatory retirement at any age. Its general effect, in this context, is to prevent the making of a contract providing for mandatory retirement at a fixed age of less than 65 unless the employer is able, under s. 23(*b*) of the Code, to establish on a balance of probabilities that age is a reasonable and *bona fide* qualification because of the nature of the employment. Such protection can, in the government sector, also be obtained under the *Charter*, without reference to age at all, subject to reasonable limitation under s. 1. The Code, however, extends protection within the age limits prescribed against age discrimination in employment in the private sector which, we saw, is not directly affected by the *Charter*.

Though not directly relevant perhaps, I should mention that s. 9(*a*) is also discriminatory in that it provides for a minimum age of 18 years for those seeking protection under the Code in respect of employment. That distinction is, I would think, readily explicable on human, social and economic grounds. More relevant, however, is the fact that until 1982 the Code or its predecessor statutes limited protection on the basis of age to persons "of forty years or more and less than sixty-five years". The *Age Discrimination Act*, S.O. 1966, c. 3, the first statute that provided protection against discrimination in respect of employment, was limited to those ages as was the Ontario *Human Rights Code Amendment Act*, S.O. 1972, c. 119, which extended the protection to other types of discrimination. Those statutes, in fact, provided for a number of qualifications to the age protection: an exemption for *bona fide* superannuation funds or plans, or insurance plans which discriminated on grounds of age, for "special employment programs", and for an exemption based on "*bona fide* occupational qualification and requirement". The present restriction between the ages of 18 and 65 was only proclaimed on June 15, 1982, a change that, as one can see from the companion case of *Harrison v. University of British Columbia*, *supra*, has not yet been made in all the provinces.

What this reveals, of course, is that there has been a growing recognition of the need for protection against distinctions on the basis of age as society has more clearly perceived its discriminatory effects. It also reveals that, for a variety of reasons, there has long been a differentiation made between it and other rights, and that like other rights, it is not absolute. Under the *Charter*, however, questions as to whether these qualifications have been made must be measured against the requirements of s. 1 of that instrument. As a preliminary to that task, however, it appears useful to deal first with the history of mandatory retirement and the place it occupies in our society and its interrelationship with legislation, notably the *Human Rights Code, 1981*, aimed at preventing discrimination on the ground of age. This is in keeping with Dickson J.'s admonition in *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 344, that it is important to

recall that the *Charter* was not enacted in a vacuum and must, therefore, be placed in its proper linguistic, philosophic and historical contexts; see also *United States of America v. Cotroni*, *supra*, at pp. 1490-91.

History and Place of Mandatory Retirement

Retirement as a social phenomenon is relatively new. It is a by-product of industrialization which effected a separation between family life and work. Bismark is generally credited with establishing 65 as the age for retirement when, through his initiative, Germany adopted a public pension plan for the aged. At that time, 65 would certainly have been considered "old", the life expectancy in Germany then being 45. When Great Britain adopted similar legislation in 1908, it initially applied from age 70 but was later reduced to 65. Other countries followed Bismark's lead.

Of greater significance for this country is that this was the age adopted as the age when social security would be paid pursuant to the *Social Security Act*, 49 Stat. 620, enacted by the United States Congress in 1935. This measure was undoubtedly aimed at providing some security for the aged, but it was also designed to remove older people from the labour force in the interests of maintaining employment for younger workers with families during the Depression years. There appears to have been no special reason for the adoption of 65 beyond the fact that it appears to have been widely accepted at the time. The Act did not mandate retirement at age 65 as such, but since people who were regularly employed were not entitled to social security payments, this became the "normal" age of retirement; see *Retirement Without Tears*, the Report of the [Canadian] Special Senate Committee on Retirement Age Policies (1979); *Mandatory Retirement: The Social and Human Cost of Enforced Idleness*, U.S. Congress Report by the Select Committee on Aging (1977); Kertzer, "Perspectives on Older Workers:

Maine's Prohibition of Mandatory Retirement" (1981), 33 *Me. L. Rev.* 157; Graebner, *A History of Retirement: The Meaning and Function of an American Institution 1885-1978* (1980).

In Canada, mandatory retirement developed with the introduction of private and public pension plans. It is not based on law. In 1927, public security plans began with *The Old Age Pensions Act, 1927*, S.C. 1926-27, c. 35, which adopted 70 as the age of entitlement, but this was lowered to 65 in the 1960s. Other programs, such as the Old Age Security (O.A.S.), Guaranteed Income Supplement and the Canada and Quebec Pension Plans also provided that retirement benefits were to be paid beginning at age 65. By the 1970s, the orientation in respect of the treatment of age had been set. Public social security and pension schemes as well as private pension plans were put in place in order to provide income security to older persons; see Atcheson and Sullivan, "Passage to Retirement: Age Discrimination and the Charter" in Bayefsky and Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), at p. 231.

Private businesses developed or adapted their plans to complement and integrate with government pensions. About one half of the Canadian work force occupy jobs subject to mandatory retirement, and about two-thirds of collective agreements in Canada contain mandatory retirement provisions at the age of 65, which reflects that it is not a condition imposed on the workers but one which they themselves bargain for through their own organizations. Generally, it seems fair to say that 65 has now become generally accepted as the "normal" age of retirement. This has had profound implications for the organization of the workplace -- for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others. The Court of Appeal succinctly put the matter this way in describing what it saw as the objectives of s. 9(*a*), at p. 53:

> One of the primary objectives of s. 9(*a*) was to arrive at a legislative compromise between protecting individuals from age-based employment discrimination and giving employers and employees the freedom to agree on a date for the termination of the employment relationship. Freedom to agree on a termination date is of considerable benefit to both employers and employees. It permits employers to plan their financial obligations, particularly in the area of pension plans and other benefits. It also permits a deferred compensation system whereby employees are paid less in earlier years than their productivity and more in later years, rather than have a wage system founded on current productivity. In addition it facilitates the recruitment and training of new staff. It avoids the stress of continuous reviews resulting from ability declining with age, and the need for dismissal for cause. It permits a seniority system and the willingness to tolerate its continuance having the knowledge that the work relationship will be coming to an end at a finite date. Employees can plan for their retirement well in advance and retire with dignity.
>
> Another important objective of s. 9(*a*) was the opening up of the labour market for younger unemployed workers. The problem of unemployment would be aggravated if employers were unable to retire their long-term workers.

To put it in its simplest terms, mandatory retirement has become part of the very fabric of the organization of the labour market in this country. This was the situation when s. 9(*a*) of the *Human Rights Code, 1981* was enacted. It was the situation when the *Charter* was proclaimed as well.

It must be said, however, that there has been a profound alteration in society's view of age discrimination in recent years and, in consequence, of mandatory retirement. Originally, social services schemes and private arrangements, which encouraged and sometimes required mandatory retirement coupled with pension benefits were viewed as a reward for a lifetime of service, and there is no doubt that the beneficial aspects of these plans do serve the important goal of ensuring financial security for the aged, and many still so regard it. But as Jacques Maritain has taught us, human rights continue to emerge from human experience: *Man and the State* (1951). For some, it became all too obvious that retirement was a curse rather than a blessing and resulted in deprivations of former advantages that a number of commentators have denounced in biting terms: see, for example, McDougal, Lasswell and

Chen, "The Protection of the Aged from Discrimination" in *Human Rights and World Public Order* (1980), chapter 15, especially at pp. 779-82.

Age had not fully emerged as an unacceptable ground of discrimination when the early international human rights documents were adopted. These did not specifically refer to age among impermissible grounds of discrimination although their specific enumerations were never regarded as exhaustive. At all events, in the light of growing concerns about the issue, the United Nations undertook a study on the aged (*Question of the Elderly and the Aged* (report of the Secretary General) U.N. Doc. A9126 (1973)), which culminated in a resolution of the General Assembly in which that body, emphasizing the "respect for the dignity and worth of the human person", urged member states to "discourage, whenever and wherever the overall situation allows, discriminatory attitudes, policies and measures in employment practices based exclusively on age" (G.A. Res. 3137, U.N. Doc. A19030 (1973)).

The evolving right against discrimination on the ground of age is gaining ground in this and other countries. I have mentioned earlier its partial recognition in the Human Rights Codes. In some provinces, as in the British Columbia statute dealt with in *Harrison*, *supra*, it is still only recognized in the form in which it existed in Ontario before 1982. Other provinces, Quebec, New Brunswick and Manitoba, have now gone further and prohibited age discrimination in employment altogether. Similarly in 1967, the United States enacted the *Age Discrimination in Employment Act*, 29 U.S.C. {SS} {SS} 621-634 (1976), although it was limited to persons between 40 to 65. In 1977, however, Maine abolished as of 1980 all mandatory retirement in both the public and private sectors (the Act is discussed by Kertzer, "Perspectives on Older Workers: Maine's Prohibition of Mandatory Retirement" *supra*.

The Nature of the Right

Section 15(1) of the *Charter* specifically mentions age as one of the grounds of discrimination sought to be protected by that provision, and there is no doubt as I have already indicated that such discrimination, like the other categories mentioned, can constitute a significant abridgement to the dignity and self-worth of the human person. It must not be overlooked, however, that there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability; see "The Age Discrimination in Employment Act of 1967" (1976), 90 *Harv. L. Rev.* 380, at p. 384; Tarnopolsky and Pentney, *Discrimination and the Law* (1985), at p. 7-5. This hardly means that general impediments based on age should not be approached with suspicion, for we age at differential rates, and what may be old for one person is not necessarily so for another. In assessing the weight to be given to that consideration, however, we should bear in mind that the other grounds mentioned are generally motivated by different factors. Racial and religious discrimination and the like are generally based on feelings of hostility or intolerance. On the other hand, as Professor Ely has observed, "the facts that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws . . . that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older", *Democracy and Distrust* (1980), at p. 160. The truth is that, while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits. The careful manner in which the General Assembly Resolution on the rights of the aged is framed is worth noting. Its recommendation discouraging discriminatory practices in employment based

exclusively on age is prefaced by the words that this be done "wherever and whenever the overall situation allows".

I turn then to the balancing of the competing values mandated by s. 1 of the *Charter*.

Section 1

Preliminary Issue

I have already referred in a general way to the approach taken by this Court in weighing competing values in assessing whether a legislative scheme or other law constitutes a reasonable exception to a right guaranteed under the *Charter*, and I shall not repeat it here. Before making this assessment, however, it is necessary to dispose of a preliminary issue that has arisen in this case. In the Court of Appeal, the majority largely confined its examination of s. 1 to the specific situation before it, i.e., it considered the specific import of s. 9(*a*) of the *Human Rights Code, 1981* to mandatory retirement in the university setting. On an examination of the evidence in that specific area, it concluded that s. 9(*a*) constituted a reasonable exception to the right under s. 15 of the *Charter* not to be subjected to discrimination on the ground of age. Blair J.A. (dissenting), however, was of the view that s. 9(*a*) had to be considered against the background of all the situations to which it could apply and in considering the issue in this way he concluded that s. 9(*a*) did not meet the requirements of s. 1 of the *Charter*. The trial judge, Gray J., I should say, also considered the whole context against which the provision operated but concluded that it was justified under s. 1 of the *Charter*.

I agree, and this was conceded by the Attorney General for Ontario, that the analysis under s. 1 should not be restricted to the university context. The appellants in this case were denied the protection of the Code, not because they were university professors but because they were 65 years of age or over. To restrict examination of its application to the university context would be inconsistent with the first component of the proportionality test enunciated by this Court in *R. v. Oakes*, at p. 139, namely, that "the measures adopted must be carefully designed to achieve the objective in question". Section 9(*a*) is not restricted to the university context, and while evidence respecting the specific context in which the issue arises may, as I indicated earlier, serve as an example to demonstrate the reasonableness of the objectives, it must not be confused with those objectives. To the objectives I now turn.

Objectives

The objective of ss. 9(*a*) and 4 of the *Human Rights Code, 1981* is to extend protection against discrimination to persons in a specified age range. The protection as originally prescribed was limited, we saw, to persons between the ages of 45 and 65, an age group considered with considerable justification to be most in need of protection. Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills. Their difficulty is also influenced by the fact that many in that age range are paid more and will generally serve a shorter period of employment than the young, a factor that is affected not only by the desire of many older people to retire but by retirement policies both in the private and public sectors. By 1982, youth employment had also become a more serious factor and the protection was extended, we saw, to the ages of 18 to 65.

Those over 65 are by and large not as seriously exposed to the adverse results of unemployment as those under that age. As mentioned earlier, many social security schemes and private pensions are geared to have effect on the attainment of 65. The respondents, however, did not rely on this factor as constituting a sufficient justification for the differentiation made in the Code between those under, and those over 65. And there is no question that while social security and private pension schemes may afford some financial redress, many older people have need of additional income, a situation that is becoming more apparent as people live longer. Besides, as I indicated earlier, work cannot be considered solely from a purely economic standpoint. In a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth. I need not pursue this further, however, for as the respondents argued, there are several intertwined objectives of these provisions and it is in terms of these combined objectives that the legislation must be assessed.

The general objectives of the legislature in enacting ss. 9(*a*) and 4, Gray J. noted, are readily apparent from a reading of the debates leading to their enactment. Throughout the debate, great concern was expressed about the perplexing problem of not affording protection in the employment sector for those over 65, but in the end other considerations predominated. After voicing his concerns about mandatory retirement, the Minister, the Honourable Mr. Elgie, in moving second reading of the Bill, continued (Ontario Hansard, May 15, 1981, at p. 743):

> On the other hand, I can appreciate the views of those employees who fear that such a change might result in their delayed retirement and delayed benefits, especially for those older workers who wish to take advantage of what they have considered for years to be the normal age of retirement.
>
> We also have to look at the labour market ramifications of extending the definition of age under the code and the effect it might have on younger persons entering the labour force. The rates of unemployment there are chronically the highest.

Later, on May 25, 1981 (*ibid.*, at p. 959), he again noted that

> . . . emotionally, we all want to do that [raise the age of mandatory retirement], but in doing so we must make sure we do not deprive people of certain rights they expect, and rightfully expect, when they retire.
>
> We should not rush headlong into that; we should recognize that we must not deprive people of certain benefits they have come to expect following retirement, and we must be sure that we do not interfere with hiring and personnel practices, and with the problem of youth unemployment, by acting very hastily over an issue that we have strong emotional feelings about.

At the Committee stage, the Minister again spoke of the reasons why the government was not ready to abandon the age of 65 as the upward limit for protection of the Code in the field of employment. On December 1, 1981 (*ibid.*, at p. 4097), he stated:

> One cannot address this issue without thoughtful consideration of the real issues -- the demographic issues, youth unemployment issues, pension benefits and the changes that may be suddenly thrown on people who had not planned it in that way. Those are things that have to be considered.
>
> . . . Let us not pretend that there is any disagreement about the principle. We are talking about the problems that may arise, and that is what we are going to address in the study.

What comes out clearly from the debates is the anguish of the members in the face of a measure, which for reasons they viewed as overriding, they felt could not be extended to the protection of the elderly, and the government undertook to make further studies of the ramifications of raising the age limit.

Assuming the test of proportionality can be met, most of the reasons identified by the Legislature for not extending the protection of the Code to those over 65 warrant overriding the constitutional right of the equal protection of the law. That was the view, as well, of Gray J. who, in a passage (at p. 32) with which I am in complete agreement, thus put the matter:

> The foregoing excerpts from Hansard indicate the true objectives of the Legislature in limiting protection against age-based employment discrimination. Ramifications relating to the integrity of pension systems and the prospects for younger members of the labour force were the predominant concerns. The object of the age ceiling is intimately related to the desire for cautious legislative reform. On their face, these objectives and concerns are of sufficient importance to warrant overriding a constitutionally protected right. The motivating concerns can be readily characterized as "pressing and substantial in a free and democratic society".

What we are confronted with is a complex socio-economic problem that involves the basic and interconnected rules of the workplace throughout the whole of our society. As already mentioned, the Legislature was not operating in a vacuum. Mandatory retirement has long been with us; it is widespread throughout the labour market; it involves 50 per cent of the workforce. The Legislature's concerns were with the ramifications of changing what had for long been the rule on such important social issues as its effect on pension plans, youth employment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship. These issues are surely of "pressing and substantial [concern] in a free and democratic society". And as Gray J. observed at p. 32, this conclusion is generally reinforced by reference to other industrialized democracies. The United States, the United Kingdom, Ireland, Australia, the Federal Republic of Germany, Norway and Japan all recognize some form of pension-associated mandatory retirement.

As for the objective of reducing youth unemployment, it seems to me that such objective should not be accorded much weight. If the values and principles essential to a free and democratic society include, according to *Oakes*, "respect for the inherent dignity of the human person" and "commitment to social justice and equality", then the objective of forcibly retiring

older workers in order to make way for younger workers is in itself discriminatory since it assumes that the continued employment of some individuals is less important to those individuals, and of less value to society at large, than is the employment of other individuals, solely on the basis of age.

Proportionality

The objectives of the legislation being sufficient to warrant overriding a constitutional right, it remains to consider whether the means employed to achieve them are proportional in terms of the guidelines previously enunciated by this Court and set forth earlier in these reasons. First of the matters to be considered is whether these means are rationally connected to the objectives.

Rationality

I find little difficulty in holding that the legislation is rationally connected to its objectives and I shall only briefly deal with this issue since most of the same considerations arise in discussing whether the legislation impinges on the guaranteed right as little as possible.

In examining this question, the history of mandatory retirement and its position as an integral part of the organization of the workplace, which I have already discussed, must not be overlooked. And, as Gray J. observed, *supra*, at pp. 35-36, the courts' "consideration of the propriety of the Legislature's methods cannot be divorced from the knowledge that the Legislature's cautious conduct is motivated by the concern for an orderly transition of values". I noted earlier that the resolution of the General Assembly of the United Nations itself

manifests a recognition of the need to have regard for the "overall situation" in advancing the rights of the aged.

The legislation obviously achieves its purpose of maintaining stability in pension arrangements, and is thus rationally connected to that end. That is true, as well, of the impact of having a set age of retirement on conditions of work. Mandatory retirement is part of a complex web of rules which results in significant benefits as well as burdens to the individuals affected. In consequence, there is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement suitable to a particular area of activity.

Finally, there is the concern for youth unemployment. As I noted earlier, mandatory retirement appears to have some influence on youth employment in closed systems such as universities. As a general proposition, however, the evidence, as Gray J. noted, is somewhat conjectural and I attach little weight to it. As Professor Pesando has pointed out in a passage cited by the British Columbia Court of Appeal in *Harrison v. Univ. of B.C.* (at p. 159), the job opportunities made available through mandatory retirement should not be accorded a central role in the debate on mandatory retirement.

On the whole, however, as stated earlier, I have no difficulty concluding that the legislation is rationally connected to the various objectives sought to be accomplished.

Minimal Impairment

I turn then to the question whether mandatory retirement impairs the right to equality without discrimination on the basis of age "as little as possible". In undertaking this task, it

is important again to remember that the ramifications of mandatory retirement on the organization of the workplace and its impact on society generally are not matters capable of precise measurement, and the effect of its removal by judicial fiat is even less certain. Decisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components. They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch, as *Irwin Toy*, *supra*, at pp. 993-94, has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.

In performing their functions of ensuring compliance with the constitutional norms in these amorphous areas, courts must of necessity turn to such available knowledge as exists and, in particular, to social science research, both of a particular and general nature. The Court of Appeal in its judgment (at pp. 49-51) has helpfully described the difficult problems of evaluating these works and the extent to which the judiciary should defer to legislative judgment in determining issues of minimal impairment of a constitutional right when evidence rationally supports the legislative judgment. This Court has, however, recently dealt with these issues in *Irwin Toy*, *supra*, which I have discussed earlier in these reasons and I rely on what I have already said there. I simply reiterate here that the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives.

In examining this question, it is relevant as it was in the examination of the issue of the rationality of the legislative means employed in attaining the Legislature's objectives, to recall the historical origins of mandatory retirement at age 65 and its evolution as one of the important structural elements in the organization of the workplace. As a result of this development, I repeat, 65 has come to be generally considered the normal age of retirement and some 50 per cent of the work force is organized on the basis of mandatory retirement at that age. There is thus no stigma attached to being retired at 65. It conforms as well to what most people would do voluntarily. Indeed, the evidence indicates that there is an increasing trend towards earlier retirement. Many regard it as a reward for long years of service and, for one reason or another, look forward to retirement. The estimates of workers who would voluntarily elect to work beyond the age of 65 vary from 0.1 to 0.4 per cent of the labour force, or 4,787 to 19,148 persons annually in 1985, rising to 5,347 to 21,388 in the year 2000 (Dr. Foot's affidavit). And the likelihood is that a disproportionate number rank among the more advantaged in society.

As noted earlier, mandatory retirement forms part of a web of interconnected rules mutually impacting on each other. In dealing with university policies on mandatory retirement, I noted its impact in the university context. In that context, we saw, mandatory retirement forms part of a system of long-term employment up to age 65. The system involves increased remuneration over the years without, on the whole, reference to ongoing performance, and reduces demeaning competency hearings for dismissal and the like. I refer again to that portion of the Court of Appeal's judgment at p. 54 cited above. As I mentioned earlier, while s. 9(*a*) cannot be looked at in the discrete setting of the university, it serves as a microcosm that throws important light on what is a widespread labour market phenomenon involving 50 per cent of the work force and undoubtedly affecting other areas by a kind of osmosis.

While there are significant differences from sector to sector, the university system is in many respects a reflection of many other parts of the work force where mandatory retirement is part of a complex, interrelated, lifetime contractual arrangement involving something like deferred compensation. Certainly it is true of union-organized labour where seniority serves as something of a functional equivalent to tenure. Seniority not only allocates the high paying jobs to senior people; it protects them against layoffs which are first allocated to younger people. And it takes no great stretch of the imagination to understand that reduction in performance in the years before retirement will be met with more understanding and tolerance than if the person were not close to retirement. As I indicated, this type of arrangement is reflected by osmotic forces in many other areas of the work force. Many organizations are so arranged that the individual is paid increasingly higher remuneration with the years with the expectation or understanding that he or she will depart at a certain stage.

As the study by Professors Gunderson and Pesando submitted by the respondents indicates, mandatory retirement cannot be looked at in isolation. In the view of these scholars, the repercussions of abolishing mandatory retirement would be felt "in all dimensions of the personnel function: hiring, training, dismissals, monitoring and evaluation, and compensation". All these issues would require to be addressed. In a passage cited with approval by Gray J., at p. 38 these authors observed:

> In short, a number of issues regarding the design of occupational pension plans would have to be addressed if mandatory retirement were not permitted. So, too, would the wage policy followed by many employers, especially when the pension benefit is linked to the employee's earnings. The use of the occupational pension plan as a *vehicle* for deferring a portion of the employee's total compensation to the employee's later work years may be reduced. As before, not permitting mandatory retirement is likely to require compensating adjustments elsewhere in the compensation package and in the set of work rules that govern the workplace.

In tinkering with mandatory retirement, we are affecting an institution closely intertwined with other organizing rules of the workplace.

The parties presented competing social science evidence on each of these issues. The appellants began by underlining that mandatory retirement simply constituted arbitrary treatment of individuals on the sole ground that they are members of an identifiable group, citing the 1985 Federal Parliamentary Committee on Equality Rights, *Equality For All*, at p. 21. While there may be some jobs where mandatory retirement can be justified on the basis of a reasonable and *bona fide* occupational qualification, they said, s. 9(*a*) does not differentiate between these jobs and those where it cannot be so justified. It would, they added, be easy to design a scheme permitting mandatory retirement only in workplaces where it was required, for example, to preserve the integrity of existing pension plans or to implement a scheme to hire younger persons. At all events, they argued, the evidence they submitted disclosed: that the abolition of mandatory retirement would not increase youth employment; that pension plans do not require mandatory retirement to provide financial security for employees; and that it would not have a significant effect on personnel policies, including deferred compensation, dismissals, evaluation and monitoring, or planning considerations which were in any event matters only of administrative convenience or costs. They drew attention to the fact that in several Canadian jurisdictions, New Brunswick, Quebec and Manitoba, mandatory retirement had been abolished without adverse effects, and the same was true of Maine.

The respondents naturally submitted evidence supporting the opposite conclusions. Their argument and evidence in support was that a number of consequences would likely arise at all stages of the employment relationship. At the hiring stage, it could reduce youth employment opportunities. As well, employers might be reluctant to hire middle-aged workers in the absence of a known age when the contract must end, and this might restrict promotion

opportunities for older workers. Deferred compensation would not be as feasible. As to working conditions, the evidence they presented was to the following effect: dismissals of older workers would likely increase; monitoring and evaluation of all workers would also increase; so too would continuous monitoring and evaluation; ultimately, compensation of older workers would fall and that of younger workers would rise; the importance of seniority would be affected. In addition, the design of occupational pension plans would have to be reviewed. As now constituted, these plans form part of deferred compensation schemes which generally benefit workers.

In the face of these competing views, it should not be altogether surprising that the Legislature opted for a cautious approach to the matter. The Legislature, like this Court, was faced with competing socio-economic theories, about which respected academics not unnaturally differ. In my view, the Legislature is entitled to choose between them and surely to proceed cautiously in effecting change on such important issues of social and economic concern. On issues of this kind, where there is competing social science evidence, I have already discussed what *Irwin Toy*, *supra*, has told us about the stance the Court should take. In a word, the question for this Court is whether the government had a reasonable basis for concluding that the legislation impaired the relevant right as little as possible given the government's pressing and substantial objectives.

We are told that a number of jurisdictions have removed mandatory retirement and the apprehended effects have not resulted. I should say, first of all, that this step did not result from judicial fiat, but out of a legislative choice. A study on the Maine legislation to which I have already referred (see Kertzer, *supra*, at p. 168) reveals the incremental way in which a legislative process for the abolition of mandatory retirement proceeded. More important, however, is that we do not really know what the ramifications of these new schemes will be

and the evidence is that it will be some 15 to 20 years before a reliable analysis can be made. The American data available is open to question because the "tax back" features of the American social security legislation discourage workers from continuing to work beyond the normal retirement age. We thus do not really know how many workers will opt for a longer working life in a climate where 65 is no longer the normal age and thus the nature and extent of the impact the removal of mandatory retirement would have on the organization of the workplace.

Take the issue of pensions. The importance of this issue and its interrelationship with mandatory retirement is set forth by Professors Gunderson and Pesando in the following passage (at p. 8):

> Mandatory retirement, as part of a collective agreement or a company personnel policy, is highly correlated with the existence of occupational pension plans. For example, the Conference Board report (page 7) indicates that ninety-six per cent of their respondents with a pension plan have a mandatory retirement policy. A recent Labour Canada report indicates that 95 per cent of the pension plans in Canadian collective agreements of 500 or more employees contain mandatory retirement clauses, and that approximately 70 per cent of these agreements contain pension provisions. Therefore, about two-thirds of these major collective agreements have mandatory retirement provisions.

The appellants nonetheless argue that the removal of mandatory retirement has no demonstrated effect on pensions, and that any dislocations resulting from such removal could easily be adjusted. But there is strong evidence to support Dickson C.J.'s remark in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 83, that "there is a close relationship between salaries and pensions". Professors Gunderson and Pesando put it this way:

> Especially if the employee's pension is linked to the employee's earnings just prior to retirement, the pension plan is likely to be an important vehicle through which the deferral of total compensation takes place (James E. Pesando, "The Usefulness of the Wind-Up Measure of Pension Liabilities," *Journal of Finance*, July 1985, entered as Exhibit "L").

> The pension benefits earned each year tend to rise with the employee's age and years of service. Pension benefits become more valuable as the employee nears the age at which they become payable, and wage increases granted the employee have a magnified impact through the benefit formula. Without mandatory retirement, there would likely be a reduction in the willingness of employers to defer compensation. This would require adjustments in pay policy and/or the pension plan on this account.

There is concern that if the age of retirement is lifted, social security benefits will be moved upwards.

It can be seen, therefore, that the concern about mandatory retirement is not about mere administrative convenience in dealing with a small percentage of the population. The concern is with the impact the removal of a rule that is generally beneficial for workers would have on the compelling objectives the Legislature has sought to achieve.

It is argued that the Legislature should tailor the legislation so as to permit mandatory retirement only in those industries where age constitutes a reasonable and *bona fide* employment requirement. As we saw in discussing university policies, however, one is not necessarily concerned with whether a particular individual is or is not competent to do the job. We are concerned with whether a private organization should or should not be organized in those terms; see also *Stoffman v. Vancouver General Hospital*, *supra*. It seems difficult to see how the Legislature could in the absence of an examination in context of factors such as were analyzed in the university context and in the context of these companion cases be able to divine this ahead of time. Nor is it by any means obvious that a Human Rights Commission is necessarily the most appropriate body to make that assessment.

Indeed, there are not only valid economic reasons, but sound reasons of social policy, for the Legislature's not imposing its will in the area. Mandatory retirement is not government

policy in respect of which the *Charter* may be directly invoked. It is an arrangement negotiated in the private sector, and it can only be brought into the ambit of the *Charter* tangentially because the Legislature has attempted to protect, not attack, a *Charter* value. This is not a case like *Blainey*, *supra*, where the provision in question could only have a discriminatory purpose.

It must be remembered that what we are dealing with is not regulation of the government's employees; nor is it government policy favouring mandatory retirement. It simply reflects a permissive policy. It allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. It was not a condition imposed on employees. Rather it derives in substantial measure from arrangements which the union movement or individual employees have struggled to obtain. It results from employment contracts that ensure stable, long-term employment, and some security for retirement. Far from being an unmitigated evil, it forms, as Professor Gunderson puts it, "an intricate part of the interrelated employment relationship" that is generally beneficial to both employers and employees. Expectations have built up on both sides.

As I stated, the labour movement, which comprises the most protected group of employees, fought for it for many years. University faculties and personnel, with which we are directly concerned here, actively sought it. The labour movement is now worried about its elimination. The Canadian Labour Congress adopted a resolution on the subject (No. 377), passed in 1980 and confirmed in 1982, which reads as follows:

> WHEREAS the organized labour movement has fought hard and long legislative battles to establish the mandatory retirement age of sixty-five (65) years; and

> WHEREAS the labour movement has continued to press for a lowering of the retirement age with adequate pensions in order that workers may enjoy a few years of leisure in good health; and
>
> WHEREAS a mandatory retirement age provides employment for Canada's youth entering the labour market for the first time; and
>
> WHEREAS there has been recent discussion and especially Senator David Croll's report expressing some desire to end the mandatory retirement age and encourage a system of voluntary retirement;
>
> BE IT RESOLVED that the Canadian Labour Congress oppose the erosion of the mandatory retirement system, and that the current permissive legal framework with regard to mandatory retirement be maintained, so that the unions that wish to accept mandatory retirement are free to do so and those that wish to eliminate it can do so through collective bargaining.

Involved here, as I indicated, are important social as well as economic values. The present situation allows the parties concerned, the employers and the employees, the freedom to agree about an issue of central importance to their lives and activities. The freedom of employers and employees to determine conditions of the workplace for themselves through a process of bargaining is a very desirable goal in a free society. Certainly, the parties involved desire it. The employers are contesting this action. The labour movement, which represents a significant portion of the labour force and whose efforts have benefited other workers, both through legislation adopting standard conditions in collective agreements and through private agreements that emulate them, contests it as well.

Both employers and employees may prefer a contractual relationship which includes a definite termination date rather than an indefinite work term, because such an agreement provides a number of benefits to both parties. I have already referred to these -- a type of deferred compensation scheme, periodic as opposed to continuous monitoring that may prevail if an employee's compensation is tied to productivity at all times, a "due process" scheme achieved through seniority rules, consensual evaluation and promotion procedures, a known

time ending the work relationship which permits both employer and employee to engage in long-term planning, and a desire for a termination date that allows the individual to retire with dignity. These are looked upon by both sides as characteristics of a lifetime contractual arrangement in which mandatory retirement is an integral part. Though an individual may, quite understandably, object to being mandatorily retired when he or she becomes 65, it does not alter the fact that this was the arrangement that underlay the expectations of both parties at the beginning and throughout the employee's working life and for which they contracted.

I do not intend here to take sides on the economic arguments, and it may well be that acceptable arrangements can be worked out over time to take more sensitive account of the disadvantages resulting to the aged from present arrangements. But I am not prepared to say that the course adopted by the Legislature, in the social and historical context through which we are now passing, is not one that reasonably balances the competing social demands which our society must address. The fact that other jurisdictions have taken a different view proves only that the Legislatures there adopted a different balance to a complex set of competing values. The latter choice may impinge on important rights of others, especially those near retirement. The observations I made in *R. v. Edwards Books and Art Ltd.*, *supra*, at p. 795, have application here:

> By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the *Charter* established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.

In such circumstances, as I there stated, "a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures". What a court needs to consider is whether, on the available evidence, the Legislature may reasonably conclude that the protection it accords one group does not unreasonably interfere with a guaranteed right. To repeat the formulation adopted in *Irwin Toys*, *supra*, the Legislature had a reasonable basis for concluding that the rights of the aged were impaired as little as possible given the government's pressing and substantial objectives.

Overbreadth

I have dealt with s. 9(*a*) of the *Human Rights Code, 1981* solely in terms of mandatory retirement. That, as I see it, is the real cause of concern about the provision. It is right to say, however, that the appellants' attack on the provision was more comprehensive. In their counsel's view, s. 9(*a*) denies them any protection against any form of age-based employment discrimination under the Code. Even if it could be justified if confined to mandatory retirement, he argued, it would simply be overbroad.

Counsel did not press this argument too strongly, and in my view rightly so. With respect, it seems to me, the argument addresses concerns that are more fanciful than real. In *R. v. Edwards Books and Art Ltd.*, *supra*, at p. 795, I cautioned against a too abstract, too theoretical, approach to constitutional interpretation. The Constitution, I there observed, must be applied on a realistic basis taking account of the practical, living facts to which legislation is addressed. Here counsel for the appellants was hard-pressed to give an example of age-based discrimination that would not otherwise be covered by the Code. The one example he did give, a highly unlikely situation in the workplace, could be dealt with by the Code as harassment. It would be wrong to let the constitutionality of the legislation hang on the

Legislature's failure to address situations that are, for all practical purposes, hypothetical in the workplace. This fussy concern for legislative perfection cannot realistically be expected. In fact, it may be, as counsel for the universities suggested, that the Legislature may have wished to allow some flexibility to make adjustments with respect to hours of work or responsibilities on the basis of age. Nobody doubts that the effective impact of the provision is in relation to mandatory retirement.

Effects

There remains the question whether there is a proportionality between the effects of s. 9(*a*) of the Code on the guaranteed right and the objectives of the provision. From the perspective from which the arguments were, for the most part, advanced, I could say, as I did in respect of the universities' policies, that this enquiry really involved the same considerations as were discussed in dealing with the issue of whether the legislation met the test of minimal impairment.

That is certainly true, but it seems to me that the legislation may usefully be approached from a rather different, and probably truer, perspective. It is important to keep in mind that the Legislature did not purport to legislate about mandatory retirement at all. What it genuinely sought to do was to protect individuals within a particular age range. Given the macro-economic and social concerns of extending this protection beyond 65, it did not accord the same protection beyond that age. The effect, of course, was to deny equal protection of the law for those over 65, just as, I suppose, government does not accord equal benefit of the law by granting old age pensions at 65, rather than at 63 or 64 for those who need it.

It seems to me, however, that the courts must exercise considerable caution in approaching this type of *Charter* problem. This is not a case like *Blainey*, *supra*, where there is no legitimate ground to support a provision. It is quite obvious from looking at the situation there that the different treatment accorded women was simply based on an irrelevant personal trait. In short, it was sex discrimination. The situation is quite different here. The Legislature sought to provide protection for a group which it perceived to be most in need and did not include others for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others.

In looking at this type of issue, it is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety. This Court has had occasion to advert to possibilities of this kind. In *R. v. Edwards Books and Art Ltd.*, Dickson C.J., there dealing with the regulation of business and industry, had this to say, at p. 772:

> I might add that in regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. In this context, I agree with the opinion expressed by the United States Supreme Court in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), at p. 489:
>
> > Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think . . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . The legislature

> may select one phase of one field and apply a remedy there, neglecting the others.

The question becomes whether the cut-off point can be reasonably supported. In *Blainey*, it could not. Here I think it can and I do not think (though this is a matter that always bears scrutiny) that the cut-off point, which is not only reasonable but is appropriately defined in terms of age, is necessarily invalid because this is a prohibited ground of discrimination. The *Charter* itself by its authorization of affirmative action under s. 15(2) recognized that legitimate measures for dealing with inequality might themselves create inequalities. It should not, therefore, be cause for surprise that s. 1 of the Charter should allow for partial solutions to discrimination where there are reasonable grounds for limiting a measure.

This leads to a final consideration. The *Charter*, we saw earlier, was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice. As counsel for the Attorney General for Saskatchewan colourfully put it, this "should lead us to ensure that the Charter doesn't do through the back door what it clearly can't do through the front door". Not, I repeat, that the courts should stand idly by in the face of a breach of human rights in the Code itself, as occurred in *Blainey*. But generally, the courts should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.

Disposition

I would dismiss the appeal. I would answer the constitutional questions as follows:

1. Does s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. Is s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

Yes.

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

No.

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

If these provisions had been enacted by government, they would infringe s. 15(1) of the *Charter*.

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

If question 4 had been answered in the affirmative, these provisions would nevertheless be justified under s. 1 of the *Charter*.

//*Wilson J.*//

The following are the reasons delivered by

WILSON J. (dissenting) -- This appeal and those heard along with it were grouped together in order that this Court review the applicability of the *Canadian Charter of Rights and Freedoms* to a number of different entities performing different kinds of public functions which the government has an interest in having performed. It was hoped that through an examination of these entities, their constitutions, their objects, how they were regulated or controlled, how they were funded, and how they conducted their affairs, some criteria could be developed for application in a principled way in determining whether other entities performing such functions or comparable functions were or were not covered by s. 32 of the *Charter*. If such criteria could be developed, as opposed to having each entity brought before the Court and the question addressed on a case by case basis, it would obviously be desirable in that both government and such entities could at least make an informed assessment as to whether or not their conduct would be subject to *Charter* scrutiny. It is with this objective in mind, therefore, that I approach the first question addressed by my colleague Justice La Forest in this appeal, namely does the *Charter* apply to universities?

I. To Whom Does the *Charter* Apply?

Section 32(1) of the *Charter* states:

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

The appropriate approach to the interpretation of this section received detailed treatment by this Court in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. At issue was the question whether a court injunction to restrain a union from engaging in secondary picketing infringed a union's freedom of expression under s. 2(*b*) of the *Charter*. This, in turn, raised the question whether a court order obtained in the course of a dispute between a company and a union was subject to review under the *Charter*.

Justice McIntyre, speaking for the Court on this issue, began his analysis of the *Charter*'s applicability by observing that s. 32(1) of the *Charter* made clear that the *Charter* applied to the Parliament and government of Canada and to the legislatures and governments of the provinces. But because s. 32(1) made no reference to private parties it was his view that the *Charter* did not apply to private litigation divorced from any connection to government. He then went on to discuss what "government" as used in the section meant. He said at p. 598:

> 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 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. The word `government', following as it does the words `Parliament' and `Legislature', must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word `government' is used in s. 32 of the *Charter* in the sense of the executive government of Canada and the Provinces. [Emphasis added.]

Having concluded that "government" meant the executive or administrative branch of government, McIntyre J. then moved on to consider the ways in which the executive or administrative branch could violate the *Charter*. He concluded that it could happen in two different ways. The executive could act pursuant to legislation which was itself in violation of the *Charter*. Or it could act on a common law principle which resulted in a violation of the *Charter*. He said at p. 599:

> It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the *Charter* will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a *Charter* right or freedom. In this way the *Charter* will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom. [Emphasis added.]

McIntyre J. then turned to the question that lay at the heart of *Dolphin Delivery*, namely whether for the purposes of *Charter* application a court order should be viewed as government action. He concluded at pp. 600-601 that it should not:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element

> of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the *Charter* applies. [Emphasis added.]

McIntyre J. acknowledged the difficulty in defining exactly what element of government involvement was necessary in order to bring the *Charter* into play. He did, however, indicate at p. 602 that the *Charter* applied to subordinate legislation such as "regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures". Where government action of this kind was relied on by a private litigant as giving rise to an infringement of the *Charter* rights of another, the *Charter* would apply. But a court order alone could not be relied on as constituting government action for *Charter* purposes. He said at p. 603:

> Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply.

McIntyre J. concluded his analysis by observing that in the case before him there was no offending statute. There was simply a common law rule that rendered secondary picketing tortious and subject to injunctive restraint on the basis that such picketing induced a breach of contract. While the *Charter* applied to the common law when government action was based upon it, McIntyre J. was of the view that in the case before him there was no government action that would bring the *Charter* into play.

What principles then are to be drawn from *Dolphin Delivery*? It seems to me that there are three:

(i) s. 32(1) of the *Charter* applies to legislation broadly defined and to acts of the executive or administrative branch of government;

(ii) s. 32(1) of the *Charter* does not apply to private litigation divorced from any connection to government; and,

(iii) a court order does not constitute government action for purposes of *Charter* review.

These conclusions, particularly the second and third, have been the subject of considerable criticism. Some critics have found the Court's interpretation of the section ambiguous. Others simply disagree with it. But it is clear that there are at least two divergent lines of thought underlying the criticism and it might be helpful to address them.

1. *Academic Opinion*

(a) The Common Law/Statute Distinction

A number of critics have interpreted the Court's reasons in *Dolphin Delivery* as drawing a distinction between the common law and legislation and then suggesting that the common law and private litigation are linked and that legislation and litigation in which government is involved are linked. Having interpreted the decision in this manner, the critics then point out that, if this were correct, the *Civil Code of Lower Canada* would be subject to *Charter* review but the bulk of the common law would not. Professor Otis puts the point this way:

> Amazingly, the Justices of the Supreme Court of Canada do not appear to have realized that such a sharp distinction between the common law and statute law in applying the *Charter* could be of significant consequence for the civil law system of Quebec. Virtually the whole field of private legal relationships in Quebec is governed by the Civil Code or statutes. If the Court's reasoning in *Dolphin Delivery* is applied to characterize the Code under subsection 32(1), the *Charter* seems likely to have a broader scope in Quebec than in the common law provinces where judge-made law relating to private dealings is immune from direct constitutional challenge. Quebecers potentially enjoy more extensive constitutional protection than other Canadians and, conversely, Quebec's private law is subjected to potentially greater constitutional constraint than its common law counterparts. This arguably amounts to little less than instituting a dual constitutional order in Canada on the slim ground that "government" in subsection 32(1) must be given an institutional connotation.

(Otis, "The Charter, Private Action and the Supreme Court" (1987), 19 *Ottawa L. Rev.* 71, at p. 87.)

Others have made the same point: see Slattery, "The *Charter*'s Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987), 32 *McGill L.J.* 905, at p. 910; and Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988), 46 *U.T. Fac. L. Rev.* 248, at p. 251. Moreover, Professor Slattery submits that given that in much of Canada the application of the common law ultimately depends on explicit provisions in various Reception Acts, it is difficult to see how one can justify excluding that common law from *Charter* review: see Slattery, *supra*, at p. 910.

Having pointed to one of the ways in which they feel the common law/statute distinction gives rise to difficulties, a number of critics then proceed to attack the distinction at a more general level. Professor Manwaring, for example, observes that it "seems inconsistent to say that the rules governing secondary picketing in British Columbia can be challenged to the extent that they infringe on freedoms of expression solely because they are found in a statute whereas the more restrictive rules in the other jurisdictions cannot be because the legislatures chose consciously not to legislate": see Manwaring, "Bringing the Common Law to the Bar

of Justice: A Comment on the Decision in the Case of *Dolphin Delivery Ltd.*" (1987), 19 *Ottawa L. Rev.* 413, at p. 444.

Professor Slattery accepts that important distinctions exist between the common law and legislation but emphasizes that "these differences are irrelevant to the question of the *Charter*'s application to private relations": see Slattery, *supra*, at p. 917. He goes on to ask:

> Does it make *sense* to hold that the *Charter* applies to relations between private parties where those relations are regulated by legislation, but not when they are governed by the common law? Are there good reasons in principle or policy, or in the clear wording of the *Charter*, for reaching this result? Or is the distinction an arbitrary one, producing artificial and unprincipled results? [Emphasis in original.]

And in a passage that captures the essence of much of the criticism directed at the common law/statute distinction, Howse suggests that "McIntyre J.'s identification of common law rules with private ordering and his definition of government action in terms of statute and government activity pursuant to statute represent a formalistic approach to the constitutionally relevant meaning of government action": see Howse, *supra*, at p. 251.

In my view, this criticism is based on a misinterpretation of the judgment in *Dolphin Delivery*. I cannot find that McIntyre J. identified the common law with private litigation and legislation with litigation in which government is involved. He in fact made it clear that the crucial element was action by the executive or administrative branch of government based on either legislation which violates the *Charter* or a common law principle which results in a violation of the *Charter*. He states very clearly, in my opinion, in the passage I have underlined from p. 599 of his reasons that the *Charter* applies to the common law, <u>whether in public or private litigation</u>, provided the government has acted upon it. Obviously, it follows from his analysis that while legislation (the act of the legislature) can be subject to *Charter*

review regardless of any executive or administrative action being based upon it, the common law will not be subject to *Charter* review absent any government action based upon it. This is a necessary conclusion from his view that s. 32(1) requires either a legislative act (legislation broadly construed) or an act of the executive or administrative branch of government based on a common law principle which results in a violation of the *Charter*. This is the consequence, he states, of the *Charter*'s being made applicable in s. 32(1) to legislatures and governments.

I agree with the commentators that one of the consequences of *Dolphin Delivery*'s refusal to apply the *Charter* to the common law absent government action is that the *Charter* will have a broader application in Quebec than in the other provinces. However, it seems inescapable that all legislation including the *Civil Code* of Quebec is subject to *Charter* review under s. 32(1). I see no basis on which the *Civil Code* can be distinguished for this purpose from other legislation. One might speculate as to whether Parliament overlooked this problem when it enacted s. 32(1), particularly if Professor Hogg is correct that the legislative history supports the view that Parliament did not intend the *Charter* to apply to private action: see Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at pp. 23-24. The necessary result of this, it seems to me, is that government action of some sort is a pre-requisite for *Charter* review of common law principles.

The real issue, it seems to me, is whether the Court was correct in concluding that on the wording of s. 32(1) of the *Charter* government involvement of some kind was required in order to trigger *Charter* scrutiny. I propose to return to this later.

(b) <u>The Status of Court Orders</u>

The second major criticism of McIntyre J.'s judgment, i.e., that it is a mistake not to treat court orders as government action, is particularly challenging because it raises complex questions concerning the very nature of government action. In discussing this aspect of the decision many of *Dolphin Delivery*'s critics have been quick to point to a seeming contradiction in McIntyre J.'s reasoning. For example, Professor Manwaring, *supra*, states at p. 438:

> His reasoning on this point is confusing in spite of its importance to the result. He said that the courts are bound by the *Charter* in the same way that they are bound by all law but, at the same time, he argued that court orders are not governmental action for the purposes of section 32 because the courts are not part of the executive branch of government. They act as neutral arbiters. This implies that courts have an independent constitutional status that exempts them from the *Charter*. This reasoning is contradictory because it suggests that the courts are at the same time bound and not bound without providing any clear criteria which would permit us to decide when the *Charter* will apply.
>
> If the courts are bound by the *Charter* it makes no sense to suggest that they do not have to respect it when making orders.

Other critics have gone on to make at least three points concerning McIntyre J.'s observations about court orders and the apparent tension in his reasoning. First, several writers have stressed that various sections of the *Charter* make clear that there <u>are</u> instances in which the *Charter* applies to courts. Professor Hogg, for example, states that ss. 11, 12, 13, 14 and 19 of the *Charter* obviously apply to the courts: see Hogg, "*The Dolphin Delivery Case*: The Application of the *Charter* to Private Action" (1986-87), 51 *Sask. L. Rev.* 273, at p. 275; see also Howse, *supra*, at p. 251. Professor Hogg notes that courts in this country have been established or continued by statute and that "their powers to grant injunctions and make other orders are granted (or continued) by statute". Given that other statutory tribunals will have to comply with the *Charter,* he asks, "Why not the courts?": see Hogg, *supra*, at p. 275.

A second and more sweeping line of attack suggests that McIntyre J.'s analysis of s. 32(1) is simply incompatible with a robust understanding of s. 52 of the *Constitution Act, 1982*. Professor Beatty puts the argument this way:

> For those who read section 52 comprehensively, as elevating the Constitution and the rule of law above all branches of our government, the result can be no different when the same or a similar law is declared to be the deciding rule by the judicial branch of our government. Regardless of which of the three branches of government exercises the authority of the state to reconcile these competing freedoms, the force and coercion of the law will be the same.

(Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987), 37 *U.T.L.J.* 183, at p. 187.)

Professor Slattery argues that courts must be seen as a branch of government: courts "act in the name of the community as a whole, as symbolized by the Crown, and derive their authority from that fact. In this respect they represent the State, even if they function differently than other branches of government" (Slattery, *supra*, at p. 918). Similarly, Professor Gibson states:

> If one were to inquire why, in the opinion of most constitutionalists, and now of the Supreme Court of Canada, governmental actors should be subjected to a more stringent obligation to respect rights and freedoms than private actors, the most frequent answer would surely be: because government activities, backed by the overwhelming power of the State, have much greater potential for oppression than do private activities. Do judicial powers carry less potential for oppression than executive powers? Clearly not. Judges wield at least as much power over individual citizens as do most bureaucrats. Sometimes it includes the power of life and death. At the highest level, the judiciary could be said to hold even greater power than the executive, since decisions of the Supreme Court of Canada, unlike those of the Cabinet, are immune from judicial review.

(Gibson, " What did Dolphin Deliver?", in Gérald-A. Beaudoin, ed., *Your Clients and the Charter -- Liberty and Equality* (1987), at p. 83.)

Finally, some critics have gone on to articulate a third line of attack on the proposition that court orders are not government action. They have emphasized that it is well accepted in the United States both that court action may constitute government action and that attempts to distinguish courts from government are likely to prove unsuccessful: see, for example, Manwaring, *supra,* at p. 440. Furthermore, Professor Etherington has observed that many of the academics whose work McIntyre J. found persuasive in *Dolphin Delivery* conclude that the *Charter* should not apply to private action and at no time suggest that the *Charter* does not apply to private litigation: see Etherington, "*Retail, Wholesale and Dept. Store Union, Local 580* v. *Dolphin Delivery Ltd.*" (1987), 66 *Can. Bar Rev.* 818. At page 833, he notes:

> But all treat the question, whether the Charter should apply to private litigation where a court is asked to enforce a common law rule which infringes a Charter right, as a separate issue under the question of what constitutes governmental action. Swinton remains noncommittal on the question of whether the Charter should apply to private litigation in such circumstances. McLellan and Elman suggest that it is likely that the Charter will have an indirect impact on private activity by this route, while Hogg advocates the adoption of the *Shelley* v. *Kraemer* [334 U.S. 1 (1948)] and *N.Y. Times Co.* v. *Sullivan* [376 U.S. 254 (1964)] doctrine in such cases to preclude the judicial enforcement of common law doctrines that would infringe Charter rights. Although Hogg's position on the central question at issue in *Dolphin Delivery* is revealed with some clarity later in the judgment, McIntyre J.'s assertion that his conclusion, that the Charter does not apply to private litigation, has been adopted by most commentators who have dealt with this question is not convincing.

To summarize, critics of the proposition that court orders are not government action stress: (i) that various sections of the *Charter* are obviously applicable to the courts, (ii) that s. 52 of the *Constitution Act, 1982* requires that s. 32(1) of the *Charter* be interpreted in such a way as to bind courts by its provisions, and (iii) that courts represent the state as much as any other branch of government.

Let us return to McIntyre J.'s analysis on this point. The nub of it appears in the passage which I have underlined from p. 600 of his reasons. It states:

> The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation.

Two thoughts underlie this passage, it seems to me. The first is the distinction made by McIntyre J. between the role of the court in litigation as compared with the role of the parties. One of the parties is alleging a *Charter* violation by the other. The court is bound by the *Charter* in the sense that it must interpret and apply it to the dispute. But it is, he says, a neutral arbiter in the decision-making process. The question it has to answer is: has there been a violation of the *Charter* by either the legislature or the executive or administrative branch of government? The critics say: but it is itself "government" within the meaning of s. 32(1) when it does this. McIntyre J. says no: it is acting in its traditional adjudicative capacity in which it is totally independent of the other branches of government. This must be so, he says, because it could not otherwise perform the function it has been given under the *Charter*. It cannot be both judge and judged at the same time. How could it, for example, take an unbiased approach to whether the government had violated human rights or whether, if it had, its conduct was justified under s. 1?

This is not to say, as McIntyre J. points out, that the courts are above the law and above the *Charter*, but simply that in exercising their adjudicative function under the *Charter* in a dispute between others, they cannot be viewed as "government" and the end product of their decision-making, the order of the court, as government action for purposes of s. 32(1).

If, of course, a court as an institution were in its own administration to violate a citizen's human rights, e.g., its employees' freedom of religion or equality rights, it would be just as guilty of a *Charter* violation as any other institution.

The second thought expressed by McIntyre J. is that, if court orders constitute government action for purposes of s. 32(1) then, since virtually all disputes before the court end in a court order of some kind, all litigation would be subject to *Charter* scrutiny. McIntyre J. obviously thought that this would be a very convoluted way of making the *Charter* applicable to private action. Why would s. 32(1) restrict the application of the *Charter* to legislatures and governments if it was meant to apply to private action as well? Why not simply say so? It is, I believe, also clear from the judgment in *Dolphin Delivery* that McIntyre J. was concerned that the role of the Human Rights Codes not be pre-empted by the *Charter*.

Assuming that my interpretation of the Court's decision in *Dolphin Delivery* is correct and that the Court did draw a sharp distinction between government and private action for purposes of *Charter* application, was it justified in so doing?

2. *Is the Private/Government Distinction Sustainable*?

Professor Slattery has argued that many of the difficulties encountered in *Dolphin Delivery* flow from the Court's distinction between government and private action. He shares Professor Beatty's view that s. 52 of the *Constitution Act, 1982* which states that any law inconsistent with the Constitution "is, to the extent of the inconsistency, of no force or effect" is a clear indication that s. 32(1) was not meant to place limits on the *Charter*'s application. Slattery states at p. 920:

> Given that the law in most of Canada today is a tightly woven mesh of mixed common law and statutory origins, the search for the golden thread of State action is likely to prove both frustrating and in the end pointless.

As a result, Professor Slattery suggests that questions of applicability can really only be determined by looking at the individual provisions of the *Charter*: see Slattery, *supra*, at p. 922, and Slattery, "Charter of Rights and Freedoms -- Does it Bind Private Persons" (1985), 63 *Can. Bar Rev.* 157, at p. 158.

For his part, Professor Gibson has consistently argued that the only sensible interpretation of s. 32(1) of the *Charter* is one that places no restrictions on the range of bodies to which it applies: see "The Charter of Rights and the Private Sector" (1982), 12 *Man. L.J.* 213; "Distinguishing the Governors from the Governed: The Meaning of "Government" Under Section 32(1) of the Charter" (1983), 13 *Man L.J.* 505; *The Law of the Charter: General Principles* (1986), at pp. 85-118; and "What did Dolphin Deliver?", in *Your Clients and the Charter -- Liberty and Equality*, *supra*, at pp. 75-90. He stresses that American jurisprudence and academic commentary has struggled in vain to produce a workable distinction. He observes that in *Reitman v. Mulkey*, 387 U.S. 369 (1967), at p. 378, the United States Supreme Court described efforts to distinguish between private action and government action as an "impossible task". He too is of the view that the wording of s. 32(1) does not require the Court to read limits into the scope of the *Charter*'s application. Moreover, he submits that "If the Charter is to serve the purpose of striking a satisfactory compromise between the claims of the individual and the claims of the community, its norms must be applied to everyone -- public or private -- whose actions affect the rights and freedoms of others": see *The Law of the Charter: General Principles*, *supra*, at p. 118.

Professor Manwaring has also explored some of the problems raised in American jurisprudence that addresses the state action doctrine and notes that there are American writers who have argued that the public/private distinction is conceptually incoherent: see, for example, the Papers from the University of Pennsylvania Law Review Symposium on The

Public/Private Distinction (1982), 130 *U. Pa. L. Rev.* 1289 to 1608. While he observes that in his view s. 32(1) of the *Charter* was meant to be a codification of the very state action doctrine that has proven the source of so many intractable problems in the United States, he concludes that "The extent of the doctrinal confusion and the strength of the critique suggest that, in spite of the fact that the reasons for including section 32 in the *Charter* seem obvious, it is going to prove very difficult to apply the section in practice": see Manwaring, *supra*, at p. 436.

Some commentators who take the position that the *Charter* applies to private action as well as government action have suggested that s. 32(1) may simply have been included to make it clear that the *Charter* binds the Crown. For example, Professor De Montigny notes that one might be tempted to explain the presence of this clause by resorting "to the well-known and long-established principle that the Crown, in absence of an express indication to the contrary, is not subject to statutory law, and to thereby contend that without express mention of government in section 32, decisions taken by the executive in the exercise of its prerogative powers could not be reviewed": see "Section 32 and Equality Rights", in Bayefsky and Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), at p. 568.

In similar vein Professor Gibson notes in *The Law of the Charter: General Principles*, *supra*, at pp. 112-13:

> First, there is a long-established principle of interpretation that although legislation normally applies to everyone else without explicit reference, it does not apply to the Crown unless the Crown is referred to explicitly or by necessary implication. Statutes which state that they apply to the Crown, but make no explicit reference to others to whom they apply are commonplace. Given the possibility that a similar approach might be taken with respect to the interpretation of the Charter, there was good reason to refer expressly to "government" in section 32(1). While the term "government" rather than the more formal "Her Majesty" is somewhat unusual, its use can be attributed to both a desire to make the document intelligible to lay readers and the fact that certain non-Crown governmental entities, such as local governments, were intended to be covered.

In other words, this line of argument suggests that had s. 32 not been included, this Court might well have concluded that at least some of the Crown's activities were not subject to the *Charter*.

I do not find this line of reasoning persuasive since it seems to me obvious that one of the basic purposes of a constitutional document like the *Charter* is to bind the Crown. I do not believe therefore that in the absence of s. 32(1) it would have been open to the Court to apply ordinary principles of statutory interpretation when construing the *Charter* and thereby conclude that the Crown was not bound by its provisions.

Moreover, it seems to me that if the purpose of s. 32(1) was simply to make clear that the *Charter* applies to activities undertaken by virtue of the Crown's common law powers, the provision would have been drafted in much more precise language and that the term "Crown" or "Her Majesty" would have been used. I do not find convincing the suggestion that the term "government" was employed as a more colloquial way of referring to the Crown.

There are, of course, also commentators who agree that providing a clear outline of the limits on *Charter* application is a very difficult task, but who nonetheless argue that s. 32(1) of the *Charter* does impose such limits. The problem with *Dolphin Delivery*, they suggest, is not that the distinction cannot be drawn, but that the Court did not draw it in a satisfactory way. Howse, for example, puts the point this way (*supra*, at p. 253):

> The Court was thus justified in its view that *some* limits must be placed on the applicability of the Charter to private activity. Yet, instead of developing a constitutional doctrine of the public/ private distinction to determine these limits, it employed a formal conception of government action to restrict Charter application.

Professor Otis, for his part, observes that it is "remarkable" that the Court did not elaborate on the "jurisprudential and contextual assumptions" underlying its stance. He suggests that when one puts s. 32(1) in its broader context, it becomes clear that the document as a whole was meant to apply only to government: "Many substantive provisions are textually restricted to government, while others have been arguably construed as such by the Supreme Court of Canada". See Otis, *supra*, at p. 78. In particular, he points to the following provisions of the *Charter*: s. 19, which sets out linguistic rights that are clearly aimed at delineating governments' obligations; s. 15, which refers to equality rights only with respect to "law" and which he feels thereby provides strong textual evidence in support of the proposition that the *Charter* is only applicable to government; ss. 3 and 4, which set out a citizen's democratic rights and which impose corresponding obligations on government; ss. 11 and 13, which, he submits, this Court has made clear are restricted to criminal and penal proceedings (see *Dubois v. The Queen*, [1985] 2 S.C.R. 350); and s. 7 which he points out has been interpreted in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 490, as concerned with the protection of the individual from direct impingement by government upon his or her life, liberty and security of the person. Professor Otis concludes at p. 84:

> When the whole picture of the *Charter* is thus revealed, its application to the private sector appears ruled out and the conclusion reached by the Supreme Court of Canada is vindicated.

Professor Hogg also accepts that one must draw a distinction between the acts of private actors and government action. He observes, however, (*supra*, at p. 274) that:

> McIntyre J. did not give his reasons for reaching this important conclusion, but, in my view, there are good reasons for reading the *Charter* in this way. I think that it is the best reading of the (admittedly ambiguous) language of the *Charter*; it is supported by the legislative history of the *Charter*; and it is consistent with the "state action" limitation on the American *Bill of Rights*. Underlying these reasons, of course, is the assumption that there is a private

realm in which people are not obliged to subscribe to "state" virtues and into which constitutional norms ought not to intrude.

Professor Hogg develops this argument at greater length in his *Constitutional Law of Canada* (2nd ed. 1985), at pp. 670-78. In particular, he suggests, at pp. 675-76, that s. 32(2) of the *Charter*, which stipulates that, "notwithstanding" s. 32(1), s. 15 of the *Charter* was only to come into force three years after s. 32 came into force, "plainly assumes that s. 15 is effective through s. 32(1)". This, in his view, is evidence that s. 32(1) was meant to limit the application of the *Charter*. Moreover, he points out that the legislative history of s. 32 supports the view that the *Charter* has no applicability to private action. He places particular weight on testimony given by Mr. Jordan in 1981 before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, who was at the time senior counsel, Public Law, in the Department of Justice. Mr. Jordan [at p. 48:27] asserted that the *Charter* "addresses itself only to laws and relationships between the state and individuals", not private relationships. Finally, Professor Hogg expresses his conviction that the American state action doctrine captures "the normal, expected role of a constitution: it establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people" (*supra*, at p. 677).

As McIntyre J. pointed out in *Dolphin Delivery*, *supra*, at pp. 593-97, Professor Hogg is not the only one to argue that there are limits on the *Charter*'s application. Professor Swinton has argued that the *Charter* is neither designed nor suited to deal with private action: see "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, eds., *The Canadian Charter of Rights and Freedoms -- Commentary* (1982), at p. 41. She observes that the *Charter* contemplates no positive obligation on governmental bodies to eliminate private discrimination and suggests that the *Charter*'s purpose is to restrain

government action, not to generate legislative action (at pp. 46-47). And at p. 48, she puts forward yet another textually related argument in favour of the proposition that the *Charter* is limited in its application:

> One should also keep in mind the concerns of the federal and provincial governments in drafting and agreeing to the Charter. Their focus was its effect on their own governmental operations. That is the reason for s. 1, requiring the courts to interpret the guarantees so as to allow reasonable limitations imposed by law. The override section (s. 33), allowing the legislatures to enact laws infringing the Charter, also indicates that governments were concerned about bounds on legislative action. The governments did not address the application of the Charter to private action, and indeed it would have been strange for them to do so, for their existing human rights codes address that matter.

Professor Swinton also suggests that it is important to bear in mind that the *Charter* is a less effective way to regulate private action than human rights legislation and was not intended to pre-empt such legislation. She says at p. 48:

> In conclusion, while the language of the Charter could be interpreted to extend to private relationships, it should not be so interpreted. To apply the Charter to private activity will lead to a great deal of litigation in a judicial forum unsuited to the problem. It was not intended by the drafters nor accepting governments that it would so extend, for the Charter, as part of the Constitution, is meant to restrict governmental action.

And as McIntyre J. noted in *Dolphin Delivery*, *supra*, at p. 597, further support for this view may be found in McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361. These authors are also sympathetic to the argument that human rights legislation provides a more efficient and less costly method by which an individual may seek redress for acts of private discrimination (at p. 367).

Where does this leave us? It seems to me that it leaves us where the Court began pre-*Dolphin Delivery*, asking itself what the purpose of the *Charter* was. Was it aimed at

government action? Was the *Charter* perceived by the draftsmen as the intermediary between the citizen and government only or was it also perceived as the intermediary between citizen and citizen? I remain of the view that it was aimed at government action, both legislative and administrative, and that the provincial and federal human rights legislation was left to function within its proper sphere. I do not doubt that the government/private action distinction will be difficult to make in some circumstances but I also believe that the text of the *Charter* must be respected.

One particularly convincing textual argument, it seems to me, is the proposition that s. 32(1) must be read in light of s. 33, the so-called override provision. While I do not propose to analyze the nature of the override provision in any detail, particularly since this Court recently had occasion to consider the provision in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 733-45, I believe that the presence of a provision designed to enable the legislature to override certain sections of the *Charter* lends considerable weight to an interpretation of s. 32(1) that concludes that the focus of the *Charter* is government. The presence of s. 33 suggests that those governments that subscribed to the *Charter* were aware that the document was designed to place constraints on their action and that they were concerned to provide themselves with a way to avoid some of those constraints (i.e., ss. 2 and 7 to 15) should this prove necessary.

It seems to me also that this Court's approach to s. 1 of the *Charter* has emphasized that *Charter* interpretation is fundamentally about balancing the rights of the citizen against the legitimate objectives of government. At no point has this Court suggested that a s. 1 analysis, notably the proportionality test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, is intended to assist in the resolution of disputes between individuals. Indeed, given this Court's approach to s. 1, I have difficulty in seeing how one could engage in a s. 1 analysis absent government action.

No less revealing, in my view, is the fact that provisions like ss. 3-4 and 16-20 of the *Charter* are clearly aimed at legislatures and governments. While no single section can be said to provide conclusive proof that the *Charter* must be interpreted as concerned solely with government action, I believe that a reading of the document that is sensitive to the need to provide a coherent and consistent interpretation of all of its provisions leads to the conclusion that the purpose of the *Charter* was to constrain government action.

It is, of course, true that in limiting what government may do, particularly the legislative branch of government, the *Charter* may place limits on what citizens are entitled to do. But I do not think that this derivative form of constraint supports the proposition that the *Charter*'s focus is as much on constraining the individual as it is on constraining government. On the contrary, it seems to me that a careful analysis of the text as a whole makes clear that, as far as the individual is concerned, the focus of the document is protection and not constraint. It was designed to provide the citizen with constitutionally protected rights and freedoms which he or she could assert against government if the need arose.

While I am sensitive to the observation of Lamer J. [as he then was] in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 508, that "the Minutes of the Proceedings of the Special Joint Committee [on the Constitution], though admissible, and granted somewhat more weight than speeches should not be given too much weight", it seems to me that the testimony before that Committee lends support, however limited, to the proposition that the document's focus is on government action. I note that Mr. Jordan, Senior Counsel, Public Law, in the Department of Justice at the time the *Charter* was before the Special Joint Committee on the Constitution, told the Committee [at p. 48:28] that he thought "the whole of the Charter is addressing itself to the protection for individuals against acts by the state" and that he would be "very worried if we ended up with a Charter that mixed into that the domain of private

infringement of liberties and freedoms". He expressed the view [at p. 48:28] that "private" infringements of this kind were best "left to be dealt with by human rights codes": see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, First Session of the Thirty-second Parliament, 1980-81, pp. 48:27, 48:28 (January 29, 1981); see also p. 49:47 (January 30, 1981).

The then Minister of Justice (Mr. Chrétien) observed that the *Charter* was not intended to provide a solution to all social problems and that room had to be left for both levels of government in this country to enact and amend legislation designed to deal with social problems without constantly having to resort to constitutional amendments: see p. 48:27. Although I do not think that any more weight should be placed on testimony regarding the meaning of the term "government" in s. 32(1) than testimony regarding the meaning of the term "liberty" or "equal", we cannot totally ignore the fact that much of the testimony before the Committee is highly compatible with a textual analysis that concludes that the *Charter*'s purpose is to constrain "government", however that term is best understood.

Finally, while it is my view that the textual argument is in and of itself convincing and that ultimately this is the proper basis on which to rest conclusions about the application of the *Charter*, it seems to me that Professors Swinton, McLellan and Elman have a point when they suggest that the legislatures which enacted the *Charter* were of the view that the ordering of relations between private individuals was best left to human rights legislation. The thrust of such legislation was to get many disputes out of the courts and into a setting more conducive to providing constructive solutions to various forms of discrimination. I do not believe that the *Charter* was intended as an alternate route to human rights legislation for the resolution of allegations of private discrimination.

In summary, I remain committed to the view previously expressed by the Court that the *Charter* applies to government action. And rather than attempt to define the boundary between government action and private action, it seems to me that the focus of our analysis in the group of appeals currently before us must be on the nature of government action. Whether this process will shed light on the debate about the validity of the government/private action distinction need not concern us. What must concern us is: when is action properly attributed to government and what are the criteria by which that determination is to be made? As Roger Tassé points out, "If the *Charter* applies to everyone, there is no need to define the scope of the government" but if it applies only to government action, then it is vital to ask the question: "What is meant by the word `government' in this context?" See Tassé, "Application of the Canadian Charter of Rights and Freedoms", in Beaudoin and Ratushny (eds.) *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), at p. 97 and 77 respectively.

3. *What is "Government Action"*?

My colleague La Forest J. has concluded that the *Charter* applies only to government in its narrowest sense. He finds support for this view in a particular doctrine of the role of constitutions known as "constitutionalism". According to this doctrine states are a necessary evil. Because of the potential for tyranny and abuse which large states embody, the role of government should be strictly confined. Social and economic ordering should be left to the private sector. The more the state interferes with this private ordering, the more likely it is that the freedom of the people will be curtailed. Thus, the minimal state is an unqualified good. However, even with the minimal state there has to be some mechanism to protect the citizen against the risk of government tyranny and that mechanism is the constitution itself. Hence the concept of constitutional government as protector of the citizens' liberty.

Drawing on this vision of the classical role of states and constitutions my colleague has formulated what I would view as a very narrow test of "government action" under s. 32(1) of the *Charter*. In his view, only those entities which actually are "government" will fall within the ambit of the *Charter*. They must be "part of the government apparatus", "part of government", "part of the machinery of government".

I believe that the concept of government as oppressor of the people and the function of government as the enactment of "coercive laws" is no longer valid in Canada, if indeed it ever was. To make my point it is necessary to consider the historical evolution of the state in Canada as well as the evolution of its constitution culminating in the document before us, the *Canadian Charter of Rights and Freedoms*.

(a) Canada and the United States Compared

The doctrine of constitutionalism was a driving force behind the creation of the American constitution. The American Bill of Rights was in large measure the product of a revolution. Unhappy with the injustices the Americans perceived were perpetrated against them by the British, the American people were left with a deep distrust of powerful states. The United States Constitution enshrines the belief of the American people that unless the state is strictly controlled it poses a great danger to individual liberty. Its primary focus, articulated in the bulk of its provisions, is against "state action". Canada does not share this history.

This Court has already recognized that while the American jurisprudential record may provide assistance in the adjudication of *Charter* claims, its utility is limited. In *Re B.C. Motor Vehicle Act*, *supra*, we were called upon to determine the scope of s. 7 of the *Charter*. Naturally, at that early stage of Canadian *Charter* jurisprudence, the American constitutional

tradition was heavily relied upon. Nevertheless, Lamer J., writing for the Court, made it eminently clear that our Courts were not to be unduly influenced by the decisions in United States cases. He said at p. 498:

> The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

Although in that case Lamer J. was relying primarily on the structural differences that exist between the Canadian and American constitutions, structural differences are not the sole measure of differentiation. Social, political and historical differences between our two nations also exist. The *Charter* has to be understood and respected as a uniquely Canadian constitutional document. However, the fact that Canada did not spring into being as a nation through the same process as the United States does not necessarily mean that Canadians do not share the same perception as our neighbours of the proper role of government. We can only discern how Canadians perceive that role by examining how it has developed through our history.

(b) <u>The Historical Development of the Canadian State</u>

Professor Corry in his report *The Growth of Government Activities Since Confederation* (Ottawa 1939) has emphasized the fact that regulation has always played a role in the governance of Canadian society and that, apart from a brief interlude during the first half of the nineteenth century, the philosophy of laissez-faire never enjoyed permanent or widespread

acceptance here. He commences his discussion of the growth of government activity with the following observation at p. 1:

> The period since Confederation has seen a steadily accelerating increase in the activities of governments. We tend to think of this as an increase in absolute terms, eclipsing in range and intensity all previous state interference. This, of course, is quite unhistorical. In all ages prior to the nineteenth century, strong governments had interfered quite freely and generally, quite arbitrarily in every aspect of human affairs. Regarded in proper perspective, the retreat of the state from the overhead direction of human affairs was a brief interlude roughly coincident with the first half of the nineteenth century.

Professor Risk in his article "Lawyers, Courts, and the Rise of the Regulatory State" (1984), 9 *Dalhousie L.J.* 31, makes the same point at pp. 32-33:

> Canada never had the liberal state in the middle of the nineteenth century that England had and which some thinkers thought it should have. The state encouraged the creation of the nation and its economic expansion primarily by creating and financing railways, creating a tariff barrier, and encouraging immigration.

While Canada was struggling to become a self-sufficient nation the popularity of laissez-faire in England and in the United States was on the wane. As Professor Corry points out, the needs of a new country required the energies of government to be directed towards development. The primary obligation resting on the state in the years immediately following Confederation was the need to open up the country through the establishment of transportation facilities and the provision of basic services.

Indeed, one of the first priorities of the new federation was to knit the country together by the establishment of transportational connections between the various regions. Dorman points out in *A Statutory History of the Steam and Electric Railways of Canada, 1836-1937*, (Ottawa 1938), at p. 7:

> Confederation brought a new impetus to railway construction. One of the articles of agreement between the four provinces called for construction of an Intercolonial Railway, and the Federal Government began the implementing of that agreement ...

While it is beyond the scope of this review to detail the myriad ways in which the state has intervened in the railway sector, suffice it to say that the Canadian government has always played a large part in the creation and control of the railways. As Abbott said in his *A Treatise on the Railway Law of Canada* (Montreal 1896), at p. 1:

> Railways in this country exist exclusively in virtue of legislative authority, and are invariably constructed and operated by incorporated companies subject to statutory conditions and limitations.

It was during those decades that the Canadian economy greatly expanded. This period has been described by a number of authors as the "wheat boom" since during that time, as Mackintosh wrote in his report *Economic Background of Dominion-Provincial Relations* (Toronto 1964), at p. 39:

> . . . the driving force behind the new period was wheat and the wheat-growing region. It gave an economic unity to the country not hitherto experienced and built up a degree of interdependence between its different regions which was in sharp contrast to the isolation of the separate economic regions which had united in 1867.

Whether or not the wheat economy was primarily responsible for the economic growth of the period, there is no dispute about the soundness of the general observation that the time was one of significant growth for Canada. The government of the day, headed by Prime Minister Sir Wilfrid Laurier, believed that it was its duty to involve itself in this process. In a speech delivered in 1903 he said:

> We say to-day it is the duty of all those who have a mandate from the people to attend the needs and requirements of this fast growing country.

As Baggaley noted in his review of the role of the Canadian state (*The Emergence of the Regulatory State in Canada, 1867-1939* (Ottawa 1981)), Laurier's conception of the appropriate role of the Canadian government was not novel. He said at pp. 42-43:

> ...it was not surprising that Laurier thought it was the duty of the Canadian government to assist in the construction of a second transcontinental railway. (It was soon assisting the construction of a third.) He was merely continuing a long Canadian tradition. Public policy in Canada has always been explicitly developmental .... In 1903, at the same time Laurier was justifying public assistance to build a transcontinental railway, his government was preparing to create the Board of Railway Commissioners to regulate freight rates. In Canada public regulation went hand in hand with public assistance. [Emphasis added.]

The increase in accessability to all regions of the country was accompanied by increased crop production, increased immigration and the growth of Canadian cities. Business also began to grow, in part due to the creation of new enterprises and in part due to the consolidation or merger of smaller businesses. In short, rapid socio-economic changes were taking place in the early part of this century and those changes sparked a re-evaluation of the appropriate role of the state. While historians have not always agreed on the characterization of this era of government interventionism most agree that the so-called "progressive era" marked an increased role for and acceptance of government regulation. A remarkable amount of government regulation both economic and social was introduced in this period.

For instance, pure food laws designed to afford basic protections to consumers were enacted during this period. Sellers were compelled to ensure minimum standards of food purity on pain of penalty. The *Inland Revenue Act of* 1875, S.C. 1874, c. 8, which made it an offence to knowingly sell any adulterated food or drink, exemplifies this kind of legislation. With the

increase in industrialization came more sophisticated laws dealing with the market. Under *The Food and Drugs Act, 1920,* S.C. 1920, c. 27, for example, officers appointed under the Act were given the power to take samples and have them tested for quality by government analysts. Grading and inspection of products was made compulsory and false or misleading labelling was prohibited. Thus, the thrust of these laws shifted from being pure health measures to a regime aimed at protecting the producer's status in the marketplace by providing government guarantees of the quality of his products.

The provinces enacted measures of a similar nature, particularly in the dairy industry. Initial attempts were aimed at correcting the problem of the selling of tainted or diseased products although, as in the case of the federal sphere, these attempts eventually led to a more regulated regime with the added purpose of protecting markets. See for example: *The Milk, Cheese and Butter Act*, S.O. 1908, c. 55; *The Dairy Association Act*, S.Q. 1921, c. 37; and *Creameries and Dairies Regulation Act*, S.B.C. 1920, c. 23.

Legislative forays were also conducted into the employer/employee relationship. Factories Acts were passed in most provinces dealing with the terms of employment of women and children and with sanitation and safety in the work place. By the 1920s all provinces except Prince Edward Island had workers' compensation legislation. Minimum wages and maximum hours of work were established as well. Initially these protections applied only to women and children. It was not until the depression years that mandatory minimum employment standards were recognized as necessary for most workers.

It was during the First World War, however, that the real boom in government regulation during the first half of this century occurred. A number of agencies were created to deal with the problems that a war economy produces, including: a Food Controller, a Fuel Controller,

a Paper Controller, the War Trade Board, the Wheat Board, a Board of Commerce, and a Cost of Living Commissioner. Many of the initiatives were short lived, however, and at the end of the war only the Wheat Board remained.

The movement back to a more moderate level of government intervention, one committed to fostering private sector growth, gained sway in the years immediately following the war. It was not to last long, however. The Canadian stock market crash in 1929 ushered in the era of the Great Depression and a dramatic shift in favour of government involvement in market processes and the maintenance of minimum living standards for the population. Ominously, Prime Minister Bennett announced to the country in 1935:

> I am for reform .... And in my mind reform means government intervention. It means the end of laissez-faire .... I nail the flag of progress to the masthead. I summon the power of the state to its support.

Perhaps because of the great toll the Depression took, a number of welfare oriented pieces of legislation were enacted in the areas of agriculture, labour relations and unemployment. The new measures were unlike the legislation passed in previous decades in that they endorsed the objectives of redistribution and planning. Government began to regulate both prices and output in the agricultural sector. Licensing was introduced in gasoline sales. Restrictions were placed upon the common law remedies of mortgagees and creditors. Some of the important legislative initiatives of that era included: *The Farmers' Creditors Arrangement Act, 1934*, S.C. 1934, c. 53; *The Natural Products Marketing Act, 1934*, S.C. 1934, c. 57; *The Dominion Trade and Industry Commission Act, 1935*, S.C. 1935, c. 59; *The Minimum Wages Act*, S.C. 1935, c. 44; *The Weekly Rest in Industrial Undertakings Act*, S.C. 1935, c. 14; *The Limitation of Hours of Work Act*, S.C. 1935, c. 63; and *The Employment and Social Insurance Act*, S.C. 1935, c. 38. These statutes, their provisions and effects are thoroughly explored by

McConnell in his article, "The Judicial Review of Prime Minister Bennett's `New Deal'" (1968), 6 *Osgoode Hall L.J.* 39.

A number of commentators date the birth of the Canadian welfare state to the period immediately following the New Deal. Prior to this period there were few provisions aimed at protecting working people and ensuring a minimum standard of living. Before the First World War public education and public health services were virtually the only measures of this kind in place. It was not until later, however, that other forms of income security were introduced. The old age pension scheme was introduced in 1951 and the Guaranteed Income Supplement in 1966. Two employment related measures were also introduced during this period: unemployment insurance in 1940 and the Canada Pension Plan in 1951. Families also began to receive state support in the form of the family allowance and the child tax credit. The provinces continued to provide social assistance to the particularly needy, continuing a tradition that started with the ancient poor laws. The financing of these programs, however, became a joint effort when the federal government introduced the Canada Assistance Program under which a fifty per cent cost sharing agreement was reached with all the provinces except Quebec. In addition, tax deductions for individual pension plans were introduced under the *Income Tax Act*, R.S.C. 1952, c. 148, as am.

The new wave of social welfare provisions was not limited to income security measures. During the 1950s and 60s a new form of social protection was added: human rights legislation. The first province to enact a statute dedicated solely to the protection of human rights was Saskatchewan which in 1947 passed *The Saskatchewan Bill of Rights Act, 1947*, S.S. 1947, c. 35. Other provinces, some of which had enacted legislation dealing with specific forms of discrimination in particular sets of circumstances (e.g., the Ontario *The Fair Accommodation Practices Act, 1954*, S.O. 1954, c. 28), followed suit. Comprehensive codes providing

protection on a more global scale began next starting with Ontario in 1962 (*The Ontario Human Rights Code, 1961-62*, S.O. 1961-62, c. 93) and ending with Quebec in 1975 (*Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6). Three provinces have now enacted specific legislation dealing with the problem of pay inequities based on gender: The *Pay Equity Act, 1987*, S.O. 1987, c. 34; *Pay Equity Act*, R.S.P.E.I. 1988, c. P-2; and *The Pay Equity Act*, S.M. 1985-86, c. 21.

Nor was the growth of human rights law the last phase in the increasing involvement of the state in the protection of citizens' welfare. The 1970s in particular saw a period of rapid growth in the number of regulatory statutes on such issues as environmental protection, health and safety, and consumer protection. For instance, at the federal level the *Arctic Waters Pollution Prevention Act*, R.S.C., 1985, c. A-12, the *Clean Air Act*, R.S.C., 1985, c. C-32, the *Environmental Contaminants Act*, R.S.C., 1985, c. E-12, and the *Ocean Dumping Control Act*, R.S.C., 1985, c. O-2, were virtually all passed during the first half of that decade. Similarly, government in the 1970s enacted a number of statutes directed at protecting consumers from dangerous or hazardous products such as: the *Hazardous Products Act*, R.S.C., 1985, c. H-3; the *Motor Vehicle Safety Act*, R.S.C., 1985, c. M-10; and the *Radiation Emitting Devices Act*, R.S.C., 1985, c. R-1.

The increase in state activity has naturally led to a large increase in the size of government. In 1962 *The Royal Commission on Government Organization* (Ottawa) reported that the federal public service had increased nine fold since the First World War and employed some 214,000 civil servants. No fewer than 89 government departments, crown agencies and corporations are listed in the schedules to the *Financial Administration Act*, R.S.C., 1985, c. F-11.

As well, the diversification of state function has led to the creation of a complex conglomeration of entities which together constitute "government". An examination of the range of entities listed in the *Financial Administration Act* is instructive. For instance, the long tradition of Crown ownership which began with the canals, the Canadian National Railway and provincial public utilities has been continued and many are listed in the schedules. So too are the subsidiaries which these Crown corporations themselves own. Also included are what the *Royal Commission on Financial Management & Accountability* ("The Lambert Commission") (Ottawa 1980) called shared enterprises and independent deciding and advisory bodies. The latter, which operate with a marked degree of autonomy from government, are nonetheless still considered to be part of the state, illustrating very well the diversity of bodies now considered by the state itself to be part of its enterprise.

(c) The Modern Canadian State

In approaching the question of the scope of application of the *Charter*, I believe we must address the issue of how this very important document became part of Canadian life. While Canada has existed as a nation for over 100 years, it never seems to have been considered necessary or especially desireable prior to 1982 that the Canadian people be protected by an entrenched bill of rights. It is legitimate to ask: why in 1982?

Many commentators have suggested that the increased power of private groups and institutions has resulted in the violation of human freedoms on a massive scale (Tribe, "Refocusing the "State Action" Inquiry: Separating State Acts From State Actors", in *Constitutional Choices* (Cambridge 1985); Chemerinsky, "Rethinking State Action" (1985), 80 *Nw. U.L. Rev.* 503; Bazelon, "Civil Liberties -- Protecting Old Values in the New Century" (1976), 51 *N.Y.U. L. Rev.* 505; Nerken, "A New Deal for the Protection of Fourteenth

Amendment Rights: Challenging the Doctrinal Bases of the *Civil Rights Cases* and State Action Theory" (1977), 12 *Harv. C.R.-C.L. L. Rev.* 297; and Berle, "Constitutional Limitations on Corporate Activity -- Protection of Personal Rights from Invasion Through Economic Power" (1952), 100 *U. Pa. L. Rev.* 933). They argue that private discrimination is hardly trivial and is just as pernicious as discrimination caused by government. As Professor Chemerinsky, *supra,* put it at pp. 510-11:

> ... the concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct. Just as people may need protection from government because its power can inflict great injuries, so must there be some shield against infringements of basic rights by private power. In fact, the need for court protection from private actions arguably is greater because democratic processes, no matter how imprecise a check, impose some accountability and limits on the government. Ultimately, of course, the point is that private parties can inflict great injuries upon constitutional values; how this compares to other sources of injury is of secondary concern.

It is not simply that the accumulation of social, political and legal power in private entities makes possible the commission of human rights violations, it is also that recent evidence tends to suggest that it is within the realm of the "private" that the vast bulk of these injustices occur. As Tribe, *supra*, has remarked (at p. 246):

> ... particularly where ostensibly "private" power is the primary source of the coercion and violence that oppressed individuals and groups experience, it is hard to accept with equanimity a rigid legal distinction between state and society. The pervasive *system* of racial apartheid which existed in the South for a century after the Civil War, for example, thrived only because of the "resonance of society and politics ... the close fit between private terror, public discrimination, and political exclusion."

Clearly, one of the realities of modern life is that "private" power when left unchecked can and does lead to problems which are incompatible with the Canadian conception of a just society. The increasing pressure for and ultimate enactment of human rights legislation speaks

eloquently to this fact. Canadian society has been prepared to embrace and solicit the assistance of the state in respect of a number of social, political and economic problems that have plagued our communities from time to time. The Canadian government has thus not been regarded as a monolith of oppression but rather as having a beneficent and protective role to play. Indeed, as Professor Robson points out in his book *The Governors and the Governed* (London 1964), at pp. 12-13:

> The vast majority of citizens nowadays want their government to be continuously active. Few people still subscribe to the doctrine that the less government does the better will be the result. The main controversies are centred not on whether the government should act, but on how and when it should act.

This is not to say, as Professor Slattery has remarked in his article, "A Theory of the Charter" (1987), 25 *Osgoode Hall L.J.* 701, at p. 729, that the Canadian state has not at times been guilty of discriminatory, oppressive, and otherwise inappropriate behaviour towards its citizens. It would be a gross distortion of this nation's history to advance a purist vision of the Canadian way of life. Accordingly, the federal government, recognizing that we are living in a world which is becoming increasingly preoccupied with the problem of effective safeguards for human freedom -- witness the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), the *European Convention on Human Rights and Fundamental Freedoms*, 213 UNTS 221 and the *International Covenant on Civil and Political Rights*, 999 UNTS 171 to which Canada became a signatory in 1976 -- enacted first the *Canadian Bill of Rights*, R.S.C., 1985, App. III, in 1960 and then the *Canadian Charter of Rights and Freedoms* in 1982, the latter having constitutional status. The values reflected in the *Charter* were to be the foundation of all laws, part of the "supreme law of Canada" against which the constitutionality of all other laws was to be measured.

Several observations may be made with respect to the role of the Canadian state based on this brief historical review.

First, government regulation and intervention has long been part of the political, social and economic culture of Canada though its extent has varied during different periods in our history. The focus of intervention has also changed from time to time in response to different needs. In spite, however, of these fluctuations, it seems to be generally accepted by our historians that the political philosophy of laissez-faire has not been embraced to any substantial degree in Canada.

Second, as some historians have noted, the phenomenon of the interventionist state has traditionally been and continues to be a feature of Canadian political life. Government participation and control has persisted irrespective of the particular government in power. Thus, as Professor McConnell concludes at p. 222 of his article "Some Comparisons of the Roosevelt and Bennett `New Deals'" (1971), 9 *Osgoode Hall L.J.* 221:

> There can hardly be any question, however, that governments of all political hues will henceforward use all the instruments of fiscal and economic policy to prevent a recurrence of the depression and, in smaller or greater measure, to achieve the overall economic planning that is associated with the further development of the "welfare state".

Third, the interventionist activities of the Canadian state have taken many forms. As noted by Priest, Stanbury and Thompson, ("On the Definition of Economic Regulation", in Stanbury (ed.), *Government Regulation: Scope, Growth, Process* (Montreal 1980)), policy instruments may take the form of "Moral suasion, exhortation or negotiation", direct expenditures, taxation, tax expenditures and public ownership. All of these measures and probably others are available in order to further the objectives of the state and the Canadian government has

utilized many if not all of them at some time or other. It has, for example, engaged in a government-owned industry in some sectors while merely imposing tariffs in others.

I believe that this historical review demonstrates that Canadians have a somewhat different attitude towards government and its role from our U.S. neighbours. Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society. The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security to name but a few examples. It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.

Finally, it is, I think, true to say that while government intervention has traditionally been acceptable to Canadians, the state has never assumed sole responsibility for economic and social welfare matters. There has always been and continues to be a broad sphere of purely private activity in Canada.

All of these observations lead, in my opinion, to the conclusion that a concept of minimal state intervention should not be relied on to justify a restrictive interpretation of "government" or "government action". Governments act today through many different instrumentalities depending upon their suitability for attaining the objectives governments seek to attain. The realities of the modern state place government in many different roles *vis-à-vis* its citizens, some of which cannot be effected, or cannot be best and most efficiently effected, directly by the apparatus of government itself. We should not place form ahead of substance and permit the provisions of the *Charter* to be circumvented by the simple expedient of creating a separate

entity and having it perform the role. We must, in my opinion, examine the nature of the relationship between that entity and government in order to decide whether when it acts it truly is "government" which is acting. We must, as I suggested at the outset, identify those criteria which are relevant to that determination so that they may be applied in a principled way.

4. *The Relevant Criteria*

In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J., as he then was, emphasized at p. 156, that it was important to engage in a broad purposive analysis of the *Charter*'s provisions. And in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, he stressed that interpretations of the *Charter*'s provisions should be generous rather than legalistic. In deciding what kind of criteria are relevant in interpreting the term "government" in s. 32 of the *Charter*, we should therefore adopt a purposive approach. We should ask ourselves the question: why does the *Charter* constrain the activities of government?

It seems to me that a historical review of the growth of the Canadian state makes clear that those who enacted the *Charter* were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role. I do not think they intended to do this by carving out or preserving "private" spheres of activity. I believe, however, that they considered it crucial to establish norms by which government would be constrained in performing the many roles it has assumed and will no doubt continue to assume. They sought to do this by setting out basic constitutional norms rooted in a concern for individual dignity and autonomy which government should be compelled to respect when structuring important aspects of citizens' lives. The purpose of the *Charter* then, it seems to me, is to ensure that government action that affects the citizen satisfies these basic

constitutional norms. I think that Dickson J. put the point well in *Hunter*, *supra*, at p. 155, when he made the following observation about the role of a constitution:

> Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties.

In my view, it follows from these propositions that we must take a broad view of the meaning of the term "government", one that is sensitive both to the variety of roles that government has come to play in our society and to the need to ensure that in all of these roles it abides by the constitutional norms set out in the *Charter*. This means that one must not be quick to assume that a body is *not* part of government. Consideration of a wide range of factors may well be necessary before one can conclude definitively that a particular entity is not part of government. If this Court is to discharge its responsibility of ensuring that our constitution does provide "unremitting protection of individual rights and liberties" against government action, then it must not take a narrow view of what government action is. To do so is to limit the impact of the *Charter* and minimize the protection it was intended to provide.

What then are the criteria which will help us to identify the kinds of bodies that the *Charter* seeks to constrain through the imposition of constitutional norms? At least three tests have been suggested. While none is probably in and of itself determinative, each has something important to say about the nature of government.

(a) The "Control" Test

The control test poses the question: is the body in question part of the legislative, executive or administrative branches of government and, if not, is it subject to the control of one of these

branches of government? When faced with a body that is not itself part of the legislative, executive or administrative branches of government, the control test in turn asks: (a) general questions about the nature and extent of government control over an entity, such as, "does government exercise such significant control over the operation of the institution that the activities of the latter may properly be seen as activities of the former?"; and (b) more specific questions about the entity's activities, such as, "is there a clear nexus between government and the particular impugned activity?"

In my view, we see a very clear application of this approach in the British Columbia Court of Appeal's decision in the related appeal in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1988] 2 W.W.R. 718. In that case, the Court of Appeal stated at p. 721 that "The control exercised by the government over the affairs of the college generally, coupled with actual governmental involvement in the finalization of the collective agreement, permits no other conclusion [than that the college in question is subject to the *Charter*]". In reaching this conclusion the Court of Appeal first examined the question of general control. It noted that the College was an agent of the Crown, was subject to ministerial control over many aspects of its activities, and had to have its by-laws approved by a College Board whose members were appointed by the government.

The Court of Appeal then turned to specific questions concerning the nexus between government and the College's contractual relations with its employees. It noted that the executive branch of government had the power to appoint a Commissioner whose task it was to monitor compensation plans and to investigate arrangements by public sector employers. The *Compensation Stabilization Act*, S.B.C. 1982, c. 32, gave this Commissioner extensive power to approve or disapprove the terms of collective agreements between the parties. The Court of Appeal was of the view that "In these circumstances the collective agreement must

be regarded as the result of an action of the executive or administrative arm of government" (at p. 723).

The general questions the control test requires to be asked in the case of an entity not clearly part of the legislative, executive or administrative branches of government are, in my view, quite apposite. The approach seeks to ascertain whether there is a link between that which one knows is government (i.e., the executive, legislative and administrative branches) and that which one is not sure is government by focussing on whether the former exercises general control over the latter. The challenge under this part of the approach, of course, is to ascertain what are relevant forms of control. While I do not think that one can come up with an exhaustive list of relevant forms of control or that any one form of control will necessarily prove determinative, it does seem to me that the Court of Appeal in *Douglas College* focussed on the kind of considerations one should bear in mind, viz. whether an actor that is clearly part of a branch of government controls aspects of the entity's activity through input into its policy formulation process, through the approval of the by-laws or rules that determine how that entity is to carry out its mandate, through the allocation of funding used to implement its objectives, or through the appointment of the personnel that run the entity. These forms of relatively direct control will provide strong indicia that an entity is part of government.

More problematic, in my view, is the second limb of the control test: namely, the search for a specific nexus between government and the impugned act. In many instances, it may be that the relevant branch of government does not exercise control over the entity's activities in as direct a way as in the *Douglas College* case, but that the entity is nonetheless a governmental actor. One need only think of those bodies that are created by statute, that depend heavily on government funding and that receive broad policy directives concerning their overall mandate from one of the branches of government, but that are deliberately placed at arm's length and

given the freedom to make a wide range of choices about how to implement particular policies. This kind of arrangement is hardly novel, particularly in areas where ministers and government departments do not wish to be involved in complex and politically sensitive decisions concerning the allocation of government funds or the specific application of particular policies. Decisions of these kinds often require choosing between irreconcilable demands, and governments have therefore frequently found it prudent to create agencies or tribunals that can make these decisions free from political pressure. Thus, even although such arm's length organizations have often been created with a view to performing tasks that a government department had previously performed or might otherwise have performed, one cannot necessarily point to a nexus between the government and the arm's length organization's day-to-day activities.

In my view, it is therefore far from obvious that a body should automatically be deemed to be non-governmental simply because one cannot point to a specific nexus of the kind seen in *Douglas College*. To conclude that bodies that are in an arm's length relationship with the executive or administrative branches of government are automatically non-governmental would mean that a wide range of entities that are created but not controlled by the legislative branch of government would escape *Charter* review. This would hardly provide the kind of "unremitting protection" of rights and liberties that the *Charter* was meant to secure.

In other words, the problem with a restrictive application of the control test is that it risks leaving open to government the option to delegate wide powers to arm's length agencies and then to insulate those bodies from *Charter* review by limiting government involvement in those bodies' day-to-day decision-making processes. An unduly restrictive version of the control test would thereby leave it open to government to exclude significant areas of activity from *Charter* review.

I note that Mr. Roger Tassé has observed, "There has been a tremendous increase in subordinate legislation over the course of the past 25 years. Government by way of regulation is much more commonplace today than is government by conventional legislation": see "Application of the Canadian Charter of Rights and Freedoms", *supra*, at p. 73. Mr. Tassé goes on to identify the very concern that I have just raised when he states at p. 72:

> The subordinate authority to which legislative powers are delegated must be subject to the same obligations and constraints as the enabling authority. If it were otherwise, Parliament and the legislatures could avoid their constitutional obligations simply by confiding to others the authority to exercise their powers. This means that all regulation-making authority conferred on Cabinet, individual ministers, civil servants, commissions or administrative tribunals must be exercised so as to comply with the Charter. It means still more, however. Not only must the regulations themselves comply with the Charter, but actions taken under the authority of those regulations must also comply. [Emphasis added.]

In my view, these comments are equally applicable to arm's length bodies that are subject to general governmental control.

It seems to me therefore that the control test has something valuable to say at a general level. The presence of general government control will amount to an important indicium that one is faced with government action although it will not necessarily be conclusive. One can, of course, conceive of entities that are subject to government regulation and that are therefore subject to control but that are in no sense part of government, e.g., private corporations that are subject to government regulation. The evidence that one is dealing with government action will, of course, be even stronger if one can point to a direct nexus between government and the activity in question. But I do not think that the specific questions the control test poses about the presence of such a nexus are in any sense necessary conditions for a finding that there is government action. I am quite prepared to accept that, even in the absence of such a

nexus, there may be sufficient government control to enable one to conclude that government action is in issue.

(b) The "Government Function" Test

A second test that has been proposed asks whether the performance of a given activity is a "government function". It seems to me that this is the kind of test that the Ontario Court of Appeal applied in this appeal when it asked itself whether a university performs a government function. In the Ontario Court of Appeal's view universities do not perform a government function even although they provide a public service for which they receive significant government funding. But the Court of Appeal felt that a body like a municipality would be subject to the *Charter* because it performs what the Court of Appeal viewed as quintessentially governmental functions, including the enactment of laws of general application. The Court of Appeal observed (see: *McKinney v. University of Guelph* (1987), 63 O.R. (2d) 1, at p. 24):

> The fact that municipal corporations are "creatures of the legislature" is not determinative. It is the function that they were created to perform that is. "Creatures of the legislature" do not automatically become accountable to the Charter: they remain accountable to their "creator". Ordinarily, it is their "creator" which would attract the reach of the Charter, but municipal corporations differ from other statutory corporations in that they are incorporated by government to perform a governmental function; a function that the provincial government could and often does perform itself. As such, they can be considered "a distinct level of government" to use Linden J.'s phrase, or "a branch of government" to use that of McIntyre J. in *Dolphin Delivery, supra*. But it is the function for which they are incorporated that gives them this status and not the mere fact that they are incorporated and have their authority to act bestowed upon them by their incorporating statute. [Emphasis added.]

In my view, there are at least three problems with the Ontario Court of Appeal's "functional" approach. First, it seems to me that the particular version of this approach advocated by the Ontario Court of Appeal is based on a rather narrow view of government as the maker and enforcer of laws. At best, this can be but part of any complete picture of the modern Canadian

state. I think it clear that over time government has become involved in many areas through the creation of bodies that do not simply enact laws (and may not enact laws at all) but that provide a wide range of services and support (financial or otherwise) to the citizen. There is therefore a real danger that the Ontario Court of Appeal has narrowly circumscribed government's "function" in a way which does not accord with twentieth century reality.

Second, even if one were to operate with a somewhat more expansive concept of a government's "function", this approach would risk excluding from *Charter* review many actions of the legislative, executive or administrative branches of government that might not necessarily be seen as part of a government's "function": for example, entering into employment agreements with civil servants or entering into contracts for supplies with outside bodies. This result would hardly be compatible with a purposive interpretation of s. 32(1) of the *Charter*, a provision which states that the *Charter* applies to "all matters within the authority" of Parliament.

Third, and most importantly, it seems to me that a functional approach risks assuming that government is static, something which the historical review that I have presented reveals is far from the case. If we have learned anything from the widespread criticism of the private/ government distinction and the remarkable evolution of government in the last century, it must surely be that government's functions are not finite. Government has become involved in an ever-widening range of activities. Moreover, it is likely both to move into new areas and to move out of areas in which it no longer feels it should be involved. Governments' functions are constantly evolving even although there may be some core group of activities that most governments have engaged in most of the time. Any test that focusses solely on these core activities, or that limits itself to the activities that a given government is engaged in at a

particular point in time, will be of little use in dealing with hard cases in which government has assumed a new area of involvement.

In other words, it is a mistake to think that one can identify the key function(s) that is (are) determinative of what is government. In my view, it is hardly surprising that in the course of conducting a thorough analysis of a variety of bodies that one might consider part of government, Mr. Tassé concludes that "There are no clear and generally accepted criteria for determining when a function is properly judged to be governmental" (Tassé, *supra*, at p. 81). A function becomes governmental because a government has decided that it should perform that function, not because the function is inherently a government function. It seems to me that in ignoring this point the functional approach risks putting the cart before the horse. Moreover, it seems to me that one must recognize that there may be circumstances in which both governmental and non-governmental bodies fulfil a given function at the same time. In such cases the functional approach may tell us little about the status of any given entity that performs that function.

That much having been said, it does seem to me that the functional approach has something to offer, provided that one does not assume that just because a body is not performing a traditional government function it is not a government actor. The fact that an entity is performing an activity that we have come to accept as being one of the exclusive functions that a given level of government performs may well be a strong indicium that one is faced with a government actor. Indeed, one may conclude that even although there is no direct nexus between government and a given body's activities and that even although there is minimal government control over that body, the entity must nonetheless be viewed as part of government because it performs a function that has traditionally been performed by government.

Ultimately, much will turn on the function with which one is concerned. While there are functions that government has long fulfilled, e.g., the criminal law enforcement process, there are others that may on some occasions be fulfilled by government and on other occasions by other kinds of bodies, e.g., private corporations. There may also be functions that government decides it should no longer perform. And, as I have already suggested, there may be sectors of the economy where government is competing directly with the private sector with respect to the provision of particular services and where it is very difficult to apply a functional approach in order to sort out which players are government actors and which are not. At best, then, the functional approach can only provide tentative answers to the question whether one is dealing with government. But the approach may nonetheless point to important considerations that should be taken into account in any analysis of the status of a given body.

(c) The "Government Entity" Test

A third approach might centre on the question of whether a given body is a "government entity". This approach focusses on the question whether an entity performs a task pursuant to statutory authority and whether it performs that task on behalf of government in furtherance of a government purpose. In my view, this approach captures considerations which neither the control test nor the government function test address, considerations that may well enable us to ascertain whether government is in fact taking on new roles or fulfilling old roles through the creation of new institutional arrangements.

While I am not aware of a decision based on this approach to the interpretation of s. 32(1) of the *Charter*, it seems to me that this Court has applied a variation of this test in cases in which it has dealt with the doctrine of Crown immunity. I note, for example, that in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at pp. 565-66, this Court stated:

> Statutory bodies such as Uranium Canada and Eldorado are created for limited purposes. When a Crown agent acts within the scope of the public purposes it is statutorily empowered to pursue, it is entitled to Crown immunity from the operation of statutes, because it is acting on behalf of the Crown. When the agent steps outside the ambit of Crown purposes, however, it acts personally, and not on behalf of the state, and cannot claim to be immune as an agent of the Crown.

While this approach has traditionally been used to determine when an entity's actions are not bound by statutes, it seems to me that it may well be of assistance in identifying bodies whose acts are subject to *Charter* review.

More precisely, this approach looks at the nature of a body's statutory authority and addresses the possibility that government has delegated power to a subordinate body. It seems to me that this approach may therefore assist one to identify those bodies that are neither subject to extensive government control and that cannot be said to be carrying out a traditional government function, but that may nonetheless be the product of government's decision to take on a new role. By examining whether a body exists to serve a government's objectives in a particular area or acts primarily in its own self-interest, this approach may also assist one in distinguishing between entities that are in some sense creatures of statute but that cannot be said to form part of government (e.g., privately held corporations incorporated under a Business Corporations Act) and entities that are creatures of statute that do form part of government (e.g., Crown agents).

Thus, this approach would assist in identifying bodies like Eldorado Nuclear Limited as part of government even although the body's "corporate objects clauses and the relevant statutes leave it free to operate without government direction" (*per* Dickson J. in *Eldorado*, *supra*, at p. 573) and even although the body operated within a relatively new area of government activity, i.e., the nuclear industry. As a Crown agent created to address what the government

of the day clearly perceived to be a matter of public concern, this body would therefore be required to abide by basic constitutional norms.

In my view, this result accords with common sense. I note that in the course of its extensive study of government management and accountability, the Lambert Commission, *supra*, at p. 269, observed:

> The extensive resort to Crown agencies is a legitimate response by government to the problem of developing alternative instrumentalities to cope with the demands imposed by the assumption of new roles that require independent sources of policy advice, regulation of important sectors of the economy, objective determination of rights, and outright government ownership and operation of numerous business-like undertakings. Crown agencies serve a necessary and useful purpose in lightening the burdens on ministers caused by the growth of programs and added responsibilities within conventional departments.

As I have already mentioned, it seems to me self-evident that the *Charter* was meant to bind the Crown. I can see no reason why Crown agents should be labelled non-governmental and thereby exempted from the ambit of the *Charter*. If we are to ensure that the *Charter* continues to provide unremitting protection of individual rights and liberties, then it seems to me that the "alternative instrumentalities" that the Lambert Commission identified must be subject to the *Charter*. I note that Professor Hogg has reached a similar conclusion in *Constitutional Law of Canada* (2nd ed.), *supra*, at p. 672, where he observes:

> Also clearly included are those Crown corporations and public agencies that are outside the formal departmental structure, but which, by virtue of ministerial control or express statutory stipulation, are deemed to be "agents" of the Crown.

Once again, I do not think that this approach will necessarily produce definitive answers. There might well be entities like charitable organizations that are creatures of statute and that

serve the public interest, but which would not be properly viewed as part of government. Nevertheless, it does seem to me that this approach captures an important perspective that must be borne in mind in any inquiry concerning government action, a perspective that is absent from both the control test and the government function test. This is a perspective that can help us to identify some of the more unusual bodies that government creates or becomes intricately involved with in the process of pursuing particular government objectives.

As this review of possible approaches to the identification of government makes clear, I do not think that any one test or approach is a panacea. All have something of value to offer since each provides a somewhat different perspective from which to deal with the question what is government. But each alone risks missing a range of bodies that it seems to me must be viewed as part of government, particularly if one is to ensure that the *Charter* does in fact provide unremitting protection for individual rights and liberties. It would seem therefore that the only satisfactory approach under s. 32(1) of the *Charter* is one that is sensitive to the strong points of each of the approaches outlined above.

As a result, I would favour an approach that asks the following questions about entities that are not self-evidently part of the legislative, executive or administrative branches of government:

1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?

2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?

3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

Each of these questions is meant to identify aspects of government in its contemporary context. An affirmative answer to one or more of these questions would, to my mind, be a strong indicator that one is dealing with an entity that forms part of government. I hasten to add, however, that an affirmative answer can never be more than an indicator. It will always be open to the parties to explain why the body in question is not part of government. Likewise a negative answer is not conclusive that the entity is not part of government. It will always be open to the parties to explain that there is some other feature of the entity that the questions listed above do not touch upon but which makes it part of government.

We must at all costs be sensitive to the fact that government is a constantly evolving organism. It follows that the kinds of questions we must ask when trying to identify government must also be capable of evolving. It seems to me that the reason why fixed tests designed to identify government inevitably fail is that they assume that government is static, an assumption that is not borne out by an historical and comparative review of governments in this and other countries. As a result, the questions that I have listed above are not carved in stone. Other questions may have to be added to the list as governments enter or withdraw from different fields. The questions I have listed are intended only as practical guidelines to those trying to decide whether a body that is not self-evidently part of the legislative, executive or administrative branches of government may nonetheless be part of government for purposes of s. 32(1) of the *Charter*.

5. *Application of the Criteria to the Universities*

(a) The "Control" Test

A review of the various connections between the province and the universities leads me to conclude that the state exercises a substantial measure of control over universities in Canada.

As I noted earlier in these reasons, control may be exercised in a variety of different ways. In this case the government has exercised control over the universities in four broad areas: (1) funding; (2) governing structure; (3) decision-making processes; and (4) policy. Dealing first with funding, it is clear that the province has involved itself heavily in the financing of these institutions of higher learning. As my colleague La Forest J. has noted, the province contributes substantially to the existence of the universities. It finances the bulk of the universities' capital expenditures and provides special funds for special projects. The evidence reveals that approximately 80% of the operating and capital costs of the universities is met by government. In addition to those matters to which La Forest J. has referred, I point out that the government also funds the universities' "clientele", i.e., the student population. It is the availability from government of student grant and loan programs which makes it possible for a great many students to obtain a university education. Finally, the government provides funding for specific research projects.

It should also be noted that government funding of universities is not unconditional. The universities disburse operating grants in accordance with a ministerial Operating Formula Manual which, while not designed to limit or control the expenditure of funds granted to the universities, has as a practical matter that effect. Operating grants are calculated on the basis of the costs of the university program and the number of students involved in that program. The universities set their own tuition fees which are then subtracted from the operating grants. The universities may set tuition fees at 110% of the formula fee without a reduction in

operating grants. Control is also exercised over capital and special grants. These grants must be spent on the purposes for which they were received.

The broadly based nature of the financial assistance offered by government to all members of the university community including the administration, students, and academics indicates that government exercises a substantial measure of control over the operation of universities.

Second, the government exercises what may be termed "structural" control over these institutions. All of the universities in issue in this appeal have been incorporated through Acts of the provincial legislature. The history of this feature of these institutions was summarized by the Ontario Court of Appeal at pp. 14-15:

> The University of Toronto (U. of T.) was created by the legislature as the "provincial university" in 1849. Its enabling statute was changed from time to time and is presently the *University of Toronto Act, 1971,* S.O. 1971, c. 56.
>
> The University of Guelph (Guelph) is an amalgam of the Ontario Agricultural College, the Ontario Veterinary College and the McDonald Institute which formerly operated under the direct control of the provincial Department of Agriculture. The university in its present form was created in 1964 by the *University of Guelph Act, 1964*, S.O. 1964, c. 120.
>
> Laurentian University (Laurentian) finds its origin in Sacred Heart College established as a Roman Catholic and bilingual college in 1913. In 1957 it was changed by an Act of the legislature into the University of Sudbury and subsequently became Laurentian University by the passage of the *Laurentian University of Sudbury Act, 1960*, S.O. 1960, c. 151, as amended by 1961-62, c. 154, ss. 1 to 7.
>
> York University (York) was established in 1959 as an affiliate of the U. of T. This affiliation ended by mutual agreement in 1965 when the legislature enacted the *York University Act, 1965*, S.O. 1965, c. 143.

These "enabling" statutes set out in detail the powers, functions, privileges, and governing structure of the universities. Each establishes a governing body known as the board of governors in the case of Laurentian, York and Guelph and the governing council in the case

of the U. of T. These governing bodies are given the power to "run" the institutions. They are the entities responsible for exercising all the powers and authority granted to the universities under their enabling legislation as well as under other Acts which touch upon their powers (eg., the *University Expropriation Powers Act*, R.S.O. 1980, c. 516).

Third, the legislative branch of government through the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, confers power on the courts to supervise the universities' exercise of their authority in order to ensure adherence to the principle of fairness. There is accordingly governmental control over some university processes.

Finally, I believe that the province indirectly controls a significant amount of university policy. For example, in the area of undergraduate programs, prior approval must be obtained from the Ontario Council on University Affairs ("OCUA"), an advisory committee appointed by the Lieutenant Governor in Council pursuant to the *Ministry of Colleges and Universities Act*, R.S.O. 1980, c. 272, for any new programs outside core arts and science subjects. Further, an annual report must be submitted by OCUA respecting regular programming. With respect to graduate programs, they must first be accredited by the Ontario Council on Graduate Studies ("OCGS"), a sub-committee of the Council of Ontario Universities ("COU"). If the program is approved by COU, COU recommends to OCUA that the program be funded. OCUA reviews the program in terms of academic considerations, societal need, student demand, economic constraints, and duplication of existing programs and makes its recommendations to the province which makes the final determination.

I believe also that government exercises a measure of control over the universities' degree granting power pursuant to the *Degree Granting Act, 1983*, S.O. 1983, c. 36. Under that Act, only approved universities are given the power to grant degrees.

It is true that government has no direct involvement in the policy of mandatory retirement instituted by the universities. As I have indicated, however, a specific connection between the impugned act and government need not necessarily be established. If the relationship between the universities and government is sufficiently close to warrant their being considered governmental for purposes of s. 32, I see no reason why their internal policies and practices should not have to conform to the dictates of the Constitution.

I accept the submission of the respondents that the principle of academic freedom accounts for the absence of governmental intervention in some types of decisions universities must make. In my opinion, however, this argument does not really advance the universities' case for exemption from *Charter* review. Rather, it supports the view expressed earlier that government must preserve an arm's length relationship with some types of bodies in order that they can perform their function in the best possible way. The essential function which the principle of academic freedom is intended to serve is the protection and encouragement of the free flow of ideas. Accordingly, government interference in this realm is impermissible.

Quoting from the Bissell Report of the Commission on the Government of the University of Toronto (Toronto 1970), at p. 27:

> By and large, devotion to his discipline in an atmosphere of freedom characterizes the academic. As long as his discipline is respected and allowed to develop according to its own requirements, and he is provided with books, libraries, laboratories and technical services in keeping with the university's resources, the academic is content to leave the overall administration of the university to others and to encumber himself with as little administrative responsibility in the faculty or department as is consistent with common decency.
>
> Academic work and academic decisions - his teaching and research, curricular development in his department, appointments to staff, and so forth - are his primary concern, and he is convinced that academics *alone* are possessed of the expertise required to make such decisions. His dedication is to his discipline, and even when he

> engages in writing, research and consultancy outside the university, he usually sees such activities as contributing to his work in the discipline.

Quoting also from an essay by Frank Underhill (Underhill, "The Scholar: Man Thinking", in Whalley (ed.), *A Place of Liberty* (Toronto 1964)) at p. 68:

> The claim of the university teacher is that he and his fellows, whatever their legal position as employees, are in fact members of a professional community and should be considered to enjoy the rights of a learned profession. That is, they collectively should determine what shall be taught, how it shall be taught, who shall be qualified to do the teaching, and who shall be qualified to receive the teaching. In a word, they should be self-governing as are the members of other learned professions. Academic freedom is the collective freedom of a profession and the individual freedom of the members of that profession.

It should be noted that it is the universities themselves which confer academic freedom through their tenure arrangements for each faculty member. And this system is not without its critics. Indeed, the Bissell Commission calls for a re-thinking of tenure as a means of protecting academic freedom, suggesting that it has more to do with job security than academic freedom (at pp. 53-54).

While I believe that the principle of academic freedom serves an absolutely vital role in the life of the university, I think its focus is quite narrow. It protects only against the censorship of ideas. It is not incompatible with administrative control being exercised by government in other areas. In this respect, it may be somewhat analogous to the principle of judicial independence in relation to the adjudicative function. I do not believe that the fact that the province has not exercised control over the retirement policies of the universities is decisive of their status although it is clearly relevant to it.

With regard to the general level of control exercised by government over the universities, I believe that the indicia of control which I have identified support the conclusion that the province exercises quite substantial, although in some areas indirect, control over these institutions. This is not, however, by itself enough to bring them within s. 32 of the *Charter*. We have to apply the other tests outlined above.

(b) The "Government Function" Test

In applying the "government function" test the general principle is that a function becomes governmental because a government has decided to perform it, not because the function is inherently governmental.

Education has occupied an important sphere of governmental activity in both pre- and post-Confederation Canada. For example, as early as 1766 the legislature of Nova Scotia enacted *An Act concerning Schools and Schoolmasters*, S.N.S. 1766, c. 7, which provided for the appointment of schoolmasters and the funding of local schools in the colony. Other colonies of British North America had similar legislation. For example, the Revised Acts and Ordinances of Lower-Canada 1845 contain four Acts relating to education and educational establishment: *An Act to facilitate the establishment and the endowment of Elementary Schools in the Parishes of this Province*, R.S.L.C. 1845, Class I, c. 1; *An Act for the establishment of Free Schools and the advancement of Learning in this Province*, R.S.L.C. 1845, Class I, c. 2; *An Act to provide for the establishment of Normal Schools*, R.S.L.C. 1845, Class I, c. 3; and *An Act to incorporate the College of Chambly*, R.S.L.C. 1845, Class I, c. 4. See also Province of Canada Statutes, *An Act for the better establishment and maintenance of Public Schools in Upper Canada, and for repealing the present School Act*, S. Prov. C. 1849, c. 83; *Act to repeal certain Acts therein mentioned, and to make further provision for the establishment and maintenance of*

Common Schools throughout the Province [Common Schools Act], S. Prov. C. 1841, c. 18; *An Act to enable the Corporation of the Royal Institution for the Advancement of Learning, to dispose of certain portions of Land, for the better support of the University of McGill College*, S.L.C. 1844-45, c. 78; *An Act for the appropriation of the Revenues arising from the Jesuits' Estates, for the year one thousand eight hundred and forty-six*, S.L.C. 1846, c. 59; and *An Act to make better provision for promotion of superior Education and the establishment and support of Normal Schools in Lower Canada and for other purposes*, S.L.C. 1856, c. 54. And in Prince Edward Island an educational regime had been established under various Acts such as *An Act for the encouragement of education*, S.P.E.I. 1852, c. 13, and *An Act to consolidate and amend the several laws relating to education*, S.P.E.I. 1861, c. 36. All these educational activities have been continued and expanded by the various levels of government down to the present day.

In 1867 the Fathers of Confederation recognized the role that provincial governments had come to play in the area of education. Section 93 of the *Constitution Act, 1867* gives exclusive jurisdiction over education to the provinces, limiting that jurisdiction only to the extent necessary to protect denominational schools and religious minorities.

Provincial government activity in the education field subsequent to 1867 may be characterized as all-inclusive. For example, in 1871 the Ontario legislature passed *An Act to Improve the Common and Grammar Schools of the Province of Ontario*, S.O. 1871, c. 33, which reorganized the lower school system in the province creating a public system of free schools. In 1874 the legislature again acted to reform the public education department, together with the lower schools, collegiate institutes and high schools of the province, and to amend and consolidate the Public School Law, S.O. 1874, cc. 27 and 28 respectively. Finally the Revised Statutes of Ontario for 1877 contains a consolidation of the various educational statutes in force at the time. They provide for, *inter alia*, a Department of Education (c. 203), a complete

regime of public (grade) schools and high schools (cc. 204 and 205), as well as the University of Toronto (cc. 209 and 210), a school of Practical Science (c. 212), and Industrial Schools (c. 213). This governmental activity is also mirrored in other provinces and territories: see Prince Edward Island, *The Public Schools' Act, 1877*, S.P.E.I. 1877, c. 1; Nova Scotia, *Of Public Instruction*, R.S.N.S. 1873, c. 32; Quebec, *Public Instruction*, R.S.Q. 1888, Title V, arts. 1860-2288; New Brunswick, *Schools Act*, C.S.N.B. 1877, c. 65; Manitoba, *The Manitoba School Act*, C.S.M. 1880, c. 62; British Columbia, *Consolidated Public School Act, 1876*, S.B.C. 1876, c. 142, and the North-West Territories, *The School Ordinance*, C.O.N.W.T. 1898, c. 75.

A brief review of the legislation in place both before and after Confederation leads to the inescapable conclusion that education at every level has been a traditional function of governments in Canada.

(c) Statutory Authority and the Public Interest Test

It has already been established that the universities are broadly empowered to conduct their affairs through their enabling statutes. Moreover, the grant of statutory authority clearly encompasses the power to enter into employment contracts and collective agreements with faculty and staff.

It is beyond dispute that the universities perform an important public function which government has decided to have performed and, indeed, regards it as its responsibility to have performed. Counsel for the respondents conceded as much at trial. Moreover, justification for state activity in this area is not hard to find. The state's interest in education in today's society does not and cannot stop at the point of ensuring basic literacy. The promotion of higher learning and the provision of access to opportunities for study at this level is clearly in

the public interest. The state readily acknowledges the important role universities play not only in the education of our young people but also more generally in the advancement and free exchange of ideas in our society. On a more practical level, the province recognizes that prospects for economic growth are linked to the development and maintenance of a critical mass of scholars and researchers and, more basically, an educated community. For this reason also the province has a vital interest in a first class, comprehensive system of education.

As in the case of the control test, I might not be prepared to conclude that satisfaction of the third test was enough by itself to bring the respondents within s. 32 of the *Charter*. However, the fact that the universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of "government" for purposes of s. 32. Their policies of mandatory retirement are therefore subject to scrutiny under s. 15 of the *Charter*.

II. Does the Universities' Mandatory Retirement Policy Infringe Section 15 of the *Charter*?

1. *The Meaning of "Law" in Section 15*

Having found that the *Charter* applies to universities in Ontario, it must next be determined whether the policy of mandating retirement at the age of sixty-five infringes s. 15(1) of the *Charter*. Section 15(1) provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular,

> without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. discussed the meaning of the word "law" in s. 15 as follows at pp. 163-164:

> This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law. No problem regarding the scope of the word "law", as employed in s. 15(1), can arise in this case because it is an Act of the Legislature which is under attack. Whether other governmental or *quasi*-governmental regulations, rules, or requirements may be termed laws under s. 15(1) should be left for cases in which the issue arises.

Because of its obvious application to statute law McIntyre J. did not have to consider how much further the word "law" in s. 15 might extend. This, however, has a direct bearing on the reach of s. 15.

A number of lower courts have attempted to grapple with this issue. In *Douglas/Kwantlen Faculty Assn. v. Douglas College*, *supra*, the British Columbia Court of Appeal noted that the word "law" appears not only in s. 15 but also in s. 1 of the *Charter* and s. 52 of the *Constitution Act, 1982*. Relying upon a rule of statutory construction which provides that when a term appears more than once in the same piece of legislation it should be given the same meaning, the court turned to the jurisprudence of this Court dealing with "law" in s. 1 of the *Charter* and s. 52 of the *Constitution Act, 1982*. The Court of Appeal offered the following definition at pp. 726-27: "a rule or a system of rules formulated by government and imposed upon the whole or a segment of society. In this context, law may be made by government itself or by bodies or agencies exercising governmental power."

At issue in *Douglas College* was a provision in a collective agreement mandating retirement at age 65. The court noted that in general the provisions in a collective agreement would not be considered "law" since they reflect the will of the parties and not the government. The same could not be said of the agreement before the court, however, since all its terms were subject to the approval of a commissioner appointed by the government with the power to review and reject all compensation practices. Similarly in *Stoffman v. Vancouver Gen. Hosp.* (1988), 21 B.C.L.R. (2d) 165, the same panel of the court (Hinkson, Macfarlane and McLachlin (now of this Court) JJ.A.) found on the strength of *Douglas College* that a regulation passed by the hospital's management board terminating the hospital privileges of doctors over the age of 65 was also "law". As in *Douglas College* the regulation did not become effective until approved by the Minister.

By way of contrast, in *Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board* (1987), 58 O.R. (2d) 545, the Divisional Court of Ontario divided on the issue of whether a policy formulated by the school board mandating retirement at age 65 could be considered "law" for the purposes of s. 15. Craig J. in dissent expressed the opinion, at p. 550, that "the policy is intended to be binding upon the teachers and is "law" within the meaning of s. 15(1) of the Charter and s. 52(1) of the *Constitution Act, 1982*." The majority (Anderson and McKinlay JJ.) felt otherwise, noting at p. 565, that "law" meant "law in the sense of a rule of conduct made binding upon a subject by the State." In their view, the policy of the board and its resolution to apply it did not constitute law in this sense.

Despite the differences between *Douglas College* and *Vancouver General Hospital* on the one hand, and *Essex County* on the other, these decisions all accept as a fundamental premise that the word "law" in s. 15 embraces the notion of some discrete, explicit and identifiable rule. My colleague La Forest J. also seems to accept this approach to the role the word "law" is

intended to play in the operation of the equality guarantee although he would give it a liberal interpretation.

I do not regard it as self-evident that the term "law" in s. 15 was intended to play a limiting role. I would agree with La Forest J. that if you have to find a "law" under s. 15 before the section is triggered, then "law" should be given a very liberal interpretation and should not be confined to legislative activity. It should also cover policies and practices even if adopted consensually. Indeed, it would be my view that the guarantee of equality applies irrespective of the particular form the discrimination takes.

As La Forest J. noted in *Andrews*, *supra*, at p. 193:

> I am not prepared to accept at this point that the only significance to be attached to the opening words that refer more generally to equality is that the protection afforded by the section is restricted to discrimination through the application of law. It is possible to read s. 15 in this way and I have no doubt that on any view redress against that kind of discrimination will constitute the bulk of the courts' work under the provision. Moreover, from the manner in which it was drafted, I also have no doubt that it was so intended. However, it can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them, particularly having regard to the fact that s. 32 already limits the application of the *Charter* to legislation and governmental activity. It may also be thought to be out of keeping with the broad and generous approach given to other *Charter* rights, not the least of which s. 7, which is like s. 15 is of a generalized character.

See also Eberts, "Sex-based Discrimination and the Charter," in Bayefsky and Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto 1985), at pp. 206-07.

I believe, however, that on a purposive interpretation of s. 15 the guarantee of equality before and under the law and equal protection and benefit of the law also constitutes a directive to the courts to see that discrimination engaged in by anyone to whom the *Charter*

applies is redressed whether it takes the form of legislative activity, common law principles or simply conduct. In other words, s. 15 is, in effect, declaratory of the rights of all to equality under the justice system so that, if an individual's guarantee of equality is not respected by those to whom the *Charter* applies, the courts must redress that inequality. I say "by those to whom the *Charter* applies" because of this Court's conclusion in *Dolphin Delivery* that it does not apply to private action absent a government connection.

However, accepting that limitation, this approach to s. 15 seems to me to be completely consistent with the finding that s. 32 of the *Charter* makes acts of the executive or administrative branch of government subject to *Charter* scrutiny. I see no sound reason why government conduct which violates an individual's equality rights under s. 15 is not subject to redress by the courts in order to restore that individual's declared right to equality under the law. Section 15, on this interpretation, does not require a search for a "law" which discriminates but merely a search for discrimination which must be redressed by the law.

Section 24 of the *Charter* confers a broad discretion on the courts to redress *Charter* violations. It reads:

> **24**. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This section may be contrasted with s. 1 of the *Charter* and s. 52 of the *Constitution Act, 1982.* Section 1 requires limits on *Charter* rights to be "prescribed by law", and if so prescribed, to be reasonable and demonstrably justified in a free and democratic society. Section 52 provides that the Constitution is the supreme law of Canada and that any law which is inconsistent with it is of no force or effect. These provisions operate to allow the courts to strike down existing

laws which derogate from the values enshrined in the Constitution. Section 24 of the *Charter*, on the other hand, seems to have been included so as to give the courts jurisdiction to design appropriate remedies for violations which do not necessarily have their origin in law as such. It thus provides a means whereby the courts can remedy infringements arising from conduct.

I believe also that the wording of s. 15(2) supports the view that s. 15(1) was not meant to be restricted to "law" even broadly construed. Section 15(2) provides:

> **15.** . . .
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

"Activity" cannot, in my view, be read narrowly in order to be equated with "law". Subsection (2) must be read together with subs. (1). It would not have been necessary to exempt programs and activities from the ambit of subs. (1) if they were not included in subs. (1) in the first place. I believe that the inclusion of these words in subs. (2) provides strong support for the proposition that s. 15(1) was not intended to apply only in the narrow context of discriminatory legislation or "rules" analogous thereto.

Finally, and perhaps most importantly, this broad interpretation of s. 15 best achieves the purpose of the section, namely to protect against the evil of discrimination by the state whatever form it takes. This Court has said on many occasions that the proper approach to *Charter* interpretation is a purposive one: see *Hunter v. Southam Inc., supra.* Moreover, in interpreting "law" in s. 1 of the *Charter* and s. 52 of the *Constitution Act, 1982*, the decisions of this Court demonstrate that "law" may not have the same meaning throughout the

constitution. For instance, in *Operation Dismantle Inc. v. The Queen, supra*, Dickson J. said of s. 52 at p. 459:

> I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the *Charter* [*sic*] is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52.

Contrariwise, in interpreting s. 1, Lamer J. said in *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 623:

> As set out in the reasons of Estey J., the violation of the respondent's rights is not the result of the operation of law but of the police action and there is no need, in my view, to consider in this case whether under s. 1 of the *Charter* the "breathalyzer scheme" set up through s. 235(1) and s. 237 of the *Criminal Code* is a reasonable limit to one's rights under the *Charter*.

Le Dain J., dissenting on other grounds, agreed saying at p. 645:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule. [Emphasis added.]

These two definitions of "law" are obviously quite different. Their difference springs from the fact that s. 1 of the *Charter* and s. 52 of the *Constitution Act, 1982* serve two very different purposes. Section 52 is animated by the doctrine of constitutional supremacy. As such, a wide view of "law" under that provision is mandated so that all exercises of state power, whether legislative or administrative, are caught by the *Charter*. Section 1, on the other hand, serves the purpose of permitting limits to be imposed on constitutional rights when the demands of

a free and democratic society require them. These limits must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective. Just as the meaning of "law" in s. 1 of the *Charter* and s. 52 of the *Constitution Act, 1982*, depends on the purpose those sections were meant to achieve, so also does the meaning of "law" in s. 15(1).

In *Andrews* it was acknowledged that the key to s. 15 is the word "discrimination". At page 172 of his reasons McIntyre J. said:

> The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.

In *Reference Re Workers' Compensation Act, 1983*, [1989] 1 S.C.R. 922; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695, and *R. v. S. (S.)*, [1990] 2 S.C.R. 254, this Court repeatedly affirmed that in order to establish a violation of s. 15(1) there must be evidence of discrimination in the sense of stereotype and prejudice. For example, quoting from *Turpin* at p. 1333:

> Differentiating for mode of trial purposes between those accused of s. 427 offences in Alberta and those accused of the same offences elsewhere in Canada would not, in my view, advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case....

It is, I think, now clearly established that what lies at the heart of s. 15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations. However, the nature of discrimination is such that attitudes rather than laws or rules may be the source of the discrimination. In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, this Court quoted from Judge Abella's report *Equality in Employment* regarding the phenomenon of "systemic discrimination". At page 9 of that report, Judge Abella explains:

> The impact of behaviour is the essence of "systemic discrimination". It suggests that the inexorable, cumulative effect on individuals or groups of behaviour that has an arbitrarily negative impact on them is more significant than whether the behaviour flows from insensitivity or intentional discrimination ....
>
> Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified. [Emphasis added.]

Given that discrimination is frequently perpetuated, unwittingly or not, through rather informal practices, it would be altogether inconceivable that they should be treated as insufficient to trigger the application of s. 15.

For the reasons given above I believe that the arguments in support of a liberal interpretation of s. 15 are compelling. It is not strictly necessary, however, for the Court to come to a definitive conclusion on this aspect of s. 15 in this case for two reasons. First, even if the most restrictive interpretation of "law" is adopted, the universities' enabling statutes all contain provisions conferring power on the respondents to terminate their contracts of employment with the appellants as they see fit. For example, *The York University Act, 1965*, S.O. 1965, c. 143, provides:

> **10.** Except as to such matters by this Act specifically assigned to the Senate, the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University, including, without limiting the generality of the foregoing, power,
>
> ...
>
> (*c*) to appoint, promote and remove all members of the teaching and administrative staffs of the University and all such other officers and employees as the Board may deem necessary or advisable for the purposes of the University, but no member of the teaching or administrative staffs, except the President, shall be appointed, promoted or removed except on the recommendation of the President, who shall be governed by the terms of the University's commitments and practices;
>
> (*d*) to fix the number, duties, salaries and other emoluments of officers, agents and employees of the University;

See similarly: *The University of Toronto Act, 1971*, S.O. 1971, c. 56, s. 2(14)(*b*) and (*c*); *The University of Guelph Act, 1964*, S.O. 1964, c. 120, s. 11(*b*) and (*c*); and *The Laurentian University of Sudbury Act, 1960*, S.O. 1960, c. 151, s. 13(1)(*b*) and (*c*). It was pursuant to these legislative provisions that the discrimination complained of took place.

Secondly, even if a more liberal approach to the interpretation of the word "law" is adopted, it would lead to a finding that the policies instituting mandatory retirement constitute "law" within the meaning of s. 15. At the University of Guelph the mandatory retirement age is in the form of a university policy. At both York University and Laurentian University mandatory retirement is imposed in collective agreements entered into between faculty and administration. And at the University of Toronto the age of retirement is incorporated into the definition of academic tenure, which definition forms part of the faculty members' contract of employment with the university. All of these methods of instituting mandatory retirement, it seems to me, constitute "binding rules" in the broad sense. I agree with La Forest J. that it makes no difference that some of the rules came about as a result of a process of negotiation

culminating in their incorporation into collective agreements. Nor does it make any difference, in my view, that those subject to these rules, negotiated or not, have not previously pushed for their repeal. What we are dealing with in these appeals is, broadly speaking, "the law of the workplace" -- law which may be determined exclusively by the employer in the case of unorganized establishments or by the joint efforts of the union and the employer in the case of unionized establishments -- but binding law nonetheless.

For the above reasons, therefore, I find that the mandatory retirement policies of the universities are subject to s. 15 scrutiny.

2. *Is the Imposition of Mandatory Retirement Discriminatory*?

Both La Forest J. and L'Heureux-Dubé J. have found that the imposition of mandatory retirement infringes s. 15(1) of the *Charter*. I take no issue with that finding. Indeed, one would be hard pressed to construe any rule prohibiting employment past a certain age as anything other than a clear example of direct discrimination. I wish, however, to add a few comments about the developing jurisprudence of this Court on the application of s. 15.

In *Andrews*, *supra*, McIntyre J. described the steps to be taken in determining s. 15 claims. The first question to be asked is whether the rule, in purpose or effect, distinguishes between different individuals or different classes of individuals. A finding that "different treatment" exists, however, does not end the inquiry. McIntyre J. explicitly stated that not every difference in treatment would give rise to a s. 15 violation. The sorts of differences in treatment caught by the section are those that are discriminatory. Thus the second issue to be determined in equality cases is whether the distinction once found gives rise to discrimination.

What is discrimination? Before this Court had an opportunity to review the purpose of s. 15, many of the lower courts had equated "discrimination" with different treatment *simpliciter*, thereby rendering the presence of the word "discrimination" in the section more or less superfluous. McIntyre J. quite rightly rejected this interpretation. At pages 174-75 he said that discrimination:

> ... may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [Emphasis added.]

Later in his reasons McIntyre J. set out the various approaches to s. 15 that had been advanced by academics and courts. In particular, he described what has become known as the "enumerated or analogous grounds approach" which was ultimately adopted by the Court as the proper approach to s. 15. At pages 180-81 he said:

> The analysis of discrimination in this approach must take place within the context of the enumerated grounds and those analogous to them. The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

These comments ought not to be considered in isolation from one another. As Professor Gold remarked in his article, "Comment: *Andrews* v. *Law Society of British Columbia*" (1988-89), 34 *McGill L. J.* 1063, at p. 1079:

> The equality provisions in the *Charter* are like the three-dimensional image in a holographic plate. Although one may break the plate into a thousand pieces, shining a laser beam through any one of the shards will reproduce the image in its entirety. So too is it with the concepts of "equality", "discrimination", "reasonableness" and "justification". Out of any one of these concepts can be generated all of the principles that we distribute amongst the various clauses of sections 15 and 1.

The view expressed by Professor Gold has been implicitly endorsed by this Court in its decisions following *Andrews*. As I noted earlier in these reasons, the evil which s. 15 was meant to protect against is stereotype and prejudice. The purpose of the equality guarantee is the promotion of human dignity. This interest is particularly threatened when stereotype and prejudice inform our interactions with one another, whether on an individual or collective basis. It is for this reason that the central focus of the equality guarantee rests upon those vehicles of discrimination, stereotype and prejudice.

The centrality of the concept of "prejudice" explains why the similarly situated test has no place in equality jurisprudence. Unhappily, the parties involved in these appeals as well as some of the academics who have commented upon the *Andrews* decision have continued to resort to that test. For instance, Professor Gold, *supra*, remarked at p. 1065 of his comments:

> A number of questions arise from the Court's analysis of the principle of formal equality. First, the Court does not say that the principle of formal equality has no role to play in any case whatsoever, only that it would be wrong to attempt to resolve all issues "within such a fixed and limited formula". Second, notwithstanding the harshness of its criticisms, the Court does not reject the underlying premise of this principle. For example, Justice McIntyre cites the following in support of the proposition that equality does not necessarily demand identical treatment: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals". If the "wise man" was not Aristotle, it certainly could have been: this passage is a pure expression of the principle of formal equality. [Citations omitted.]

See also Black and Smith, "Note" (1989), 68 *Can. Bar Rev.* 591, at pp. 600-601.

In my view, and with great respect to those who think otherwise, this Court has clearly rejected similarity of situation as the benchmark for the application of s. 15. I need not repeat the criticisms of the test articulated by McIntyre J. in *Andrews* or, indeed, any of the other criticisms of the test which have been identified by other commentators. The focus of s. 15, in my view, is clearly prejudice and stereotype.

In the context of these appeals the question then is whether the policy of mandatory retirement at age 65 gives rise to discrimination within the meaning of s. 15. The respondent universities contend that it does not. They argue that simply because mandatory retirement draws an adverse distinction on the basis of the enumerated ground of age does not mean that the policy discriminates. They say that those who are subject to mandatory retirement suffer no prejudice and s. 15 is therefore not infringed. The appellants, on the other hand, submit that it is unnecessary for them to establish anything other than the fact that an adverse distinction has been drawn on the basis of a prohibited ground.

In my view, neither the respondents nor the appellants have properly approached the question this Court must address. The grounds enumerated in s. 15 represent some blatant examples of discrimination which society has at last come to recognize as such. Their common characteristic is political, social and legal disadvantage and vulnerability. The listing of sex, age and race, for example, is not meant to suggest that any distinction drawn on these grounds is *per se* discriminatory. Their enumeration is intended rather to assist in the recognition of prejudice when it exists. At the same time, however, once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory.

It follows, in my opinion, that the mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrebuttable presumption of prejudice. Rather it compels one to ask the question: is there prejudice? Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue? Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? I think the answer to these questions is clearly yes and that s. 15 is accordingly infringed.

III. Is the Universities' Mandatory Retirement Policy Justifiable Under Section 1 of the *Charter*?

I have found that the *Charter* applies to the universities and that their policy of mandatory retirement at age 65 violates s. 15. The next question is whether the policy can be saved under s. 1 of the *Charter* which provides:

> **1**. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. *The Meaning of "Law" in Section 1*

This section requires limits on *Charter* rights and freedoms to be "prescribed by law". As I have noted elsewhere, the term "law" within s. 1 should be construed in accordance with the purpose which the section was intended to serve. Part of that purpose, I believe, is to make sure that only limits imposed pursuant to the rule of law be examined to see whether they are reasonable and demonstrably justifiable under s. 1. Put more succinctly, as Le Dain J. noted in *Therens*, *supra*, the purpose behind the "prescribed by law" requirement is to distinguish

between those limits which arise by law and those which result from arbitrary action. Is, then, the imposition of mandatory retirement prescribed by law within the meaning of s. 1?

This Court has had occasion to consider the "prescribed by law" requirement on a number of occasions. In *R. v. Therens, supra*, the respondent had lost control of his motor vehicle and collided with a tree. When the police arrived at the scene of the accident they suspected that the respondent had been drinking and consequently demanded from him a breath sample pursuant to s. 235(1) of the *Criminal Code*, R.S.C. 1970, c. C-34. The section provided that a person from whom a breath sample has been demanded is to comply with the demand "as soon as practicable" and, in any event, not later than two hours after the demand is made. Therens accompanied the officer to the police station and willingly provided the sample. He was subsequently charged and convicted under s. 236(1) of the *Code* of driving with a blood alcohol level in excess of the legal limit. Therens appealed his conviction on the basis that, since he was not informed of his right to counsel upon detention, the breath sample had been obtained in violation of his *Charter* rights and the evidence respecting his blood alcohol level was therefore improperly admitted.

One of the questions posed to the Court was whether the limit on the accused's right to counsel was prescribed by law. As the section of the *Code* provided that breath samples were to be provided as soon as practicable, the section did not expressly or by necessary implication compel infringement of the *Charter*. The majority found therefore that the limitation on the rights of the accused under the *Charter* arose from the action of the police officer involved and not from Parliament and as such could not be saved under s. 1.

The same analysis was applied in *R. v. Thomsen*, [1988] 1 S.C.R. 640, where s. 234.1(1) of the *Code* was challenged. Unlike s. 235(1), s. 234.1(1) provided that a breath sample was to

be provided "forthwith" rather than as soon as practicable. Le Dain J., writing for a unanimous court, held that the section by necessary implication infringed s. 10(*b*) of the *Charter* but could be justified under s. 1.

In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the Court was faced with the question of whether a legislative prohibition on advertising directed against children was justified under s. 1. The legislation in question provided a mechanism by which it could be determined whether advertisements were in fact aimed at that segment of the community. Under s. 249 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, a judge was to determine whether advertisements were directed towards children on the basis of three factors: (1) the nature and intended purpose of the goods advertised; (2) the manner of presentation; and (3) the time and place the advertisement was to be shown. The respondent complained that these factors were too vague and did not provide the court with sufficient guidance to make the determination whether or not advertising was directed toward children. This lack of solid guidance, it was argued, meant that the limit on the advertisers' freedom of expression was not "prescribed by law" within the meaning of s. 1. Dickson C.J., Lamer J. and I disagreed. At page 983 we said:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

Finally, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, it was decided that a provision which conferred a discretion upon a labour arbitrator to grant relief for infringements of the *Canada Labour Code*, R.S.C. 1970, c. L-1, impliedly gave the arbitrator

jurisdiction to make orders placing limits on *Charter* rights. Lamer J. summarized the application of this aspect of s. 1 in such circumstances at p. 1081:

> To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament had not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

In my view, a similar approach ought to be taken in these appeals. While the universities are not creatures of statute in the same sense as the arbitrator in *Slaight Communications*, they do derive their authority over employment relations with their faculty and staff through their enabling statutes. These provisions do not in and of themselves infringe the *Charter*. Instead, it is the action that has been taken pursuant to them which has led to the violation. It is not necessary, therefore, to determine specifically whether the actual policies compelling retirement at age 65 are "law" within the meaning of s. 1. For reasons analogous to those expressed in *Slaight Communications*, if the measures instituting mandatory retirement are not reasonable and demonstrably justified, they fall outside the authority of the universities and must be struck down.

2. *Is the Universities' Mandatory Retirement Policy Reasonable and Demonstrably Justified*?

The role of s. 1 within the *Charter* was first articulated in this Court in *R. v. Oakes*, *supra*. The *Oakes* "test" was succinctly summarized in the later case of *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, by Dickson C.J. at p. 768:

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

It is this test that must be applied in ascertaining whether the universities' mandatory retirement policy meets the requirements of s. 1 of the *Charter*.

Despite the fact that my colleagues La Forest and L'Heureux-Dubé JJ. have not found, as I have, that the *Charter* applies to the universities, they have both considered the constitutionality of mandatory retirement in the university context. I find myself in substantial agreement with L'Heureux-Dubé J. that the universities' mandatory retirement policy cannot be justified under s. 1. In my view, it does not meet the proportionality test.

The respondents argue that the "minimal impairment" branch of the *Oakes* test has been less stringently applied in some situations and give as examples the decisions of this Court in *Edwards Books* and *Irwin Toy*. They argue that the factors which motivated the Court in those two cases are present here and that therefore the requirement of minimal impairment should be relaxed in this case also.

In *Edwards Books*, this Court considered the constitutionality of the Ontario *Retail Business Holidays Act*, R.S.O. 1980, c. 453. The Act deemed Sunday to be a common pause day in the retail sector but provided an exemption for small retailers who did not conduct business on Saturday. The majority upheld both the pause day provision and the exemption. After

examining the exemption in relation to the interests of consumers, retailers and employees, Dickson C.J. remarked at pp. 781-82:

> A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

Later, at p. 782, he added:

> In my view, the principles articulated in *Oakes* make it incumbent on a legislature which enacts Sunday closing laws to attempt very seriously to alleviate the effects of those laws on Saturday observers. The exemption in s. 3(4) of the Act under review in these appeals represents a satisfactory effort on the part of the Legislature of Ontario to that end and is, accordingly, permissible.

In *Irwin Toy*, *supra*, a seemingly similar approach was adopted by this Court in its determination of whether a legislative ban on television advertising directed towards children was constitutionally sound as not trenching too onerously on freedom of speech. In that case, the evidence revealed that televised advertising was particularly detrimental to children under the age of six because this group was the least able to differentiate fact from fiction. They were thus the most credulous when presented with advertising messages. The evidence was, however, less than conclusive with respect to older children. The most that could be said was that the ability to view critically advertised messages in an adult way occurred somewhere between the ages of seven and thirteen. Cognizant of the body of opinion on these matters, the Quebec legislature opted for a scheme which prohibited all advertising directed at children under the age of 13.

Dickson C.J., Lamer J. and I held the provision to be reasonable and demonstrably justified within the meaning of s. 1. At page 993 it was said:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

Applying this reasoning to the problem before us, we cast the issue we were called upon to determine in *Irwin Toy* as follows at p. 994:

> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective. [Emphasis added.]

At page 999 we concluded:

> While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions. [Emphasis added.]

Do the above quoted passages evidence a willingness on the part of the Court to adopt a more flexible approach to this aspect of the s. 1 test? I think it clear that they do. In my opinion, a close examination of the facts in both cases reveals that there were indeed good reasons for the Court's adopting such an approach.

In *Edwards Books* Dickson C.J. reviewed, as I have said, the relationship between the exemption in s. 3(4) and the interests of consumers, retailers and employees. In respect of the

first two groups, he found that the scheme adopted by the legislature was no better or worse than any other proposed scheme. All of the suggested ways of dealing with exceptions to the Sunday closing laws had their faults. With respect to the interests of those who worked in the retail sector, other mechanisms for dealing with a satisfactory day of rest would severely impinge upon their interests. The Court took due notice of the fact that of all those affected in some way by Sunday shopping laws, retail employees were the most vulnerable. Largely unskilled and unrepresented, these workers would be in no position to resist pressure from their employers to not press for their rights. Thus, even although other acceptable schemes could have been adopted by the provincial government, none were clearly better at both minimizing the effects of Sunday closings on both consumers and retailers and especially at protecting the interests of those who would otherwise not reap the benefit of a uniform day off work.

In *Irwin Toy* the respondent advertisers submitted that there were indeed alternative means of dealing with the problem of children's advertising and that these means did not infringe so severely on the free speech rights of the advertisers. It was nonetheless held that these different means of dealing with the issue did not invalidate the legislature's right to proceed as it did. None of the proposed alternatives adequately accomplished the legislature's admittedly reasonable objective of protecting children from manipulation through commercial media. In that context, the Court refused to second guess the legislative wisdom of choosing to protect the interests of vulnerable children at the limited expense of the commercial speech rights of advertisers.

It seems to me that the central message to be drawn from the foregoing cases is that, if there is to be deference toward the legislative initiative in cases where different means might impinge less severely upon a guaranteed right or freedom, the exercise of such deference is

particularly apposite in those cases where something less than a straightforward denial of a right is involved. Where the legislature is forced to strike a balance between the claims of competing groups for instance, and particularly where the legislature has sought to promote or protect the interests of the less advantaged, the Court should approach the application of the minimal impairment test with a healthy measure of restraint. As was said by Dickson C.J. in *Edwards Books* at p. 779:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

In such a context, the requirement of minimal impairment will be met where alternative ways of dealing with the stated objective meant to be served by the provision in question are not clearly better than the one which has been adopted by government. It is not a question of the Court refusing to entertain other viable options. For example, in *Ford v. Quebec, supra*, other mechanisms for promoting the French language in the Province of Quebec were quite obviously considered by this Court and ultimately found preferable to the exclusivity route opted for by the legislature of Quebec. Similarly, this branch of the *Oakes* proportionality test will be met where the means chosen by government are the most reasonable ones available in light of the objective sought to be achieved.

The respondent universities seek to reap the benefit of the "vulnerable group" standard of review under *Edwards Books* and *Irwin Toy* on the basis that their mandatory retirement policy was intended to make available positions for younger academics. They argue that younger academics are "vulnerable" in the sense that, if senior faculty members are not required to

retire, they are deprived of an opportunity to enter careers in academe having regard to the financial exigencies which presently plague the universities. In my view, young academics are not the kind of "vulnerable" group contemplated in *Edwards Books* and *Irwin Toy*. There is no reason outside the reality of fiscal restraints why this group cannot gain access to their chosen profession. Their exclusion does not flow, in other words, from their condition of being young as in *Irwin Toy*, or from the nature of their relationship with the universities as in *Edwards Books*. It flows solely from the government's policy of fiscal restraint. Absent the pressures to which this policy gives rise, there is nothing to suggest that younger academics would be denied meaningful career opportunities.

I think it fair, however, that note be taken of the efforts of some universities to actively recruit for faculty positions those who previously have been denied fair access to teaching opportunities. To my mind, if one of the purposes of the mandatory retirement policy had been to provide employment opportunities to visible minorities there would arguably be a legitimate foundation for applying the deferential standard of review advocated in *Edwards Books* and *Irwin Toy*. I give this as an illustration only and express no conclusive opinion on it because it is not before us. But it serves to underline that what is at issue in these appeals cannot be characterized as an attempt to protect or promote the interests of the disadvantaged.

Thus far in my reasons I have approached the issue of the standard of review under s. 1 solely on the basis that younger academics do not constitute a "vulnerable" group within the meaning of the case law. I have concluded that since younger academics are not "vulnerable" in this sense, this basis for relaxing the standard of minimal impairment does not apply. This finding, however, does not end the matter. It is evident from the extracts I have quoted from the cases that a further factor influenced this Court's decision not to apply the full rigours of *Oakes*. As my colleague La Forest J. has noted, this Court has also expressed its approval of

the idea that the *Oakes* requirement of minimal impairment may be less stringently applied in circumstances where competition exists for scarce resources and the legislature is forced to strike a compromise. Should legislative compromises directed at assuaging the claims of competing groups attract the same measure of judicial deference as legislative initiatives aimed at protecting vulnerable members of society? I do not believe that the remarks of this Court in *Irwin Toy* dictate such a result.

It seems to me that in a period of economic restraint competition over scarce resources will almost always be a factor in the government distribution of benefits. Moreover, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. Accordingly, to treat such price (in this case the alleged consequent lack of job opportunities for young academics) as a justification for denying the constitutional rights of the appellants would completely vitiate the purpose of entrenching rights and freedoms.

On the other hand, there may be circumstances in which other factors militate against interference by the courts where the legislature has attempted a fair distribution of resources. For example, courts should probably not intervene where competing constitutional claims to fixed resources are at stake. The allocation of resources ought not, in other words, to be approached in an acontextual manner. It should always be open to the Court to examine the government's reasons for making the particular allocation and to measure those reasons against the values enshrined in the constitution.

In this case, as I have noted, it is solely because of the government's policy of economic restraint that appointment opportunities for younger academics are limited. Younger academics are not *per se* a vulnerable group and no other factor presents itself which would

justify the application of a deferential standard of review. The issue comes down plainly and simply to whether some members of the academic community, i.e., the younger ones, have to forego job opportunities in a period of economic restraint in order to protect the constitutionally entrenched rights of their senior colleagues. In my opinion, this is not the sort of situation in which the requirements of *Oakes* should be relaxed.

In any event, even if the fact of fiscal restraint *simpliciter* were a sufficient reason to take a more relaxed approach to the minimal impairment requirement, it is my view that the facts of this case do not support the application of this standard of review. As my colleague L'Heureux-Dubé J. has noted, there does not exist a one to one ratio between the retirement of senior faculty and the hiring of junior faculty. I agree with La Forest J., however, that the absence of this close relationship does not render the fact of the relationship irrelevant for s. 1 purposes. But it is my view that because the correlation between retiring and hiring is indirect, it is not appropriate to apply the relaxed standard of minimal impairment. This Court has stressed that the standard which presumptively applies is that of *Oakes*. It is only in exceptional circumstances that the full rigours of *Oakes* should be ameliorated. The onus in this case was on the respondent universities to show that the application of a more relaxed test under s. 1 was appropriate. In my respectful view that onus has not been met.

I should add that even if I were to find that the less stringent application of the minimal impairment test was appropriate in this case, I would nonetheless hold that such a standard has not been met. In assessing reasonableness pursuant to this standard two factors remain relevant: (1) the objective; and (2) the availability of alternative means. In *Edwards Books* it was held that the Court should not interfere with legislative wisdom if there are no alternative means of achieving the objective which are clearly better in terms of both minimizing the impairment of *Charter* rights and meeting the objective. In the context of these appeals it has

not been established that clearly better means are not available. Indeed, the appellants have pointed to the mechanism of voluntary retirement coupled with strong incentives to retire as not only a viable but an equally effective way of meeting the objective. The adoption of such a mechanism has the obvious advantage of not impairing the rights of senior academics and not completely sacrificing the admittedly important objective of achieving faculty renewal. Particularly when the documented success of such alternative techniques is taken into account, I find it difficult to accept that there do not exist clearly better alternatives within the meaning of *Edwards Books*.

My colleague La Forest J., in considering whether s. 9(*a*) of the *Human Rights Code, 1981*, S.O. 1981, c. 53, can be justified under s. 1 of the *Charter*, advances the proposition that mandatory retirement may be accompanied by an attractive "package deal" and that some categories of employees may be prepared to sacrifice their right to continue in their employment beyond age 65 in exchange for substantial pension and other benefits. I do not doubt that this is so. The concern under the *Human Rights Code, 1981*, however, has to be for those to whom such attractive "package deals" are not available and more will be said of this later in dealing with the constitutionality of s. 9(*a*) of the Code.

The immediate question which the "package deal" argument raises in relation to the *Charter* is whether citizens can contract out of their equality rights under s. 15 or whether public policy would prevent this. This Court has already held that some of the legal rights in the *Charter* may be waived but it has not yet been called upon to address the question whether equality rights can be bargained away. Having regard to the nature of the grounds on which discrimination is prohibited in s. 15 and the fact that the equality rights lie at the very heart of the *Charter*, I have serious reservations that they can be contracted out of. I believe that each right or freedom under the *Charter* must be considered separately in order to determine

whether its central focus is personal privilege or public policy. I note with interest that the Supreme Court of India has held that if the right is in the nature of a prohibition addressed to government and inserted in the constitution on grounds of public policy, it cannot be waived by an individual even although he or she may be primarily benefited by it: see *Behram Khurshid v. State of Bombay*, A.I.R. (42) 1955 Supreme Court 123, and *Basheshar Nath v. Commissioner of Income-tax*, A.I.R. (46) 1959 Supreme Court 149. The adoption of such an analysis would allow only those rights which can be classified as personal privileges to be waived or contracted out of.

The American courts appear to have adopted a similar approach, holding that legal rights such a the right to counsel (*Johnson v. Zerbst*, 304 U.S. 458 (1938); *Bute v. Illinois*, 333 U.S. 640 (1948)); the right to trial by jury (*Brookhart v. Janis*, 384 U.S. 1 (1966)); the privilege against self-incrimination (*Escobedo v. Illinois*, 378 U.S. 478 (1964)); the protection against double jeopardy (*Haddad v. U.S.*, 349 F.2d 511 (1965)); the benefits of the prohibition against unreasonable search and seizure (*Zap v. United States*, 328 U.S. 624 (1946)) can all be waived.

I have found no authority in any jurisdiction to support the proposition that equality rights guaranteed in the constitution may be waived or contracted out of and I prefer to leave this important question for decision in a case in which it is essential to the result. It is unnecessary to make that determination in this case because, in my view, the alternative means suggested by the appellants (i.e., voluntary retirement) is plainly a more constitutionally desirable way of achieving the objective of faculty renewal than any contract which forces a person to leave their employment against their will in return for economic gain.

For the reasons given by my colleague L'Heureux-Dubé J., as reinforced by the above, I conclude that the universities' provisions mandating retirement at age 65 cannot be justified under s. 1.

IV. What Is the Appropriate Remedy?

I turn now to the issue of the appropriate and just remedy under s. 24(1).

The appellants have requested: (1) a declaration that the universities have acted in a manner which infringes ss. 7 and 15 of the *Charter*; (2) a declaration that the appellants retain their status as full-time faculty and librarians and that they continue to be entitled to all the rights, privileges, benefits and remuneration of regular full-time appointments; (3) a permanent injunction restraining the universities from mandatorily retiring faculty and librarians contrary to their will; (4) an interlocutory injunction restraining the universities from mandatorily retiring full-time faculty and librarians upon their attaining the age of 65 and from restraining them from taking any steps toward depriving them of such status and such rights; and (5) damages for loss of the rights, benefits, privileges and remuneration attaching to regular full-time appointments.

One of the unique aspects of the *Charter* as a constitutional document is the fact that it includes several express provisions dealing with the authority of the Court to remedy *Charter* violations. In particular, s. 24(1) confers a broad discretion upon the Court to award such relief as it considers appropriate and just in the circumstances. It is s. 24(1) which gives this Court jurisdiction to award, if appropriate and just, the types of relief sought by the appellants in these appeals.

Dealing first with the suitability of a declaration that the universities have acted in a manner contrary to the *Charter*, the University of Toronto argues that this declaration should not be awarded. Counsel contends that the practical effect of the declaration will be the striking out of the termination provisions in the employment contracts between the University and the appellants. The University of Toronto maintains that this remedy is not appropriate because the term governing termination is a fundamental term of the contract and is therefore not severable. Consequently, either the entire employment contract must be done away with or any declaration which recognizes the continuation of the contract should provide that the contract is one of indefinite duration subject to termination for cause or upon due notice.

I do not agree with counsel for the University of Toronto that ordinary principles of contract should necessarily dictate which remedies are appropriate and just within the meaning of s. 24(1) of the *Charter*. The history of the enactment of this provision has been usefully canvassed by Dale & Scott Gibson in their article, "Enforcement of the Canadian Charter of Rights and Freedoms," in Beaudoin and Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), at pp. 784-86. This history demonstrates that the remedial scope of s. 24(1) was not intended to be limited to that available at common law.

Additionally, I believe that different considerations respecting appropriate remedial relief should prevail when constitutional rights and freedoms as opposed to common law rights are at stake. Remedies in contract are guided by the principle of freedom of contract. Because bargaining is seen as a wholly consensual activity, it is regarded as inappropriate for courts to award remedies which result, practically speaking, in the imposition of a new and different agreement. Where constitutional interests are implicated, on the other hand, freedom of contract must, in my opinion, necessarily play a lesser role. I believe that in the *Charter* context the courts should strive to preserve agreements while ridding them of their

unconstitutional elements. To do otherwise, I think, would render a plaintiff's victory rather hollow since, if the entire contract is struck down, there would be no incentive for an unhappy defendant to enter into a new one with its erstwhile adversary.

While I am prepared to acknowledge that the preservation of the basic contract of employment would not in all cases be appropriate, I do not agree that ridding the contract of employment of its discriminatory terms in this case would be tantamount to re-writing the agreement. The universities will retain their common law and statutory rights to terminate the employment of faculty. Those rights will be limited only in so far as their exercise violates the *Charter*. I do not believe that the imposition of this limitation fundamentally alters the nature of these agreements or that the declaration will turn them into contracts of permanent employment.

I hasten to add that even if this Court were to decide that the contract should be struck down in its entirety the respondents would be left in largely the same position as if only the termination clause were struck down. I do not believe that, if the contract were struck down, the respondents would be perfectly free to refuse to enter into another agreement with the appellants. Such a refusal, in my view, would smack of unconstitutional animus and might well provide the appellants with another cause of action under s. 15.

I think therefore that the appellants are entitled to a declaration that the policies adopted by the universities mandating retirement at age 65 violate s. 15 of the *Charter* and that the provisions in their contracts implementing this policy are of no force or effect.

With respect to the request for the second affirmative declaration, it is my opinion that the awarding of this remedy is also appropriate and just in the circumstances. The declaration

sought closely resembles what are known in the labour law context as "reinstatement orders". While reinstatement has not generally been awarded in cases of wrongful dismissal, it is quite frequently awarded by the more specialized labour adjudicators, such as labour arbitrators, labour boards, and human rights tribunals. In my opinion, the Court in exercising its discretion under s. 24(1) should follow this more generous trend of the labour relations specialists.

The circumstances in this case strongly suggest that reinstatement is an appropriate and just remedy. The evidence demonstrates the paucity of academic positions currently available in the universities. For older academics improperly ousted from their positions the probability of locating comparable work will be slight. The fact that the appellants are older, coupled with the fact that they have all been granted full tenure, militates against the likelihood of their finding suitable and similar employment. Additionally, it should be noted that the rights of the appellants which have been infringed pertain to their dignity and sense of self-worth and self-esteem as valued members of the community, values which are at the very centre of the *Charter*. It would be insufficient, in my view, to make any order which does not seek to redress the harm which flows from the violations of this interest. Reinstatement is clearly the most effective way of righting the wrong that has been caused to the appellants. I would therefore order full reinstatement with all the attendant benefits.

Similarly, I believe it is appropriate and just in these circumstances to award compensatory damages for the loss of income and benefits sustained by the appellants through the breach of their s. 15 rights. Compensation for losses which flow as a direct result of the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise. Such compelling reasons have not been advanced in this case. I recognize that the enforced retirement of the appellants was not motivated by unconstitutional animus but rather by the severe fiscal restraints under which the universities have been forced to operate. I also

appreciate that an award of damages in addition to reinstatement will place an additional monetary burden on these already financially strapped institutions. Impecuniosity and good faith are not, however, a proper basis on which to deny an award of compensatory damages. Such damages are clearly part of the web of remedies that go to make an injured party whole. Accordingly, I would award compensation for losses suffered, the matter to be remitted back to the trial judge for his determination.

Finally, with respect to the request for both an interlocutory and a permanent injunction, I do not believe that they should be awarded in this case. In my view the appellants are "made whole" by virtue of their having been awarded the declaration, the order for reinstatement and the order for damages. There is no apparent need for additional relief and I would deny it on that basis.

V. Does Section 9(*a*) of the *Human Rights Code, 1981* Infringe Section 15 of the *Charter*?

In light of the conclusion I have reached respecting the applicability of the *Charter* to the universities, it is not strictly necessary for me to address the constitutional questions relating to the *Human Rights Code, 1981*. However, as my colleagues have approached the mandatory retirement issue through the Code, it might be helpful for me to express an opinion on this as well. The relevant provisions of the *Human Rights Code, 1981,* are as follows:

> **4**.--(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.
>
> **9**. In Part I and in this Part,

> (*a*) "age" means an age that is eighteen years or more, except in subsection 4 (1) where "age" means an age that is eighteen years or more and less than sixty-five years;
>
> **23**. The right under section 4 to equal treatment with respect to employment is not infringed where,
>
> . . .
>
> (*b*) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

Section 9(*a*) does not impose mandatory retirement. Rather, it limits the protections offered by the Code in the employment context to those between the ages of 18 and 65. For those who fall within this age spectrum the Code protects them from discrimination in employment except in so far as the "discrimination" results from the operation of a *bona fide* occupational qualification. As we are dealing in these appeals with discrimination against those over 65, I express no comment on the legislated threshold age of 18 in s. 9(*a*). The question to be addressed by this Court, therefore, is whether the *Charter* is infringed when all protection against employment discrimination based upon age is denied those over the age of 65.

It has been argued by the respondents as well as by some of the interveners that this limit upon the reach of the Code does not offend the *Charter* because the province was under no obligation to provide any protection against discrimination in the first place. They say that absent such an obligation there is no room for constitutional scrutiny of the state's failure to go far enough in legislating human rights protection. It is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act. Whether the Constitution is implicated when the state fails to do something is a question which has plagued the American courts for many years. Indeed, Tribe has commented that it is precisely when the state has not acted that the court is called upon to make the most difficult determinations

regarding the scope of the Constitution: see *Constitutional Choices*, *supra*, at pp. 246 *et seq.* Since this is not an instance where the province has completely failed to act, we are happily relieved from deciding such a difficult question on these appeals, and I refrain from doing so. I do, however, consider it axiomatic that once government decides to provide protection it must do so in a non-discriminatory manner. It seems clear to me that in this instance the province has failed to provide even-handed protection. The contention that the *Charter* has no application in this circumstance must therefore be emphatically rejected: see *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.).

As noted in the factum of the appellants, s. 9(*a*) discriminates because it does not distinguish between those who are and those who are not able to work. In this way, the section operates to perpetuate the stereotype of older persons as unproductive, inefficient, and lacking in competence. By denying protection to these workers the Code has the effect of reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with. Thus, s. 9(*a*) of the Code infringes s. 15 of the *Charter*.

VI. Can Section 9(*a*) of the *Human Rights Code*, *1981* Be Justified Under Section 1 of the *Charter*?

It is submitted on behalf of the respondents that because the government was under no obligation to enact human rights legislation in the first place, and because the overall thrust of such legislation is to extend rather than limit rights, the Code should be subject to less strict scrutiny than would otherwise be the case. For the reasons I have already expressed, it is my view that this approach is not acceptable. Indeed, I would have thought that, if anything, human rights legislation which is intended to preserve, protect and promote human dignity and

individual self-worth and self-esteem should be subjected to more rigorous scrutiny than other types of legislation. I therefore reject the submissions advanced in support of a less stringent standard of review of s. 9(*a*) of the Code.

The joint operation of s. 9(*a*) and s. 4 of the Code results in mandatory retirement's being permitted without limitation or restraint. Since I have agreed with L'Heureux-Dubé J. that mandatory retirement in the universities is constitutionally invalid, it follows that s. 9(*a*) infringes the *Charter* at least to the extent that it allows this discriminatory practice. I believe, however, that s. 9(*a*) of the Code infringes the *Charter* on much broader grounds.

Section 9(*a*) not only implicitly permits mandatory retirement; it also implicitly operates to permit all forms of age discrimination in the employment context for those over the age of 65. For instance, discriminatory discipline, remuneration and job classification are also not prohibited by the Code. Thus, even although the Attorney General has confined his submissions respecting the Code to the value of mandatory retirement in furthering the objectives of the legislature, it is clear that s. 9(*a*) is not so limited. In my view, because this provision of the Code does not deal exclusively with mandatory retirement and confine itself to the stated objectives of the legislature in enacting it, the rational connection branch of the *Oakes* test is not met. This point is extremely important since in choosing the appropriate disposition of the constitutional challenge, the Court must be guided by the extent to which the provision is inconsistent with the *Charter*. In my view, the scope of the breach is so great in this instance there is little alternative but to strike down s. 9(*a*) as a whole. I would therefore concur with my colleague L'Heureux-Dubé J. that the section in its entirety is unconstitutional and of no force or effect.

Even although I would be prepared to base my decision on this aspect of these appeals on this ground alone, I join my colleague in finding that s. 9(*a*) would not, in any event, pass the second branch of the *Oakes* proportionality test, i.e., minimal impairment.

The Attorney General has sought to justify the section on the ground that it preserves freedom of contract. In particular, the Attorney General asserts that mandatory retirement comes as a "package deal" through which older employees get a number of benefits in return for the forfeiture of their constitutional right to work past the age of 65. In my view, even if this Court were to hold that citizens can contract out of their s. 15 rights (which is an important question which I do not find it necessary to decide in these appeals) attractive "package deals" are not universally available to all employees. For instance, with respect to the argument concerning pensions advanced by the Attorney General, it is clear that a great many workers in the Province of Ontario are not fortunate enough to be members of private pension schemes. The evidence has established that there is a very high correlation between the existence of such pension plans and unionization. But the statistics show that the vast proportion of the workforce is unorganized. The preservation of pension schemes has therefore very little relevance in the case of the majority of working people in Ontario. This problem is exacerbated when the demographics of this portion of the workforce is examined. Immigrant and female labour and the unskilled comprise a disproportionately high percentage of unorganized workers. This group represents the most vulnerable employees. They are the ones who, if forced to retire at age 65, will be hardest hit by the lack of legislative protection.

In addition, even in relation to the organized sector of the work force, serious problems remain. The statistics show that women workers generally are unable to amass adequate pension earnings during their working years because of the high incidence of interrupted work

histories due to child bearing and child rearing. Thus, the imposition of mandatory retirement raises not only issues of age discrimination but also may implicate other s. 15 rights as well.

In my view, when the majority of individuals affected by a piece of legislation will suffer disproportionately greater hardship by the infringement of their rights, it cannot be said that the impugned legislation impairs the rights of those affected by it as little as reasonably possible. I conclude therefore that, even if it is acceptable for citizens to bargain away their fundamental human rights in exchange for economic gain (and I see some real dangers to the more vulnerable numbers of our society in this), the fact of the matter is that the majority of working people in the province do not have access to such arrangements. I do not believe, therefore, that the minimal impairment requirement is met.

VII. Disposition

I would allow the appeal on the basis that the *Charter* applies to the respondents, that the respondents' mandatory retirement policy violates s. 15 of the *Charter* and that it is not saved by s. 1.

I would issue a declaration that the respondents have acted in a manner contrary to the *Charter*, direct the respondents to reinstate the appellants, and award the appellants damages in an amount to be determined by the trial judge. I would deny the claim for a permanent and interlocutory injunction.

I would answer the constitutional questions posed by Chief Justice Dickson as follows:

1. Does s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. Is s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

No.

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

Yes.

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

Yes.

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

No.

I would award the appellants their costs both here and in the courts below.

//*L'Heureux-Dubé J.*//

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting) -- I have had the opportunity of reading the opinion of my colleague Justice La Forest and, with respect, I must dissent. While I do not entirely disagree with his contention that universities are not part of government for the purposes of the *Canadian Charter of Rights and Freedoms*, I cannot concur with my colleague's conclusions regarding s. 9(*a*) of the *Human Rights Code 1981*, S.O. 1981, c. 53. The following constitutional questions were stated by Chief Justice Dickson on August 30, 1988:

1. Does s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. Is s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guarantee by s. 15(1) of the *Charter*?

My colleague addresses questions 3, 4, and 5 first and while I agree that universities may not have all of the necessary governmental touchstones so as to be considered public bodies, neither can they be considered as wholly private in nature. In addition to establishing that a university's internal decisions are subject to judicial review, *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, recognized that their creation, funding, and conduct are governed by statute.

The fact that universities are substantially publicly funded cannot, in my view, be easily discounted. My colleague deals with this when he says at p. 000:

> It is true that there are some cases where United States courts did hold that significant government funding constitutes sufficient state involvement to trigger constitutional guarantees, but these were largely confined to cases of racial discrimination which was the prime target of the 14th Amendment.

However, it must be recalled that in Canada, unlike the U.S., age is on par with race, sex, religion, etc., in terms of s. 15 equality protection. Furthermore, the private versus state university distinction, so prevalent in the U.S., is substantially diluted in Canada.

Nevertheless, while universities may perform certain public functions that could attract *Charter* review, I am able to accept that the hiring and firing of their employees are not properly included within this category. In *Harrison v. Univ. of B.C.* (1988), 21 B.C.L.R. (2d) 145, a companion case heard and delivered concurrently with the present appeal, the British Columbia Court of Appeal examined the relationship between the government and the university by looking at the legislation under which the university operates, and the legislation to which it is subject. The University of British Columbia is a statutory body, whose mandate is functionally identical to those of the respondent universities for the purposes of this case.

Following a careful analysis of the relationship between government and the university, the court concluded, at pp. 152-53, that:

> . . . the fact that the university is fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university and, in particular, upon the policy and contracts in issue in this case.
>
> . . . Neither the legislature nor the executive ordered, suggested or in any way caused the university to adopt its mandatory retirement scheme. . . .
>
> . . .
>
> [Furthermore], [i]t is the university's private contracts of employment which are alleged to conflict with the Charter, not its delegated public functions. Without wishing to suggest that the conduct of the university might never be subject to the Charter, it appears clear that the conduct represented by those contracts is not. [Emphasis added.]

I agree. In so saying, however, I do not mean to disagree with the test proposed by my colleague, Justice Wilson, as to the scope of government and government action for the purposes of s. 32(1) of the *Charter*. But, even under that broad test, I remain of the view that the respondent universities do not qualify for essentially the reasons outlined by my colleague La Forest J. I would only add that an historical analysis yields the same result as the functional approach: universities do not pass the test. Canadian universities have always fiercely defended their independence. This dates back to the founding of the French and British colonies. At Confederation there were 17 degree-granting institutions in the founding provinces. The University of King's College, now in Halifax, was founded in 1789. One of the original colleges of higher learning was the Séminaire de Québec, founded by Monseigneur Laval in 1663, which later spawned Laval University in 1852. The educational tradition at Laval has remained a confessional and self-sufficient university for hundreds of years. Still today, while funded to a great extent out of public money, it is autonomous: it is governed by a body of its own choice and determines its policies without government intervention. Similarly, McGill University has a Board of Governors which acts

independently, although it needs government funding to survive. The same can be said of most, if not all, of Canada's universities. One can even think of the survival of universities without government funding. Government funding cannot *per se* imply "government", otherwise even small business, which receives government subsidies, could be labelled government for the purposes of s. 32 of the *Charter*. I have no doubt that this meaning was never intended nor can s. 32 be reasonably interpreted in that fashion. The word "government", as generally understood and in my view, never contemplated universities as they were and are currently constituted.

Hence, given this conclusion with respect to the third constitutional question, that the impugned contractual arrangement between the universities and their employees is not "governmental" in character, questions four and five need not be answered. The complex role of universities should nevertheless be recognized when assessing proportionality and minimum impairment considerations under the *Human Rights Code, 1981* the various bodies it attaches to, and its lack of protection against mandatory retirement of university professors and other employees over the age of 65. I turn then to the discussion of constitutional questions one and two, which address these concerns.

Section 9(*a*) of the *Human Rights Code, 1981*

The *Human Rights Code, 1981* was enacted in 1981, and therefore pre-dates the *Canadian Charter of Rights and Freedoms* which was promulgated in April, 1982. As Blair J.A., dissenting at the Court of Appeal (1987), 63 O.R. (2d) 1, stated at p. 66:

> Thus, when the Code was passed, the legislature had untrammelled authority to deprive persons over the age of 65 of any protection with respect to employment. The extracts from the debates of the legislature referred to by my brothers show that the Code was adopted

> with the knowledge that employees in the province could be compulsorily retired at the age of 65. It is idle to speculate whether the Code would have been enacted in this form after s. 15(1) of the Charter took effect in 1985. The Code must be accepted as it is.

Furthermore, as MacKinnon A.C.J.O. maintained regarding pre-*Charter* legislation in *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 125:

> This supreme law was enacted long after the *Juvenile Delinquents Act* and there can be no presumption that the legislators intended to act constitutionally in light of legislation that was not, at that time, a gleam in its progenitor's eye.

The question then becomes: Does s. 9(*a*) of the *Human Rights Code, 1981* infringe upon s. 15 of the *Charter*?

Section 15 of the Charter

Section 9(*a*) of the *Human Rights Code, 1981* provides that:

> **9.** -- (1) In Part I and in this Part,
> (*a*) "age" means an age that is eighteen years or more, except in subsection 4 (1) where "age" means an age that is eighteen years or more and less that sixty-five years;

Section 4(1) stipulates that:

> **4**. -- (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

Section 15(1) of the *Charter* provides as follows:

> **15.** -- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is by now firmly established that constitutionally guaranteed rights and freedoms should be given a broad and liberal construction. The prohibition against discrimination set out in s. 15 is intended to ensure that those entities subject to the *Charter* treat every individual "on a footing of equality, with equal concern and equal respect, to ensure each individual the greatest opportunity for his or her enhancement": *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), at p. 529. Section 15 prescribes that individuals be treated on the basis of his or her own worth, abilities and merit, and not on the basis of external or arbitrary characteristics which artificially restrict individual opportunity.

In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. defined discrimination in the following manner at pp. 174-75:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [Emphasis added.]

As Judge Abella explained in *Limitations on the Right to Equality Before the Law*, in de Mestral et al., eds., *The Limitation of Human Rights in Comparative Constitutional Law*, at p. 226:

> Equality means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or

> her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity fully to develop his or her potential, we have achieved a kind of equality. This is what section 15 of the *Charter* affirms: equality defined as equal freedom from discrimination.
>
> Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth. [Emphasis added.]

Section 9(*a*) is discriminatory on its face. It clearly excludes designated segments of society from the ambit of protection otherwise provided by the Code. Furthermore, the exclusion is predicated strictly on age, a ground specifically enumerated in s. 15(1). As MacGuigan J.A. held in *Headly v. Public Service Commission Appeal Board (Can.)* (1987), 72 N.R. 185 (F.C.A.), at p. 190:

> The **Constitution** itself, I believe, compels this distinction between enumerated and non-enumerated grounds. In particular, the fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings ... can only mean, I believe, that non-trivial pejorative distinctions based on such categories are intended to be justified by governments under section 1 rather than to be proved as infringements by complainants under section 15. In sum, some grounds of distinction are so presumptively pejorative that they are deemed to be inherently discriminatory.

The inclusion of specific enumerated grounds in s. 15(1) of the *Charter* was intended to avoid many of the difficulties which U.S. courts have faced in attempting to determine the extent of protection afforded by the Fourteenth Amendment, which has no such express delineation. As Finkelstein expressed in "Sections 1 and 15 of the Canadian Charter of Rights and Freedoms and the Relevance of the U.S. Experience" (1985-86), 6 *Advocates' Q.* 188, at p. 192:

> . . . the Fourteenth Amendment does not give the courts any guidance about what kinds of classifications should be most closely scrutinized. The provision is textually absolute. This

> may be contrasted with s. 15(1) of the Charter which, while prohibiting all discrimination, at least sets out a list of categories for greater particularity. Canadian courts are put on notice that they should make a careful inquiry into the reasons and purpose behind any law which makes differentiations based upon any of the listed classifications. [Emphasis added.]

Like my colleague La Forest J., and for the reasons he expresses, I conclude that s. 9(*a*) overtly denies the equal protection and equal benefit of the Code, and thereby discriminates against individuals solely on the basis of age, a ground specifically enumerated in s. 15 of the *Charter*. Section 9(*a*) constitutes an arbitrary and artificial obstacle which prevents persons aged 65 and over from complaining where their right to equal treatment with respect to employment has been infringed on the ground of age. Hence the provision is inconsistent with the fundamental values enshrined within s. 15(1): the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based upon individual ability. As the Ontario Court of Appeal stated in *Blainey*, at p. 530:

> Indeed, it is somewhat of an anomaly to find in a statute designed to prohibit discrimination a provision which specifically permits it.

Section 1 of the Charter

Given my conclusion regarding s. 15(1), I now turn to the question of whether the equality violation can be justified under s. 1. As articulated by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, the government must first discharge its burden of proving that the objective served by the challenged measure relates to concerns which are of pressing and substantial importance, sufficient to warrant overriding a constitutionally protected right. Second, if it can establish such an objective, it must show

that the means chosen are proportional or appropriate. This latter criterion can only be fulfilled if three elements are satisfied:

(a) the limiting measure must be carefully designed, or rationally connected, to the objective, and cannot be arbitrary, unfair or based on irrational considerations;

(b) the right in question must not be impaired by the limiting measure any more than is reasonable having regard to the context and surrounding circumstances; and

(c) the effects of the limiting measure must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

1. The Objective

I agree with my colleague La Forest J.'s conclusion that the Ontario Court of Appeal was too restrictive when evaluating the constitutionality of s. 9(*a*) of the *Human Rights Code, 1981* exclusively in the university context. However, this setting does provide a welcome background in which the ramifications of the provision can be appraised. In his "default" *Charter* analysis, i.e., assuming that it does indeed apply to universities, La Forest J.'s underlying theme seems to be that mandatory retirement is the *quid pro quo* for a tenure system with minimal peer evaluation and necessary to ensure that younger aspirants are provided with a meaningful opportunity to pursue their livelihood. My colleague also regards the existing

pension scheme as a worthy objective, and one supportable only through the institution of mandatory retirement.

In my view, there is no convincing evidence that the mandatory retirement scheme and the tenure system are as intimately related as my colleague suggests. Peer evaluation does not, and should not, pose a threat to academic freedom, and such assessments are quite common even in those universities which have chosen to continue imposing mandatory retirement. Merit rather than age should be the governing factor. The value and status of tenure may actually be enhanced through the sustained endorsement of one's colleagues. In his reasons, La Forest J. indicates at p. 000 that academic freedom will be undermined through abolition of the existing mandatory retirement scheme:

> Mandatory retirement is thus intimately tied to the tenure system. It is true that many universities and colleges in the United States do not have a mandatory retirement but have maintained a tenure system. That does not affect the rationality of the policies, however, because mandatory retirement clearly supports the tenure system. Besides, such an approach, as the Court of Appeal observed, would demand an alternative means of dismissal, likely requiring competency hearings and dismissal for cause. Such an approach would be difficult and costly and constitute a demeaning affront to individual dignity.

This raises several points with which I beg to differ. The value of tenure is threatened by incompetence, not by the aging process. Such incompetence can manifest itself at any stage, and the presumption of academic incapacity at age 65 is not well founded. If the abolition of mandatory retirement results in a more stringent meritocracy, tenure is not depreciated. Its significance may actually be enhanced, as tenure status will reflect continued academic excellence rather than a "certificate", irrevocable once granted.

The fear that aging professors will rest on their laurels and wallow in a perpetual and interminable quagmire of unproductivity and stagnation may be a real one. Yet it applies with

equal force to younger tenured faculty as well. Peer review, so long as it is predicated on the premise of unbiased good faith, provides a healthy injection of critical evaluation and will serve to promote the scholastic standards indispensable to a flourishing university.

I find it difficult to accept the proposition that abolition of mandatory retirement of university faculty and librarians would threaten tenure as a result of increased performance evaluations. In fact, performance evaluations of faculty are an integral and ongoing part of university life, and it has never been suggested that this process threatens tenure, collegiality or academic freedom. Performance evaluations take place at the hiring stage, as well as in the process of determining whether to grant tenure, whether to promote tenured faculty, which tenured faculty to select for administrative posts and research grants, and whether and in what amount merit increases are to be awarded to tenured faculty.

Those jurisdictions which have eliminated mandatory retirement of university faculty or librarians have not experienced any increase in so-called destructive performance evaluations, or any infringement of academic freedom or collegiality. The tenure system remains firmly in place. In the United States, for example, not a single university has abolished tenure, notwithstanding that 15 per cent of universities have no mandatory retirement age for tenured faculty. The 1986 amendments to the *Age Discrimination in Employment Act*, which now preclude any university from forcibly retiring a tenured faculty member until age 70, provide that the age cap will be removed altogether when the transitional provisions expire in 1993: see 29 U.S.C. {SS} 631(d).

Moreover, any "alternative means of dismissal" necessitated by the abolition of mandatory retirement will be rather inconsequential. The number of those choosing to maintain an active and productive academic life after age 65 is relatively small. Furthermore, tenure will

continue to exist, and tenured faculty will enjoy a powerful presumption of job retention. However, this presumption should not be irrebuttable, neither at 45 nor at 65. With respect to La Forest J.'s description (at p. 000) of a "closed system with limited resources" it is neither clear that we are dealing with a fixed pie nor that allowing aging professors to enjoy their earned slices will result in younger prospects' going hungry.

To conclude that excellence in our educational institutions can only be maintained through the replacement of aging faculty with younger professors is overbroad. Professorial calibre should be gauged on a meritocratic rather than on a chronological basis. Employment opportunities for the young cannot be generated by using the elderly as exclusive sacrificial victims. The *Charter* prohibits this type of isolation of a specific target group explicitly protected by an enumerated constitutional provision.

Moreover, this scheme cannot be supported by either scholarly justification or necessity. There is no indication that the aged are less competent. The empirical track record of esteemed and venerable universities across North America which are progressively abolishing mandatory retirement reveals that the retention of such a system is not necessary in order to remain effective and efficient. This trend reflects what can be considered "reasonable" when assessing the rationale of mandatory retirement and its proportionality to any alleged objectives.

I do not disagree with my colleague La Forest J.'s assertion, at p. 000, that "[W]hile the aging process varies from person to person, the courts below found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards". But this simple assertion does not, in my view, invariably lead to the conclusion that the cut-off age for any occupation or profession must be 65. This is precisely what age discrimination is all about.

What then about federally appointed judges, whose retirement age is set at 75? What of self-employed business people, or politicians and heads of state, some of whom (including Sir Winston Churchill) serve their country well beyond the age of 65? Declining intellectual ability is a coat of many colours -- what abilities, and for which tasks? The discrepancies between physical and intellectual abilities amongst different age groups may be more than compensated for by increased experience, wisdom, and skills acquired over time.

Mandatory retirement would have to be justified on some basis other than mental decay. Agility and nimbleness of mind are highly subjective -- they vary substantially from person to person. While senility is far more common among the very old, lucidity is the norm. Furthermore, people are generally sensitive to their own degenerating faculties, in academe as well as in sport. Many an athlete is "washed up" by the age of 35, and can no longer perform at the same level. However, many can remain competitive well into their forties, while some younger athletes continue to strive for, but never quite attain, professional status.

The difficulty and cost of the evaluation process cannot defeat the merits of such a scheme, especially given that some sort of assessment procedure is already in place. Empirically, the financial burden argument is specious. Some pension programs now offer retiring professors up to 90 per cent of their average annual salary of their last five working years. Economically it makes sense to allow them to contribute fully at a marginal "cost" to the universities of only 10 per cent of their salaries.

La Forest J. reminds us of this Court's traditional deference to legislative judgment. At page 000 my colleague states:

> . . . that the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives. [Emphasis added.]

The evidence refutes the emphasized conclusion. In the very next paragraph, my colleague himself concedes at p. 000 "that there is an increasing trend towards earlier retirement", and at p. 000 that "[t]he estimates of workers who would voluntarily elect to work beyond the age of 65 vary from 0.1 to 0.4 per cent of the labour force". These figures hardly pose a "pressing and substantial" quandary that the government must contend with. According to my colleague, at p. 000, mandatory retirement:

> . . . is an arrangement negotiated in the private sector, and it can only be brought into the ambit of the *Charter* tangentially because the Legislature has attempted to protect, not attack, a *Charter* value.

Any protection offered here is strictly illusory. The excluded ages are most in need of sanctuary from arbitrary employment decisions.

The threat that an evaluation scheme will "constitute a demeaning affront to individual dignity" (at p. 000) is difficult to accept. Are objective standards of job performance a demeaning affront to individual dignity? Certainly not when measured against the prospect of getting "turfed-out" automatically at a prescribed age, and witnessing your younger ex-colleagues persevere in condoned relative incompetence on the strength of a "dignifying" tenure system. The elderly are especially susceptible to feelings of uselessness and obsolescence. If "[i]n a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth" (at p. 000), does this mean that upon reaching 65 a person's interest in self-identity and stake in self-worth disappear? That is precisely when these values

become most crucial, and when individuals become particularly vulnerable to perceived diminutions in their ability to contribute to society.

Forced removal from the work force strictly on account of age can be extraordinarily debilitating for those entering their senior years. Aging is not a reversible process. Those yearning to carry on with their livelihood, career, and ambitions cannot have this aspiration stultified or decimated by some arbitrary scheme. The fact that we all experience the aging process is not a safeguard which prevents discriminatory acts by the majority. The prospect that current decision-makers may some day be 65 and older is no guarantee against their acting in a discriminatory fashion against older individuals today, or against their acting on the basis of negative stereotypes.

Moreover, as stated in McDougal, Lasswell and Chen, "The Protection of the Aged from Discrimination", in *Human Rights and World Public Order* (1980), pp. 781-82:

> The traumatic impact of the sudden loss of accustomed roles, precipitated by involuntary retirement, is immense and profound. As Rosow has sharply summarized:
>
> > *[T]he loss of roles excludes the aged from significant social participation and devalues them*. It deprives them of vital functions that underlie their sense of worth, their self-conceptions and self-esteem. In a word, they are depreciated and become marginal, alienated from the larger society. Whatever their ability, they are judged invidiously, as if they have little of value to contribute to the world's work and affairs.
>
> . . .
>
> The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression. The ordinary process of aging aside, the psychosomatic condition of the elderly may be brutally and unduly impaired and exacerbated by the shock of involuntary retirement. Formerly useful skills are consigned to the scrap heap overnight. [Emphasis in original.]

In my view, such undesirable repercussions seriously undermine the alleged objective in the instant case. The forced attrition of elderly participants in the work force should not lightly

be considered an objective "sufficient to warrant overriding a constitutionally protected right". However, on the assumption that a legitimate objective does in fact exist, I will now assess whether the means chosen satisfy the second part of the "s. 1 test".

2. The Means

In its Report entitled *Equality For All*, at p. 21, the 1985 Federal Parliamentary Committee on Equality Rights described mandatory retirement as follows:

> In the view of the Committee, mandatory retirement is a classic example of the denial of equality on improper grounds. It involves the arbitrary treatment of individuals simply because they are members of an identifiable group. Mandatory retirement does not allow for consideration of individual characteristics, even though those caught by the rule are likely to display a wide variety of the capabilities relevant to employment. It is an easy way of being selective that is based, in whole or in part, on stereotypical assumptions about the performance of older workers. In the result, it denies individuals equal opportunity to realize the economic benefits, dignity and self-satisfaction that come from being part of the workforce. [Emphasis added.]

The *Human Rights Code, 1981* limits the protection against discrimination on the basis of age to those between the ages of 18 and 65. Persons over the age of 65 are excluded from protection solely because of their age; not for any reason related to *bona fide* qualifications, or inability to perform a required function. Thus, regardless of the circumstances, people over 65 who encounter discrimination merely because of their age are denied access to protective and remedial human rights legislation.

In his detailed historical investigation, La Forest J. notes at p. 000 that "Bismark is generally credited with establishing 65 as the age for retirement". However, Bismark governed quite some time ago. Advances in medical science and the living conditions achieved since have significantly extended life expectancy and have improved the quality of life as well. On

average, today's 65-year-old is a healthier, more invigorated specimen than his or her 45-year-old counterpart of the industrial revolution. Furthermore, the physical exertion component of many vocations has been diminished through the introduction of computers and employment differentiation. With all sorts of developing specialties people can mature concordantly with their evolving job descriptions.

The fact that "mandatory retirement has become part of the very fabric of the organization of the labour market in this country" (at p. 000) is inapposite to the present analysis in so far as it ignores the promulgation of both the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code, 1981*. Furthermore, I strongly disagree with the assertion, at p. 000, that "[t]hose over 65 are by and large not as seriously exposed to the adverse results of unemployment as those under that age". While this may be true for an "elite" sub-group that can afford to retire, it certainly does not apply to the majority of retirees, especially during periods of high inflation. The adverse effects of mandatory retirement are most painfully felt by the poor. The elderly often face staggering financial difficulties; indexed pensions have not kept pace with inflation, and a dollar saved at an earlier time in anticipation of retirement buys only pennies worth of goods today. This is predominantly true when applied to non-unionized employees, who presently constitute 50 per cent of the Canadian work force.

The median income of those over 65 is less than half the median income of average Canadians, and there is a wide disparity among these individuals many of whom have no, or very small, private pension incomes. Moreover, women are particularly affected by this deficiency. Upon attaining the age of 65, women often have either lower or no pension income since a greater proportion of them are in jobs where they are less likely to be offered pension plan coverage. Women are more susceptible to interrupted work histories, partly as

a result of childcare responsibilities, thereby losing potential pension coverage. Furthermore, women are prone to have lower lifetime earnings upon which pension benefits are based.

Section 9(*a*) denies protection against employment discrimination to those over 65 whether or not there is an adequate, or indeed any, pension plan at the particular work place, whether or not the integrity of the existing pension plan would be affected if employees did not retire at age 65, and whether or not the employer intends to or actually does replace retired employees with younger workers. In short, s. 9(*a*) permits discrimination against older workers even where retired employees are not replaced by younger employees, and where the pension plan is not affected in any way. As was stated in *Edwards Books, supra*, at p. 770:

> The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose.

When assessing the material repercussions of the provision at issue the fabric comes apart at the seams. Furthermore, it is not the function of the courts to mend constitutional infirmities by patching those areas of the legislation which violate the *Charter* with a more restrictive meaning.

The internal age restrictions imposed on the application of the *Human Rights Code, 1981* emasculate its very purpose. The "traditional" retirement age of 65 was chosen at a time wholly different from today; medical science and job differentiation have changed the world in which we live and work. The Code is designed as remedial legislation -- it is paradoxical to exclude from its ambit a group desperately in need of its protection.

The argument of legislative necessity loses much of its force when assessed in light of the ongoing adoption of voluntary retirement across the continent, and the federal government's abolition of mandatory retirement for its employees. Moreover, three Canadian provinces, Quebec, New Brunswick, and Manitoba, have eliminated mandatory retirement, and have not suffered any of the adverse effects allegedly associated with the eradication of such schemes. Universities have not been required to abandon the tenure system, the existing pension programs have remained intact, and there is no evidence of consequential rising unemployment among younger aspirants seeking work.

In response to the proportionality argument my colleague expresses the view, at p. 000, that "there is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement suitable to a particular area of activity." But the Code provides no protection for the elderly. Whatever impositions are placed on them cannot be redressed by review under the Code because that group is specifically excluded from its application. Hence, that justification becomes circular, and the scheme he purports to rationalize actually encourages mandatory retirement. It allows for the manipulation of the entitlements of a group whose rights and recourses have been neutered by the legislation! An attempt to defend this procedure on the basis of minimal impairment is especially disturbing.

On the whole there seems to be no reasonable justification for a scheme which sets 65 as an age for compulsory retirement. It is discriminatory, in the most prejudicial sense of the word, to make generalizations about diminished competence or productivity purely on the basis of the attainment of a certain age. Since the number of people who (a) attain that age, and (b) wish to continue working after that age and are physically and intellectually capable of doing so, is not overwhelming, it is difficult to conclude that the labour force will be adversely affected.

The definitions provided in the *Human Rights Code, 1981* must be assessed under s. 1 in a somewhat broader manner. While having an obvious effect on mandatory retirement, these definitions also fail to protect those over 65 from far more pervasive discrimination. For example, an employer who decided to pay all workers over the age of 65 less than those under 65 could not be challenged under human rights legislation because that legislation does not recognize discrimination against persons over 65 as being discrimination on the basis of age.

I agree with the proposition that human rights legislation has a purpose consistent with that of the *Charter* itself, the promotion of human rights. It has been argued that since such legislation operates in an area which otherwise would remain unaffected by the *Charter* (private transactions), then the least rigid and most flexible standard of review under the *Charter* should be applied. I admit that there is in fact a delicate balance to be achieved. The *Charter* should serve to prevent overt discrimination in human rights legislation, but it should not be applied in such a manner as to discourage the use of such legislation by the provinces, or to interfere with a legitimate provincial legislative decision not to provide rights in a given area.

However, there are limits within which this approach should apply. For example, in my view, if the provinces chose to enact human rights legislation which only prohibited discrimination on the basis of sex, and not age, this legislation could not be held to violate the *Charter*. However where, as in the present case, the legislation prohibits discrimination on the basis of age, and then defines "age" in a manner that denies this protection to a significant segment of the population, then the *Charter* should apply. Thus, if the province chooses to grant a right, it must grant that right in conformity with the *Charter*.

As the impugned definition denies protection from age discrimination to a segment of the population simply on the basis of age, I do not believe it can be justified under s. 1. I espouse here the reasons of Blair J.A., dissenting at the Court of Appeal, at p. 77:

> Section 9(*a*), in my opinion, does not satisfy the third requirement of the *Oakes* test that the measure adopted "should impair `as little as possible' the right or freedom in question".... Section 9(*a*) does not merely limit or restrict the appellants' Charter right under s. 15(1). It eliminates it because, under the Code, no protection against age discrimination in employment is provided after the age of 65. The absence of any qualification to the complete denial of the Charter right ... results in the failure of s. 9(*a*) to meet the *Oakes* test. [Emphasis added.]

Consequently, s. 9(*a*) of the *Human Rights Code, 1981* constitutes unreasonable and unfair discrimination against persons over age 65 for the following reasons:

(a) the failure to afford individuals aged 65 or over the protection of the Code against employment discrimination is unwarranted in the absence of any evidence that such individuals cannot perform in employment;

(b) section 9(*a*) of the Code prohibits employees from complaining about any form of employment discrimination, including hiring, demotion, transfer or salary reduction, even though its stated objective was solely to permit mandatory retirement;

(c) with respect to mandatory retirement itself, its negative effects significantly outweigh any alleged benefit associated with its continuation. Mandatory retirement arbitrarily removes an individual from his or her active worklife, and source of revenue, regardless of his or her actual mental or physical capacity, financial wherewithal, years of employment in the work force, or

individual preferences. The continued opportunity to work provides many individuals with a sense of worth and achievement, as well as a source of social status, prestige, and meaningful social contact; and

(d) on the evidence, there is no basis for denying to a segment of the population, i.e., those aged 65 and over, the protection of legislation which is of fundamental importance in the area of employment discrimination, particularly since the objectives allegedly served by s. 9(*a*) of the Code could be attained through alternative measures, which do not have such severe effects on individuals.

The *Charter* breach resulting from the application of the Code is not justified under s. 1. There is no evidence that the government is confronted with an urgent or compelling dilemma with respect to a profusion of elderly persons seeking to linger on beyond their prescribed term of productivity. Whatever legislative needs may exist to anchor an age discrimination procedure regarding access to the Code, they are not proportional to the blanket exclusion of all persons over the age of 65. The exclusion of all those over age 65 is a substantial impairment of the constitutional right to equal treatment of all ages, specifically enumerated in s. 15 of the *Charter*.

Remedy

Even if mandatory retirement programs were justified for all employees over the age of 65, the repercussions of s. 9(*a*) extend far beyond such a scheme. While the original motivation may have been to allow employers and employees to set their own retirement ages, the effect is to deny a wide range of benefits to people over 65. They will receive no protection

whatsoever from age discrimination. The protection they may require is in no way limited to retirement. After the age of 65, employees would be prohibited from making claims relating to age discrimination in the area of wages, employment conditions, and other employment related benefits. Employees under the age of 65 will have all of these protections merely as a function of their age.

However, even if we confined the application of s. 9(*a*) to mandatory retirement, the provision does not differentiate between industries or occupations in establishing age 65 as an appropriate age for retirement. While there may be certain jobs for which mandatory retirement can be justified, on the ground that it is a reasonable and *bona fide* occupation qualification, s. 9(*a*) permits mandatory retirement in many industries where age is clearly not a *bona fide* occupational qualification.

Hence, while limiting s. 9(*a*) to mandatory retirement would certainly remove some of its objectionable elements, the indiscriminate application of mandatory retirement would remain. In my view, a case-by-case application, secured by proper occupational considerations, would be the preferable alternative. The *Human Rights Code, 1981* already allows for this and hence s. 9(*a*) can be struck in its entirety. Any legitimate justification for distinguishing among employees on the basis of age can be vindicated through other provisions of the Code.

Section 10(*a*) of the Code provides:

> **10.** A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

> (*a*) the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances; ...

Section 23(*b*) provides that:

> **23.** The right under section 4 to equal treatment with respect to employment is not infringed where,
>
> . . .
>
> (*b*) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

These provisions can contain certain mandatory retirement schemes when justified by the particular job description at issue. In *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, this Court considered a policy mandating retirement at age 60 for firefighters. McIntyre J., for the Court, articulated the appropriate procedure for dealing with the *bona fide* occupational qualification ("BFOQ") provisions of the Code, at p. 208:

> Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer.

On the issue of what constitutes a *bona fide* occupational qualification, McIntyre J. stated, at p. 208, that:

> To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and

> not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. [Emphasis added.]

At page 209, McIntyre J. distinguished mandatory retirement for purely economic reasons from mandatory retirement motivated by public safety concerns:

> In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause. [Emphasis added.]

In *Alberta (Human Rights Commission) v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489, Wilson J. sets out McIntyre J.'s tests in *Etobicoke*, as well as their application to *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, and *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, and concluded, at p. 514 that:

> Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish a BFOQ.

Furthermore, as Sopinka J. wrote for the Court in relation to ascertaining appropriate *bona fide* occupational requirements in *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297, at pp. 1313-14:

> While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with employees on an individual basis by, *inter alia*, individual testing. If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it. [Emphasis added.]

It should be noted here that the effect of finding s. 9(*a*) of the Code to be unconstitutional does not abolish mandatory retirement. Rather, it simply allows individuals aged 65 or over to complain to the Human Rights Commission that their mandatory retirement constituted age discrimination in employment, contrary to s. 4 of the Code. It would still be open to an employer to establish before the Commission, as it can presently attempt in the case of mandatory retirement under age 65, that age is a "reasonable and *bona fide* qualification" under s. 23(1)(*b*) of the Code.

The structure of the *Human Rights Code, 1981* easily permits the striking down of the definition of "age" without removing the protection against discrimination on the basis of age. As the British Columbia Court of Appeal stated in *Harrison*, at p. 164:

> In our opinion, when that test [of severance] is applied to the provisions of the Human Rights Act, the definition of age is not so inextricably bound up with the balance of the Act that the balance cannot independently survive.

The result would be similar to that achieved in *Blainey*, where the exception to the general principle prohibiting sex discrimination was removed, leaving the principle to stand unrestricted.

Conclusion

Labelling universities "governmental bodies" is unnecessary, yet the indicia of public functions elevate these institutions to a higher standard under the Code. Furthermore, the Code must be read purposively. Excluding those over the age of 65 virtually immunizes all mandatory retirement schemes from the scope of Human Rights review. This should not be the purpose of remedial legislation. Other provinces, notably Quebec, New Brunswick, and Manitoba, have embraced voluntary retirement, and have endured none of the apprehended repercussions. The Code provides the apparatus through which the benefits of the *Charter* can flow to persons in the appellants' position. Excluding such persons from the Code's application would leave them without recourse against flagrant inequality. As it reads at present, Ontario's anti-discrimination Act is blatantly discriminatory.

Therefore, I would allow the appeal and answer the consitutional questions presented as follows:

1. Does s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. Is s. 9(*a*) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

No.

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

No.

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

Need not be answered.

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guarantee by s. 15(1) of the *Charter*?

Need not be answered.

//*Sopinka J.*//

The following are the reasons delivered by

SOPINKA J. -- I have had the advantage of reading the reasons of my colleagues Justices La Forest, Wilson and L'Heureux-Dubé. They have arrived at different conclusions in resolving the difficult legal and social problem which is the main subject of these appeals. The issue of mandatory retirement is a most important one for our country and will affect the lives of millions of Canadians. It is an issue on which Canadians of good will are sharply divided. This division is reflected in the opinions of my colleagues. They also reflect the powerful arguments that can be marshalled on both sides of the question. In these circumstances, I feel obliged to state my reasons, albeit briefly, as to why I share the opinion of my colleague La Forest J. that mandatory retirement is not unconstitutional.

I agree with the reasons of La Forest J. for concluding that a university is not a government entity for the purpose of attracting the provisions of the *Canadian Charter of Rights and Freedoms*. I would not go so far as to say that none of the activities of a university are governmental in nature. For the reasons given by my colleague, I am of the opinion that the core functions of a university are non-governmental and therefore not directly subject to the *Charter*. This applies *a fortiori* to the university's relations with its staff which in the case of those in these appeals are on a consensual basis.

With regard to whether the policies and practices of the universities relating to mandatory retirement are law, I would prefer not to express a final opinion on that question in this appeal. I find it difficult to classify the activities of an entity on the basis of an assumption that it is something which it is not. Not all actions of a governmental body will qualify as law. Indeed not all activities of an entity that is generally carrying on the functions of government will be governmental in nature. In attempting to classify the conduct of an entity in a given case it is important to know, first, that it is a governmental body and, second, that it is acting in that capacity in respect of the conduct sought to be subjected to *Charter* scrutiny. After all, we must bear in mind that the role of the *Charter* is to protect the individual against the coercive power of the state. Or, as one counsel put it, "to enable the citizen to fight City Hall". This suggests that there must be an element of coercion involved before the emanations of an institution can be classified as law. Many of the factors whose absence led La Forest J. to conclude that a university is not a government entity are highly relevant to determine whether its policies and practices are law. In order to make this determination I would have to assume that these factors were present. Such a determination would have a wholly artificial foundation and would simply distort the law. In these circumstances, I would prefer not to decide this question and in order to reach the key issue in this appeal I would assume not only

that a university is a governmental entity, as La Forest J. does, but as well that its policies and practices are law.

A key issue in this appeal is whether the policies and practices of the University of Guelph in providing for mandatory retirement of its teaching staff at age 65 contravene s. 15 of the *Charter*. A favourable decision to the appellants on this issue would result in mandatory retirement's being proscribed in respect of all government employees. In addition, an equally important issue is whether human rights legislation, in failing to protect persons against discrimination on the basis of age beyond the age of 65, offends s. 15 of the *Charter*. A decision favourable to the appellants on this issue would extend the prohibition of mandatory retirement to the private sector.

In respect of these two key issues, my colleague, Wilson J., with whom L'Heureux-Dubé J. agrees, has determined that both the policies and practices and the provisions of the *Human Rights Code, 1981*, S.O. 1981, c. 53, violate s. 15 and are not saved under s. 1. On the other hand, my colleague La Forest J., holds that both are justified under s. 1 and therefore mandatory retirement does not contravene the *Charter*. With all due respect to the opinions to the contrary, I find that I agree with the conclusion reached by La Forest J. and with his reasons. In addition to a preference for his reasoning, I am of the opinion that his solution to the problem is more in accord with the democratic principles which the *Charter* is intended to uphold.

The current state of affairs in the country, absent a ruling from this court that mandatory retirement is constitutionally impermissible, is the following. The federal government and several provinces have legislated against it. Others have declined to do so. These decisions have been made by means of the customary democratic process and no doubt this process will

continue unless arrested by a decision of this Court. Furthermore, employers and employees through the collective bargaining process can determine for themselves whether there should be a mandatory retirement age and what it should be. They have done so in the past, and the position taken by organized labour on this issue indicates that they wish this process to continue. A ruling that mandatory retirement is constitutionally invalid would impose on the whole country a regime not forged through the democratic process but by the heavy hand of the law. Ironically, the *Charter* would be used to restrict the freedom of many in order to promote the interests of the few. While some limitation on the rights of others is inherent in recognizing the rights and freedoms of individuals the nature and extent of the limitation, in this case, would be quite unwarranted. I would therefore dispose of the appeal as proposed by La Forest J.

//*Cory J.*//

The following are the reasons delivered by

CORY J. -- I am in agreement with the reasons of my colleague Justice Wilson with regard to the tests she suggests for determining whether entities that are not self-evidently part of the legislative, executive or administrative branches of government are nonetheless a part of the government to which the *Canadian Charter of Rights and Freedoms* applies.

As well, I am in agreement with her findings that universities form part of "government" for purposes of s. 32 of the *Charter* and, as a result, that their policies of mandatory retirement are subject to scrutiny under s. 15 and that those policies discriminate on the basis of age and thus contravene s. 15.

However, I am in agreement with the conclusion reached by my colleague Justice La Forest that the mandatory retirement policies of the universities come within the scope of s. 1 and thus survive *Charter* scrutiny.

Further, I am in agreement with La Forest J. that, although s. 9(*a*) of the *Human Rights Code, 1981*, S.O. 1981, c. 53, contravenes s. 15(1) of the *Charter* by discriminating on the basis of age, it is a reasonable limit prescribed by law within the purview of s. 1 of the *Charter*.

My colleague Wilson J. indicated that, although it was not necessary to her decision, she was doubtful whether an individual could contract out of the rights to equality provided by s. 15. I do not wish to be taken as agreeing entirely with that position. I am not certain that such a conclusion can be correct in relation to matters pertaining to age. For example, in the course of negotiating a collective bargaining agreement, it may become apparent that the union membership is overwhelmingly in favour of an agreement that embraces compulsory retirement as part of the consideration for obtaining higher wages at an earlier age -- an age when houses must be bought and children raised and educated. That is to say, at a time when the need for family funds is at the highest.

It is often the case that, before a collective bargaining agreement is ratified, the union members will have received very careful advice concerning its terms and their significance not only from union officials, but also from skilled economists and lawyers. The collective agreement represents a total package balancing many factors and interests. It represents the considered opinion of its members that it would be in their best interests to accept the proposed contract. Bargains struck whereby higher wages are paid at an earlier age in exchange for mandatory retirement at a fixed and certain age, may well confer a very real benefit upon the worker and not in any way affect his or her basic dignity or sense of worth.

If such contracts should be found to be invalid, it would attack the very foundations of collective bargaining and might well put in jeopardy some of the hard won rights of labour.

The collective agreement reflects the decision of intelligent adults, based upon sound advice, that it is in the best interest of themselves and their families to accept a higher wage settlement for the present and near future in exchange for agreeing to a fixed and certain date for retirement. In those circumstances, it would be unseemly and unfortunate for a court to say to a union worker that, although this carefully made decision is in the best interest of you and your family, you are not going to be permitted to enter into this contract. It is a position that I would find unacceptable.

Appeal dismissed, WILSON *and* L'HEUREUX-DUBÉ JJ. *dissenting.*

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