

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

Appellant
(Respondent)

- and -

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Respondent)

- and -

MARK DAVID ANDREWS

Respondent
(Petitioner)

- and -

GOREL ELIZABETH KINERSLY

Respondent

- and -

THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ONTARIO,
PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC,
THE ATTORNEY GENERAL OF NOVA SCOTIA,
THE FEDERATION OF LAW SOCIETIES OF CANADA,
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, and
ONTARIO COLLEGES AND UNIVERSITIES FACULTY ASSOCIATIONS,
THE COALITION OF PROVINCIAL ORGANIZATIONS OF THE HANDICAPPED,
THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenors

FACTUM OF THE ATTORNEY GENERAL OF ALBERTA
INTERVENOR

(For names and addresses of solicitors for the parties
see inside following title page)

ATTORNEY GENERAL OF ALBERTA
Constitutional Law Section
4th Floor, Bowker Building
9833 - 109 Street
Edmonton, Alberta
T5K 2E8

Richard F. Taylor, Esq.
Counsel

DAVIS & COMPANY
Barristers & Solicitors
2800 - 666 Burrard St.
Vancouver, B.C.
V6C 2Z7

D.W. Shaw, Q.C.
Counsel

**ATTORNEY GENERAL OF
BRITISH COLUMBIA**
Legal Services Branch
5th Floor, 609 Broughton St.
Victoria, B.C.
V8V 1X4

Joseph J. Arvay, Esq.
Counsel

RUSSELL & DUMOULIN
Barristers & Solicitors
17th Floor
1075 West Georgia St.
Vancouver, B.C.
V6E 3G2

D.G. Cowper, Esq.
W.S. Martin, Esq.
Counsel

**ATTORNEY GENERAL OF
SASKATCHEWAN**

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa Agents for the
Attorney General of Alberta

OSLER, HOSKIN & HARCOURT
Barristers & Solicitors
1400 - 50 O'Connor St.
Ottawa, Ontario
K1P 6L2

Ottawa Agents for the Law Society
of British Columbia

**BURKE-ROBERTSON, CHADWICK
& RITCHIE**
Barristers & Solicitors
1800 - 130 Albert St.
Ottawa, Ontario
K1P 5G4

Ottawa Agents for the
Attorney General of British Columbia

SCOTT & AYLEN
Barristers & Solicitors
1200 - 170 Laurier Ave., N.
Ottawa, Ontario
K1P 5V5

Ottawa Agents for the
Respondent

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

Ottawa Agents for the
Attorney General of Ontario

**PROCUREUR GENERAL DE LA
PROVINCE DE QUEBEC**

**NOEL, DECARY, AUBRY &
ASSOCIATES**
Barristers & Solicitors
111 Champlain Street
Hull, Quebec
J8X 3R1

Agents for the Procureur General
de la Province de Quebec

**ATTORNEY GENERAL OF
ONTARIO**

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

Ottawa Agents for the
Attorney General of Ontario

**ATTORNEY GENERAL OF
NOVA SCOTIA**

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

Ottawa Agents for the
Attorney General of Ontario

**FEDERATION OF LAW
SOCIETIES OF CANADA**

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

Ottawa Agents for the
Attorney General of Ontario

FRASER & BEATTY
Barristers & Solicitors
41st Floor, Box 100
First Canadian Place
Toronto, Ontario
M5X 1B2

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Box 456, Station A
Ottawa, Ontario
K1N 8S3

Solicitors for the Federation
of Law Societies of Canada

Ottawa agents for the
Federation of Law Societies
of Canada

**SACK, CHARNEY, GOLDBLATT &
MITCHELL**
20 Dundas St. West
Ste 1130
Toronto, Ontario
M5G 2G8

Solicitors for CAUT
and OCUFA

**ADVOCACY RESOURCE CENTRE
FOR THE HANDICAPPED**
40 Orchard View Blvd.
Ste. 255
Toronto, Ontario
M4R 1B9

Solicitors for the Coalition
of Provincial Organizations
of the Handicapped

NELLIGAN/POWER
77 Metcalfe St., Ste. 100
Ottawa, Ontario
K1P 5L6

Ottawa Agnts for CAUT
and OCUFA

AITKEN, GREENBERG
410 - 150 Kent St.
Ottawa, Ontario
K1P 5P4

Ottawa Agents for the Coalition
of Provincial Organizations of
the Handicapped

INDEX

	PAGE
Part I STATEMENT OF FACTS	1
Part II POINTS IN ISSUE	2
Part III ARGUMENT	3
A. Defining the Right	3
B. Definition of Right	7
C. Whether Right Infringed	9
Part IV NATURE OF ORDER SOUGHT	12
Part V LIST OF AUTHORITIES	13

PART I

STATEMENT OF FACTS

1. The Intervenor, the Attorney General of Alberta, accepts the facts set out in the Factum of the Appellant, the Law Society of British Columbia.

PART II

POINTS IN ISSUE

1. Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, infringe or deny the rights guaranteed by s. 15(1) of the Canadian Charter of Rights and Freedoms?

2. If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, infringes or denies the rights guaranteed by s. 15(1) of the Canadian Charter of Rights and Freedoms, is it justified by s. 1 of the Canadian Charter of Rights and Freedoms?

PART III

ARGUMENT

1. The first question posed initiates the first stage of a Charter inquiry: a stage which is to be kept analytically distinct from the second: R. v. Oakes, [1986] 1 S.C.R. 103, at p. 134. During this stage the right must first be defined and then one goes on to consider whether the legislation either in purpose or effect violates the right so defined.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

A. Defining the Right

2. In defining the guaranteed right the proper approach is a purposive one:

In Hunter v. Southam Inc., [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344

(a) Character and larger objects of the Charter

3. It has been stated that:

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.

Hunter et al v. Southam Inc., [1984] 2 S.C.R. 145, at p. 156.

4. The very purpose for which the Charter was entrenched in the Constitution was to ensure that Canadian society is free and democratic. Some of the underlying values of a free and democratic society have been noted by this Honourable Court:

...respect for the inherent dignity of the human person, commitment to social justice and equality accomodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individuals and groups in society.

These values and principles are inter alia "...the genesis of the rights and freedoms guaranteed by the Charter..."

R. v. Oakes, [1986] 1 S.C.R. 103, at p. 136.

(b) Language chosen to articulate right

5. It is noted that the heading, which is an integral part of the Charter and properly considered as a guide to the intention of the framers of the Charter: Law Society of Upper

Canada v. Skapinker, [1984] 1 S.C.R. 357, at pp. 370-377, speaks of "equality" rights. Further, it is noted that the word "equal" is used (on four occasions). It is respectfully submitted that these words should be kept at the forefront when defining this right.

6. The words "same" or "identical" are not used. Thus, when this right declares what individuals are, it does not declare that they are the same or identical. Similarly, when it declares how they are to be treated by the law it does not declare that they are to be treated the same or identically. It is submitted that a proper definition will recognize that although all are equal, all are not the same and that although all are to be treated equally all are not to be treated the same. Consistent with this approach is the observation, albeit in a different context, that "...the interests of true equality may well require differentiation in treatment".

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 347.

7. With respect to words "before" "under" "protection" and "benefit" it is submitted that they are reflective of an intent to avoid the perceived interpretive difficulties that had been presented by the "equality before the law" clause in s. 1(b) of the Canadian Bill of Rights and to overcome the perceived restrictions that had attached to that clause.

dissenting reasons in Reference Re An Act to Amend the Education Act (1986), 53 O.R. (2d) 513, at 553 (C.A.).

Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin, eds., Canadian

Charter of Rights and Freedoms, 1982, pp. 395-423.

Gold, A Principled Approach to Equality Rights: A Preliminary Inquiry (1982), 4 Supreme Court Law Rev. 131.

Hogg, Constitutional Law of Canada (2nd ed) 1985 Carswell, Toronto, at 798.

8. It is submitted that these words extend the parameters of the equality right. The right extends to the substance of the law. It is not to be confined to the administration of the law, nor should it exclude review of laws providing benefits.

9. With respect to the words "without discrimination" there is debate as to whether discrimination should be interpreted in the neutral sense thus proscribing any distinction or whether it should be interpreted as having a pejorative connotation thus proscribing invidious, unreasonable, or unjustifiable distinctions. In the case under appeal, Case pp. 97-101, the former approach for various delineated reasons was rejected. Also see: Century 21 Ramos Realty Inc. v. The Queen (1986), 56 C.R. (3d) 150 at pp. 171-173 (Ont. C.A.).

10. It is submitted that although the "any distinction" approach is properly rejected, such should be done primarily on the basis that such an interpretation is inconsistent with equality itself. As submitted previously, equality recognizes that all are not to be treated the same: distinctions must be made. The question is not whether equality allows distinctions to be drawn, but that distinctions may be drawn.

11. With respect to the enumerated grounds, it is submitted that these are recognizable as personal characteristics which have been traditionally layered in prejudice resulting in the disadvantageous treatment of those individuals possessing such traits. In determining the scope of this right, the nature of these grounds should be considered.

(c) Historical origins of right

12. The review and summary of the Intervenor, the Attorney General of Ontario with respect to the historical origins of s. 15 is respectfully adopted.

Also see: Tarnopolsky and Pentney,
Discrimination and The Law (1985) Don Mills,
Ontario, Richard De Boo pp. 16-1 - 16-12.

B. Definition of Right

13. It is submitted that the interests of equality require differential treatment because all are not the same. It is submitted that the meaning of this right is best expressed by the statement that individuals who are similarly situated should be similarly treated and conversely that individuals who are differently situated should be differently treated.

Case, p. 97

Century 21 Ramos Realty Inc. v. The Queen
(1987), 56 C.R. (3d) 150, at 167, 168 (Ont.
C.A.)

Smith, Kline and French Laboratories Ltd. et
al v. A.G. of Can. (1986), 34 D.L.R. (4th)
584 at 590 (Fed. C.A.); leave to appeal
refused Apr. 9, 1987 S.C.C.

R. v. P.J.T., [1986] 1 W.W.R 690 at 704
(Alta. C.A.)

14. This formulation of the right gives rise to the key issue: which categories are permissible in determining similarity of situation and which are not.

Smith, Kline and French Laboratories Ltd. et al v. A.G. Can. (supra, at 590, 591).

Century 21 Ramos Realty Inc. et al v. The Queen (supra, at 168).

15. It is submitted that determination of permissible categories cannot be met by a single test. At best, one can "...suggest a range or spectrum of criteria to determine on which side of the line any given categorization must fall".

Smith, Kline and French Laboratories Ltd et al v. A.G. of Can (supra, at 591).

To accommodate the fact that any permissible category must be cognizant of values which are competing, the modifier "reasonable" is employed. There must be a balancing just as there is a balancing with respect to the right against unreasonable search or seizure: Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at pp. 157, 159, 160. This will call for a balancing of interests focusing around the purpose of the law and of interests focusing around the interest of the individual. See: Smith, Kline and French Laboratories Ltd. et al v. A.G. Can. (supra, at 591, 592).

16. However, the definition is not complete - to say it is a right against unreasonable classification is to say laws must be reasonable because to make a law is to classify. It is submitted that its scope is defined by the enumerated grounds. The right

is, in essence, a right against unreasonable classification on the basis of a prohibited ground.

17. Prohibited is used in the sense that it includes the enumerated grounds and those of the same nature. With respect to the nature of the grounds, it is submitted that:

- (i) each is immutable or at least not easily changed
- (ii) each is a personal characteristic to a human being
- (iii) each has been the object of prejudice, paternalism or stereotype.

18. It is submitted that such a definition is obtained from "...the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom and to the historical origin of the concepts enshrined".

C. Whether Right Infringed

(a) Is citizenship a prohibited ground?

19. Citizenship is not an enumerated ground.

20. It is noted that this category is used within the Charter itself: ss. 3, 6, and 23.

21. It is neither immutable nor a personal characteristic to a human being.

22. Although used as a vehicle to attack other enumerated groups in a prejudicial fashion, such is not the case here. It

is submitted that it would only possess the third qualifying characteristic were it used in such a fashion.

23. Accordingly, it is submitted that citizenship is not a prohibited ground. However, to the extent that this conclusion is wrong, the reasonableness of this classification is assessed.

(b) Reasonableness

24. This calls for an assessment of the classification in light of the purpose of the law and the interest of the individual.

25. With respect to the requirements of citizenship such are summarized by the Learned Trial Judge as follows:

Citizenship is the birthright of most people born in Canada or of a Canadian parent. It may be granted on application to persons who have been admitted to Canada as permanent residents. Such applicants must, among other things, have lived in Canada for three years during the immediately preceding four years, be knowledgeable of certain specified matters, and swear allegiance. They must understand one of the official languages, have an adequate knowledge of Canada and the responsibilities and privileges of citizenship, not be under a deportation order, certified as a security risk, in jail, on probation or under indictment, and not have been convicted of an indictable offence within three years. A citizenship judge must examine every applicant to ensure that the applicant speaks an official language, is aware of the responsibilities and privileges of citizenship and has an adequate knowledge of such matters as the Canadian electoral process, the chief characteristics of Canadian social, cultural and political history, and the physical and political geography of the country.

26. It is submitted that the purpose of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26 is to ensure the integrity and competency of those engaged in the practice of law. The importance of this purpose is properly considered in light of the fundamental role which a lawyer has in the governmental process.

See: Factum of the Appellant, the Law Society of British Columbia, at pp. 6, 7, and 29 - 31.

Factum of the Appellant, the Attorney General of British Columbia, at pp. 30-32

27. With respect to the interest of the individual, it is in essence the right to engage in an occupation, which is an important and fundamental right.

28. In balancing the following is submitted:

(a) the requirements of citizenship are relevant to the integrity and competence of a lawyer having regard to the role which a lawyer performs.

(b) the requirements of citizenship; which are easily met do not disproportionately impact upon the interest of the individual having regard to the fact that the impact is mostly a postponement.

29. In summary, it is submitted that the classification is reasonable having regard to the degree by which the purpose of the law is effected by the requirements of citizenship versus the degree to which the interest of the individual is affected by the requirements of citizenship.

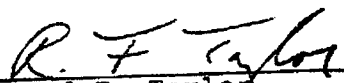
30. Accordingly, it is submitted that the impugned provision does not infringe s. 15 of the Charter.

PART IV

NATURE OF ORDER SOUGHT

1. That the appeal be allowed and the Petition dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.


Richard F. Taylor
Counsel for the Intervenor,
the Attorney General of
Alberta

September 25, 1987
Edmonton, Alberta

PART V
LIST OF AUTHORITIES

	<u>Page</u>
<u>Century 21 Ramos Realty Inc. v. The Queen</u> (1986), 56 C.R. (3d) 150 (Ont. C.A.)	6,7,8
<u>Gold, A Principled Approach to Equality Rights: A Preliminary Inquiry</u> (1982), 4 Supreme Court Law Rev. 131	6
<u>Hogg, Constitutional Law of Canada</u> (2nd ed) 1985 Carswell, Toronto	6
<u>Hunter et al v. Southam Inc.</u> , [1984] 2 S.C.R. 145	4,8
<u>Law Society of Upper Canada v. Skapinker</u> , [1984] 1 S.C.R. 103	4
<u>R. v. Big M Drug Mart Ltd.</u> , [1985] 1 S.C.R. 295	3,4,5
<u>R. v. Oakes</u> , [1986] 1 S.C.R. 103	3,4
<u>R. v. P.J.T.</u> , [1986] 1 W.W.R 690	7
<u>Reference Re An Act to Amend the Education Act</u> (1986), 53 O.R. (2d) 513 (C.A.)	5
<u>Smith, Kline and French Laboratories Ltd. et al v. A.G. of Can</u> (1986), 34 D.L.R. (4th) 584 (Fed. C.A.); leave to appeal refused Apr. 9, 1987 S.C.C.	7,8
<u>Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin, eds., Canadian Charter of Rights and Freedoms</u> , 1982,	5
<u>Tarnopolsky and Pentney, Discrimination and The Law</u> (1985), Don Mills, Ontario, Richard De Boo	7