

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE
PROVINCE OF BRITISH COLUMBIA)

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT

AND:

MARK DAVID ANDREWS

RESPONDENT

AND:

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RESPONDENT

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PART I

STATEMENT OF FACTS

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

PART II

POINTS IN ISSUE

2. 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 of s.15(1) of the Canadian Charter of Rights and Freedoms?
3. If the Canadian citizenship requirement to be 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

ARGUMENTA. Meaning of Section 15(1)

4. In order to determine whether the Canadian citizenship requirement to be a lawyer infringes or denies the rights guaranteed by s.15(1) of the Canadian Charter of Rights and Freedoms, the meaning of s.15(1) of the Charter must be ascertained.

5. This Court has expressed the view that the meaning of a right or freedom guaranteed by the Charter is to be ascertained by an analysis of the purpose of the guarantee; that is, in light of the interests it was meant to protect.

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

6. The purpose of s.15(1) is to be sought by reference, among other things, to:

- (a) the character and larger objects of the Charter itself;

-
- (b) the language used to articulate the specific right or freedom, and;
 - (c) the historical origins of the concepts enshrined.

R. v. Big M Drug Mart Ltd, supra, at p.344.

(a) Character and Larger Objects of the Charter

7. It is submitted that based on the character and larger objects of the Charter itself, the purpose of s.15(1) is to protect the profound and fundamental values of our free and democratic society respecting human dignity and worth.

8. As described by this Court in R. v. Oakes, infra, the purpose of the Charter is to ensure that "Canadian society is to be free and democratic". The values and principles essential to a free and democratic society include respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation 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.

R. v. Oakes, supra, at p.136;

Reference Re an Act to Amend the Education Act (1986), 53 O.R. (2d) 513 (Ont.C.A.) per Howland, C.J.O. and Robins, J.A. (dissenting on other grounds), at p.554, (appeal dismissed, S.C.C., unreported, June 25, 1987).

(b) Language

9. The broad language used in s.15(1) to express the equality guarantee in its various textual formulations is recognized as conferring to individuals substantive as well as procedural protection.

Reference Re An Act to Amend the Education Act, supra, at pp.553-554.

10. Furthermore, the significance of the inclusion in s.15(1) of the Charter of the words "without discrimination" has been considered by various courts.

11. Section 15(1) is recognized as establishing a right to equality "without discrimination" as opposed to simply a right to absolute equal treatment.

12. In R. v. LeGallant, [1986] 6 W.W.R. 372 (B.C.C.A.), Hinkson, J.A. summarized at p.380 the decisions of the B.C.C.A. in this regard as follows:

Everyone is entitled to the equal protection and equal benefit of the law without discrimination. It therefore becomes necessary to consider the meaning to be given to the phrase "without discrimination" in s.15.

See also: Reference Re Family Benefits Act
(1986), 75 N.S.R. (2d) 338 (N.S.S.C.A.D.) at
p.351.

13. Also, the inclusion in s.15(1) of the enumerated grounds of discrimination does, it is submitted, suggest that s.15(1) of the Charter was intended to: (a) protect groups which have historically been the subject of a course of adverse treatment on a basis that offends basic human dignity; and (b) protect insular minorities that are politically impotent. This is consistent with the American concept of equality.

Gold, A Principled Approach to Equality Rights - A Preliminary Inquiry, [1982] 4 S. Ct. L. Rev. 131 at p.144-5;

Graham and Kravitt, The Evolution of Equal Protection - Education, Municipal Services and Wealth (1972), 7 Harv. C.R. - C.L.L. Rev. 101 at p.132.

(c) Historical Origins of the Concepts Enshrined

(i) Historical Concept of Equality to the Present

14. The difficulty inherent in defining equality has been aptly described as follows:

... reflected by more than two thousand years of disagreement among philosophers and political theorists over just what 'equality' as a political notion signifies The phrase [equality] is wholly ambiguous precisely because no ready indication is given

of the common attribute with respect to which men are asserted to be equal.

Developments in the Law: Equal Protection, (1968-69), 82 Harv. L. Rev. 1065 at pp.1160-1161.

15. It is submitted that the concept of equality means more than identical treatment of individuals. It embraces the reality that individuals are different. This has been recognized from the time of Aristotle to the present.

R. v. Big M Drug Mart Ltd., *supra*, at p.347.

Abella, Limitations on the Right to Equality before the Law in The Limitation of Human Rights in Comparative Constitutional Law: (Les Editions Yvon Blais Inc: Cowansville, Que., 1986) 223 at pp.229 and 342.

Tarnopolsky and Beaudoin, Canadian Charter of Rights and Freedoms (Carswell Co. Ltd.: To, Canada, 1982) at p.398.

Tussman and ten Broek, The Equal Protection of the Laws, (1949) 37 Cal. L. Rev. 341 at pp.343-344.

Fogarty, Equality Rights and Their Limitations in the Charter (Carswell: To, Calgary, Vancouver, 1987) 1 at pp.2-3.

16. It is submitted that although the concept of equality permits differential treatment of individuals, it is generally accepted as demanding similar treatment of those who are similarly situated.

Tussman and ten Broek, The Equal Protection of the Laws, supra, at p.344;

Tarnopolsky and Beaudoin, Canadian Charter of Rights and Freedoms, supra, at p.398;

R. v. Swain (1986), 53 O.R. (2d) 609 (Ont.C.A.) at p.646;

R. v. Century 21 Ramos Realty (1987), 58 O.R. (2d) 737 (Ont. C.A.) at p.756;

Reference Re Family Benefits Act, supra, at p.351;

Tarnopolsky, The Equality Rights in the Canadian Charter of Rights and Freedoms (1983), 61 Can. Bar Rev. 242 at p.244.

17. The difficulty with this concept of equality is in ascertaining the "criteria of relevance" that identify which individuals are similarly situated for purposes of constitutional protection.

Fogarty, Equality Rights and Their Limitations in the Charter, supra, at pp.2-3;

Developments in the Law: Equal Protection, supra, at p.1060-1169;

Tarnopolsky and Beaudoin, Canadian Charter of Rights and Freedoms, supra, at p.398;

Tussman and ten Broek, The Equal Protection of the Laws, supra, at p.345.

18. It is submitted that the "criteria of relevance", by which to determine whether or not equality exists, involve

analysis of rationality and proportionality of the objective of the law and means chosen to achieve that objective.

McKay v. The Queen, [1980] 2 S.C.R. 370 at p.407;

Tussman and ten Broek, The Equal Protection of the Laws, supra, at pp.346-353;

Finkelstein, 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.189.

19. For example, under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court in the Belgian Linguistic Case found, after considering the jurisprudence from a large number of democratic states that "the principle of equality of treatment is not violated if the distinction has an objective and reasonable justification: that is, if it pursues a legitimate aim and if the relationship of proportionality between the means employed and the aim sought to be realized is not unreasonable".

In Belgian Linguistic Case (1968), 1 E.H.R.R. 252 at p.284.

20. In the United States, the concept of equality enshrined in that country's constitution involves judicial review of

legislation for rationality and proportionality at three levels of scrutiny.

Finkelstein, Sections 1 and 15 of the Canadian Charter of Rights and Freedoms and the Relevance of the U.S. Experience, supra, at pp.194-200.

21. The rationality and proportionality demands under the American "strict scrutiny" test may be described as follows:

At the [one] end of the spectrum, the American courts will apply "strict scrutiny" where a fundamental right is implicated or a suspect classification is used. There is an almost per se rule of unconstitutionality where strict scrutiny is applied. The law must be neither over-inclusive nor under-inclusive; that is, it must catch all of the people who are the cause of the perceived problem but none who are not. In other words, there must be a unique, totally symmetrical relationship between the legislative means used and the end. (Finkelstein, supra, at p.195.)

22. At the other end of the spectrum where interests such as economic regulation are at stake, the American Courts apply a "minimum level" of scrutiny, demanding very little of legislatures in terms of rationality and proportionality. Where important but not necessarily fundamental interests are affected by legislation, a "substantial relationship" between the means chosen to accomplish the legislative objective and the importance of the objective, is all that is required.

Finkelstein, Sections 1 and 15 of the Canadian Charter of Rights and Freedoms and the Relevance of the U.S. Experience, supra, at pp.196-197.

23. Even Justice Stevens of the U.S. Supreme Court, who has not followed the three level test used by the majority of the Court and who proposed an alternative test also formulates his analysis of equality rights upon the basis of the rationality and proportionality of the law.

Justice Stevens' Equal Protection Jurisprudence [1987] 100 Har. Law Rev. 1146 at pp.1147, 1153, 1153-1160, 1165.

(ii) Bill of Rights

24. It is submitted that the interpretation of s.1(b) of the Bill of Rights provides a useful historical context within which to consider the meaning of s.15(1) of the Charter.

25. The concept of equality as developed by this Court under the Bill of Rights prior to the Charter ultimately resulted in review of laws to determine whether or not they were proportional and rational, even though the Bill of Rights was not a constitutional document.

McKay v. The Queen, supra, at p.407;

See also: Gold, A Principled Approach to Equality Rights - A Preliminary Inquiry, supra, at pp.137-139.

B. Conclusion on the Meaning of Section 15(1)

26. It is submitted, based on the foregoing analysis that:

(a) equality rights are meant to protect fundamental human dignity and worth and are not meant to protect individuals from mere differentiation, i.e. mere classification, itself. To suggest that mere legislative classification or differentiation itself violates fundamental human dignity and worth, trivializes constitutional protection given to equality;

(b) it is a substantive, not merely a procedural, right; that significance must be accorded the words "without discrimination" in defining the scope of the right protected by s.15; that s.15(1) was intended to prohibit discrimination on the basis of the enumerated and akin grounds;

(c) to be meaningful in law, the concept of equality must contain inherent limitations, which may be determined upon review of the purpose of the law for rationality and the effect of the law for proportionality.

C. Section 15(1) Test

(a) Elements of the Section 15(1) Test

27. It is submitted that the meaning of s.15(1), particularly when viewed in its historical context, necessitates a test that measures a law impugned under s.15(1) according to rationality and proportionality of the objective and effects of the legislation.

28. In this regard, the Intervenor supports the test applied by McLachlin, J. in the Case on Appeal:

The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

Case on Appeal, p.103.

(b) Interrelation of Sections 1 and 15(1)

29. The Intervenor also supports McLachlin, J., in respect of the interrelation of ss.1 and 15(1):

Since R. v. Oakes, supra, it seems clear that the sections defining constitutional rights and s.1 should be kept analytically separate
... .

Case on Appeal, p.102;

See also: R. v. Oakes, supra, at p.135.

30. As stated by Hinkson, J.A. in R. v. LeGallant, supra, at p.379:

Section 15 defines a right; section 1 limits it. Therefore the determination of whether the right to equal protection and equal benefit of the law without discrimination has been violated must proceed entirely within section 15. Only if a violation can be established can the analysis shift to section 1.

31. Because the concept of equality by necessity involves assessment of legislative objectives and means, (a task according to R. v. Oakes, supra, at p.134, usually performed under s.1 of the Charter), it is submitted that s.1 has a much lesser role to play in relation to s.15(1) than it does with respect to Charter provisions that do not require assessment of legislative objectives and means in order to define the right protected.

Hogg, Section One of the Canadian Charter of Rights and Freedoms in Chapter 1: The Limitation of Human Rights in Comparative Constitutional Law, supra, 3 at p.5.

32. The following observation by Kari Josef Partsch in, "The Contribution of Universal International Instruments on Human Rights" is apposite,

A final, general question may be raised: is a general clause on limitations at all applicable to the guarantees of equality before the law and of equal protection under the law? It seems doubtful whether a need exists. In applying these direct emanations of the idea of justice, the body applying the law is entitled to include the substantive elements of a limitation clause when deciding whether the idea of equality before the law is at stake. (in Chapter 4: The Limitation of Human Rights in Comparative Constitutional Law, supra, 63 at p.73.)

33. It is submitted that the proper relationship between s.15(1) and s.1 of the Charter was as described by McLachlin, J.:

Circumstances may arise where discriminatory measures can be justified. For example, in times of war, the internment of enemy aliens might be argued to be justifiable under s.1, notwithstanding the fact that this is discriminatory and would not be tolerated in peace time. Viewed thus, s.1 plays a vital role in the determination of the validity of legislation impugned on the basis of s.15. The role, while essential, is limited

(Case on Appeal, at p.104.)

34. It is submitted that this notion of the interrelation of ss.1 and 15(1) is consistent with the use of general limitation clauses in international legal systems.

Jacobs, The Limitation Clauses of the European Convention on Human Rights in Chapter 2: The Limitation of Human Rights in Comparative Constitutional Law, supra, 21 at pp.22-26.

(c) Enumerated and Akin Grounds

35. The Intervenor supports the argument of the Appellant, the Attorney General of British Columbia, that s.15(1) is triggered only by the enumerated or akin grounds.

Factum of the Appellant, the Attorney General of British Columbia, para.6.

(d) Onus of Proof Under Section 15(1)

36. Under the Charter, it is established that the burden of proof rests upon a person seeking to challenge the validity of legislation to establish a violation of a protected right or freedom.

R. v. Big M Drug Mart Ltd., supra,
at pp.134-135;

R. v. Oakes, supra, at p.137.

37. In relation to s.15(1) of the Charter, it is submitted that the burden upon a person challenging legislation is the same irrespective of whether the impugned provision differentiates upon the basis of grounds enumerated in s.15(1) or otherwise. Because the concept of equality demands review of the legislative objective and the means chosen to accomplish that objective for proportionality and rationality, the values of basic human dignity and worth are well protected without a need to vary the burden of proof according to the type of differential treatment under scrutiny. This approach has been accepted by the Nova Scotia Supreme Court, Appeal Division:

The burden of proof in first instance of establishing that a law prima facie violates s.15(1) will be on the person challenging the statute. We see no reason to distinguish in this regard between laws which fall within the listed classifications and those which discriminate on other grounds. No doubt it will be easier to establish a case under the listed classifications as laws classifying on some of those grounds will be inherently suspect. On the other hand, it may not be apparent that a law is discriminatory until the purpose and effect of the law is carefully examined.

Reference Re Family Benefits Act, supra, at p.351.

Conclusion

38. It is submitted that the s.15(1) test developed by the British Columbia Court of Appeal in the Case on Appeal is correct in law. The Intervenor, the Attorney General of Nova Scotia, limits his submissions to analysis of the proper s.15(1) test and makes no submission with respect to whether or not the Case on Appeal should be allowed.

Factum of the Intervenor,
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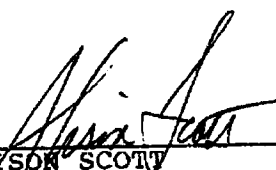
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PART IV

NATURE OF RELIEF SOUGHT

39. The Intervenor makes no submission with respect to whether this appeal should be allowed.

40. Dated this 28th day of September, 1987.



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PART V

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| 15. | Justice Stevens' <u>Equal Protection Jurisprudence</u> [1987] 100 Har. Law Rev. 1146 at pp.1146-1152, 1158-1161, 1165 | 11 |
| 16. | <u>The Limitation of Human Rights in Comparative Constitutional Law: (Les Editions Yvon Blais Inc: Cowansville, Que. 1986)</u> | |
| | a) Chapter 1: Hogg, Peter W., <u>Section One of the Canadian Charter of Rights and Freedoms</u> 3 at p.5 | 14 |
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| 17. | Tarnopolsky, <u>The Equality Rights in the Canadian Charter of Rights and Freedoms</u> (1983), 61 Can. Bar Rev. 242 at p.244 | 7 |

Factum of the Intervenor,
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